

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SAN DIEGUITO UNION HIGH SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013080189

**DECISION**

On September 24, 2013, Judith L. Pasewark, Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH), Special Education Division, presided at the due process hearing on this matter.

Justin R. Shinnefield, Esq., represented San Dieguito Union High School District (District). Charles Adams, the Director of Special Education for the District, attended on behalf of the District.

Parent represented Student (Student, sometimes, Parent or Mother). Student did not attend the hearing. Further, as explained below, Mother refused to participate in the hearing, and left the premises prior to the testimony of the first witness.

**STATEMENT OF PROCEDURE**

On August 8, 2013 the District filed this Request for Due Process Hearing (complaint). The District served Mother via fax and by delivery of the complaint to Mother's address. On August 9, 2013, OAH served the Scheduling Order and Notice of Hearing Dates on Mother via fax and GSO overnight delivery to her residence.<sup>1</sup> On August 26, 2013, the same day as the scheduled Prehearing Conference (PHC), Mother filed a Motion to Dismiss the District's Complaint alleging she had not been served with the

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<sup>1</sup> Mother receives her mail through a P.O. Box, rather than through her residence. At the initial PHC Mother requested that all correspondence and documents be faxed to her or mailed to her P.O. Box. A valid Proof of Service has been logged with OAH on each document sent to Mother throughout this matter.

complaint. Mother did participate in the telephonic PHC the same day. It is noted in the PHC Order, Mother indicated she did not receive the complaint which was served on August 5, 2013, but she did receive the Scheduling Order which was served on August 9, 2013. The ALJ denied Student's Motion to Dismiss, however she granted Student's unopposed request to continue the due process hearing. The District reserved Mother on August 26, 2013, and OAH sent Mother a new Scheduling Order on August 27, 2013. The new Scheduling Order set the due process hearing for September 24, 2013, with a telephonic Prehearing Conference on September 16, 2013. On September 4, 2013, Mother filed a Request for Due Process Hearing on behalf of Student (Student's complaint). On September 6, 2013, the District filed a Notice of Insufficiency (NOI) of Student's complaint. On September 11, 2013, OAH found Student's complaint to be insufficient on all issues. Also on September 11, 2013, the same day as the rescheduled mediation, Mother filed a NOI of the District's complaint. OAH found the District's complaint to be sufficient, and the hearing date remained as rescheduled.

Mother attended the telephonic PHC on September 16, 2013. This ALJ presided at the PHC. The due process hearing date was discussed at length. Mother did not request a continuance of the hearing at the PHC. Instead, she indicated she was going to file another Request for Due Process Hearing and a Motion to Consolidate the two matters, at which time she would request a continuance based upon the consolidation of the cases. The District's counsel indicated he would oppose any continuance of the matter. At no time was the matter continued, and Mother was informed the hearing would go forward as scheduled, absent an intervening order to the contrary. The ALJ gave Mother additional time to file Student's Witness and Exhibit Lists, and provided her with instructions on how to prepare those documents. On September 16, 2013, after the PHC, Mother filed a PHC Statement, along with her List of Exhibits and Witnesses. On September 16, 2013, Mother also filed a Motion to Consolidate, however she did not file a Request for Due Process Hearing, and to date no new complaint has been filed on behalf of Student.

On September 23, 2013, the day before the scheduled due process hearing, Mother filed a Request for Continuance. The District filed an opposition to the continuance. In denying Mother's request for continuance, the ALJ stated, "OAH has reviewed the request for good cause and considered all relevant facts and circumstances. Here, the request to continue the hearing dates in this case, based upon the desire by Student to file an amended pleading in another case, does not constitute good cause for a continuance, since Student has the right to file an amended pleading in his administrative matter at any time, and the issues raised in the amended pleading may or may not align with the issues set forth in the District's case. Moreover, the continuance request comes a day before the hearing starts in the District matter, and, under special education law, the District is entitled to a speedy resolution of its case. Accordingly, Student's request for a continuance is denied."

On September 24, 2013, all parties arrived for the hearing on time. When the record opened, prior to the first witness, Mother again requested a continuance of the hearing. Her request was heard as a reconsideration of her prior request of September 23, 2013, and was again denied. Mother began interrupting this ALJ, and repeatedly demanded a continuance.

Mother made it clear that she would not participate in the hearing that day. Instead, she continued to interrupt, and her behavior became louder and more aggressive, thereby preventing the commencement of testimony. Mother would not sit down and at one point, she physically approached this ALJ. This ALJ informed Mother that if she would not sit down and participate in the hearing in a civil manner, security would be called, or she could leave as she earlier threatened.<sup>2</sup> In any event the hearing would not be continued. Mother continued her tirade, and in order to end the ranting, this ALJ left the room for five minutes. Mother chose to leave the hearing; therefore the matter proceeded as a default in her absence. Testimony was taken, the District's Exhibits One through Eight were admitted into evidence, and the matter was submitted on the same day. The decision in this matter is due October 11, 2013.<sup>3</sup> Mother's Witness List and Exhibit List, which were submitted prior to the hearing, are referenced as Student's Exhibits One and Two.

### ISSUES AND REMEDIES

The issues presented by the District's complaint are:

1. Whether the District appropriately assessed Student in the areas of speech and language and physical therapy; and
2. Whether the Individualized Education Plan (IEP) dated July 19 and July 25, 2013, offers Student a free appropriate public education (FAPE) for the 2013-2014.

The District is requesting a finding that:

1. The District appropriately assessed Student in the areas of speech and language and physical therapy and therefore the District is not responsible for funding an independent expert evaluation (IEE) at public expense; and
2. The July 19 and 25, 2013 IEP offers Student a FAPE for the 2013-2014 school year and may be implemented by the District without parental consent.

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<sup>2</sup> Paragraph nine of the September 16, 2013 Order following Prehearing Conference states, "Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times."

<sup>3</sup> Subsequent to the hearing, Mother has logged several other documents with OAH, including another request for continuance. None of these documents are being considered as they are moot.

## FACTUAL FINDINGS

### *Background*

1. Student is a 17-year-old young man who resides within the geographic boundaries of the District. Student qualifies for special education and related services under the eligibility category of Autism. It is noted that although Student's parents speak Russian to each other, Student's primary language has been English since age two, and Student has been consistently assessed in English since his initial assessments in 1999.

2. Pursuant to a written Settlement Agreement executed on October 12, 2012 (Settlement Agreement), the District funded an educational trust for the benefit of Student for the period of December 1, 2011 through the 2013 Extended School Year (ESY), to reimburse Mother for Student's private placement, educational services, assessments, transportation, support services and attorney's fees. The parties agreed that Student would be privately placed during this period and Mother retained the sole discretion for the selection of Student's educational program. Mother thereafter removed Student from public education and enrolled him at Pacific Academy, a private school.

3. Student's IEP meeting took place over two days, July 19 and 25, 2013 (the July 2013 IEP). The terms of the District's offer are discussed at length further herein this decision. Mother did not consent to the IEP, and the District filed its complaint on August 9, 2013.

4. Pursuant to the Settlement Agreement, Student's private placement for the 2012-2013 school year did not constitute "stay put."<sup>4</sup> It appears that, upon returning to the District for the 2013-2014 school year, and pending this decision, Student is attending a District high school in a general education setting.

### *Assessments*

5. Pursuant to the terms of the Settlement Agreement, the District had the right to conduct a comprehensive evaluation of Student pursuant to an Assessment Plan which was attached as part of the executed Settlement Agreement. The Assessment Plan called for Student to be assessed in the areas of (1) language/speech/communication development; (2) academic achievement; (3) motor/psycho-motor development; (4) intellectual development; (5) social/emotional/behavioral status; (6) health development; and (7) a District funded psycho-educational IEE to be conducted by Dr. Wetter.<sup>5</sup> The terms also included provisions

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<sup>4</sup> "Stay Put" is the term used for defining a student's educational placement pending a due process hearing. (20 U.S.C. § 1415(j); Ed. Code § 56505, subd. (d).)

<sup>5</sup> Dr. Spencer Wetter's IEE was not included in the District's Exhibits. Mother included reference to Dr. Wetter as one of her witnesses, and also referenced a psycho-educational IEE in her Exhibit List. Mother did not prepare or present an Evidence Book for

that (1) the Assessment Plan would become operable on March 1, 2013; (2) the District would be allowed to observe Student in his private placement; and (3) Mother would make Student reasonably available for the assessments. In conjunction with the initiation of assessments in March 2013, the parties also agreed to hold Student's annual IEP on or before May 1, 2013, in order to review the assessments and discuss Student's educational program for the 2013-2014 school year.

6. In March 2013, Mother would not allow the assessments to take place. The District filed a Request for Due Process Hearing, OAH Case No. 2013040914, in order to obtain Mother's compliance with the assessments.<sup>6</sup> Student's assessments were ultimately completed in June 2013. This delay in obtaining the assessments required that the proposed May 1, 2013 IEP meeting be postponed until July 19, 2013. In order to accommodate Mother's participation in the IEP team discussion of the assessments, the District forwarded Mother a copy of each assessment report a week prior to the July 19, 2013 IEP meeting. The extensive amount of information to be discussed at the July 19, 2013 IEP meeting required an additional meeting on July 25, 2013 in order to complete Student's IEP. Mother did not consent to the IEP and requested IEE's in speech and language and physical therapy.

7. Pursuant to the testimony of the 2013 assessors, each one indicated that he/she assessed Student in his primary language (English) and mode of communication. Student's racial and ethnic background was considered prior to the selection and interpretation of the evaluation procedures and measures. Each of the selected assessment measures administered to Student was interpreted within the limits of their measured validity, and was administered according to standard procedures and for the specific purposes recommended by their publishers.

#### *Physical Therapy Assessment*

8. Sharon Criger is a licensed Physical Therapist and holds a doctorate in physical therapy (PT). She is an independent contractor with the District and provides both assessments and direct services to students within the District. She has administered between 100-200 PT assessments in her career. Dr. Criger previously assessed Student in 2011, and provided his direct PT services in 2011-2012, until he was privately placed by Mother. In 2013, the District referred Student to her for a PT assessment. The purpose of the assessment was to document a current baseline of Student's foundational skills, gait and gross motor abilities, and identify areas of need that negatively impacted his ability to safely and effectively access all aspects of his education. Dr. Criger conducted Student's 2013 PT

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the hearing. The District's 2013 psycho-educational Assessment Report, however, does reference Dr. Wetter's findings.

<sup>6</sup> Judicial notice is taken of the docket history on OAH Case No. 2013040914, which reflects a similar procedural history of parental motions and delays. In addition, it is noted that Mother has participated in no less than six OAH filings between 2011 and 2013.

assessment and provided a written report dated June 10, 2013. Dr. Criger also attended both July 2013 IEP meetings. Dr. Criger's testimony at hearing was credible.

9. Dr. Criger's assessments included (1) a record review, including Student's 2011 triennial assessments; (2) brief school site observations; (3) administration of subtests six and eight of the Bruininks-Oseretsky Test of Motor Proficiency (BOT-2); (4) administration of the Schmid Fall Risk assessment; and use of the Sit and Reach Box. The assessment was performed in an outdoor seating area at Pacific Academy. The assessment was performed in English. Student completed each task without complaint and responded well to short, concise directions which included a demonstration of the activity. Dr. Criger opined that she had a good rapport with Student and the assessment results were an accurate assessment of Student's then current abilities.

10. It is noted that Dr. Criger only administered subtests six and eight of the BOT-2. She explained that Student had recently been administered the other BOT-2 subtests as part of his occupational therapy (OT) assessment. PT and OT overlap in many areas. PT is more focused on gross motor and functional skills. OT centers more on visual components and fine motor skills. As a result, it is not uncommon for the BOT-2 to be divided between the two therapies, and such division is allowed by the test protocols.

11. Dr. Criger's assessment results concluded that Student continued to present with global fitness delays and his greatest areas of need were in his foundational skills (balance, muscular endurance, core stability and respiratory support). He also presented with difficulty with bilateral coordination. These foundational deficits continue to impact other areas, such as gross and fine motor functional abilities (e.g., ball skills, keyboarding, and gait), as well as his attention and focus. Further, Student had developed compensatory strategies which allow him to participate in activities of daily life, but cause him to expend much more energy than his peers. As a result, he fatigues easily and requires more breaks. In comparing Student's 2011 assessment with her 2013 findings, Dr. Criger determined that Student had made slight progress in the area of strength and proper body mechanics; however, his gross motor skills remained well below average for his age and gender.

12. Dr. Criger recommended that Student's current level of physical activity be increased to 60 minutes per day and include exercise on a moderate to vigorous intensity level. The program should include diaphragmatic breathing, balance training, core strengthening, hamstring stretching, and aerobic activities. This information was reflected in Student's present levels of performance (PLOP) contained in the 2013 IEP. Dr. Criger also recommended both direct PT services as well as consultative PT services as part of a collaborative team approach.

13. Dr. Criger presented her report at the July 19, 2013 IEP meeting. She indicated that, although Mother continually interrupted her presentation and went off on tangents unrelated to PT, Mother did not express any disagreements with her report or findings.

14. Dr. Criger testified to the validity of her assessment pursuant to the criteria contained in paragraph seven. The District's PT assessment of Student is appropriate.

### *Speech and Language Assessment*

15. Gary Lewis is a speech and language pathologist (SLP) for the District. He holds a master's degree in communicative disorders and is a licensed SLP in the State of California. He conducts between 40-60 speech and language assessments for the District each year. Mr. Lewis administered Student's 2013 speech and language assessment in June 2013, and prepared a written report. Mother was given a copy of his report prior to the July 19, 2013 IEP meeting. Mr. Lewis's testimony at hearing was credible.

16. Mr. Lewis indicated that the assessment was intended to determine Student's current communicative abilities and progress in order to determine appropriate placement and services for Student at the July 2013 IEP meeting. Mr. Lewis reported he reviewed Student's records, particularly noting a very thorough speech and language evaluation completed in 2011, as part of Student's March 3, 2011 triennial IEP. Further, Mr. Lewis extensively reviewed Student's other prior assessments to assist him in selecting appropriate tests for Student, taking into consideration Student's cognitive delays.

17. In addition to reviewing Student's records and prior assessments, Mr. Lewis administered the Receptive One Word Picture Vocabulary Test (ROWPVT), the Expressive One Word Picture Vocabulary Test (EOWPVT), and selected subtests of the Clinical Evaluations of Language Fundamentals, Fourth Edition (CELF-4). He additionally utilized the Hearbuilder Following Directions CD produced by Webber, and the Basic Concepts CD produced by Linguistics, in addition to utilizing informal measures of auditory comprehension and problem solving.

18. Student's scores on both the 2013 ROWPVT and EOWPVT were considerably below average when compared to his same-aged peers, and were lower than his scores in 2011. While these lower scores suggest regression, Mr. Lewis indicated the lower scores may have resulted from Student being unable to keep up with his same age peers in acquiring new vocabulary, rather than from not acquiring new vocabulary at all. Further Student exhibited strengths in his ability to express himself orally using grammatically correct and semantically meaningful sentences, his ability to follow instructions given orally (if kept literal, simpler and in natural order), and his ability to participate in social interaction (depending upon the patience of his social or conversational partner).

19. Three CELF-4 subtests were administered to Student. The Recalling Sentences subtest, tested Student's ability to listen to spoken sentences of increasing length and complexity, and repeating them verbatim; the Formulated Sentences subtest tested Student's ability to generate complete, semantically and grammatically spoke sentences; and the Understanding Spoken Paragraphs subtest evaluated Student's ability to sustain attention and focus while listening to spoken paragraphs and answer questions, and think critically to

arrive at logical answers. Student showed substantial improvement in these areas compared to his scores in 2011.

20. The Hearbuilder Following Directions CD was utilized to obtain informal data regarding Student's ability to listen and follow directions when presented orally. The assessment tested five types of directions: (1) basic; (2) sequential; (3) quantitative; (4) temporal; and (5) conditional. The data collected suggested that Student is capable of consistently following many different types of moderately complex two-step directions when presented orally and without repetition, and some moderately complex three-step directions as well. The Basic Concepts CD was used to assess Student's knowledge of concepts such as descriptors, comparatives, and locatives.

21. Mr. Lewis did not formally assess Student's social skills using a standardized measure. His testing was informal and was based significantly on observation. He noted that Student demonstrated good social manners, but needed adult or peer facilitation to be successful in a semi-substantive conversation. Mr. Lewis concluded that, with regard to spontaneous socialization, Student is more likely able to participate in social interactions with older children and adults who are more patient, aware of, and understanding of his differences and are willing to facilitate the conversation or interaction.

22. Mr. Lewis did not formally assess Student's articulation for this assessment. While he did notice reduced speech intelligibility, Mr. Lewis did not feel it pervasive enough to detract from a listener's ability to understand Student sufficiently with occasional repeats or clarifications. As a result, Mr. Lewis did not recommend that articulation therapy be a core focus of Student's speech services. While Student's rate, pitch, and volume variation can sometimes reduce the unintelligibility of his voice, Student could be cued to slow down, or raise or lower his volume during the natural course of his direct speech therapy.

23. Mr. Lewis concluded, Student is a more than sufficient functional communicator and is more than capable of communicating his basic wants and needs. Student is also capable, to various degrees, of responding to questions in conversation, answering comprehensive questions about short chunks of information, and communicating other thoughts. Further, the substance and variety of Student's social interactions, and the peers with whom he interacts, will be limited by his receptive and expressive deficits, as well as by some of his social mannerisms and lack of social language and experience.

24. Mr. Lewis presented his speech and language findings and report at the July 2013 IEP meeting. Although Mother persistently interrupted his presentation at the IEP meeting, she did not express any disagreement with Mr. Lewis's assessment findings. Mr. Lewis testified to the validity of his assessment pursuant to the criteria contained in paragraph seven. The District's speech and language assessment is appropriate.

*The July 2013 IEP*

25. The July 19, and July 25, 2013 IEP meetings collectively resulted in the District's offer of FAPE to Student for the 2013-2014 school year. Charles Adams, the District's director of Special Education, attended both IEP meetings and explained that the completion of Student's IEP took two days as there was "a lot of information to discuss." In addition to the procedurally required areas to discuss as part of an IEP, the IEP team had extensive assessment information to consider and discuss. Further, Mother's interruptive and agitated behaviors added additional delays to already lengthy meetings.

26. A draft of the July 19, 2013 IEP was prepared in advance of the IEP meeting and a copy provided to Mother a week in advance of the meeting. The District also provided Mother with advance copies of each assessment report to be discussed at the IEP meeting.

27. All required parties attended each IEP meeting, including Mother, Mr. Adams (administrator), Nathan Molina (educational specialist), Jane Caples (school psychologist), Rose Schleyhahn (school psychologist), Gary Lewis (speech and language pathologist), Sharon Criger (physical therapist), Amanda Gretsch (occupational therapist), Michael Santos (general education teacher), Dr. Wetter (IEE-neuropsychologist), and Sandy Ansari (Student's Pacific Academy teacher).

28. The purpose of the meeting was stated to Mother and she was provided a copy of the Procedural Safeguards.

29. Each assessor appeared at the IEP meetings to present his/her findings and to answer questions. The assessment information, along with the information provided by Mother, Ms. Ansari, and other IEP team members, was utilized to determine Student's eligibility for special education and related services; to determine Student's PLOP's; to craft Student's goals; and to prepare Student's Individualized Transition Plan (ITP).

30. It is undisputed that Student remained eligible for special education and related services under the category of autism.

31. Rose Schleyhahn, a school psychologist for the District, administered Student's 2013 psycho-educational assessment. Ms. Schleyhahn has a master's degree in educational psychology and is a licensed educational psychologist. She has performed between 250 and 300 assessments in her career. Ms. Schleyhahn's assessment included interviews, observations, and a review of Student's prior assessments, medical history, and school records. Ms. Schleyhahn also utilized standardized testing, including the Behavior Assessment System for Children, Second Edition (BASC-2), Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2), Developmental Test of Visual Motor Integration, Fifth Edition (VMI-5), Adaptive Behavior Assessment System-II (ABAS-II), and Woodcock-Johnson Test of Achievement, Third Edition (WJ-III). Ms. Schleyhahn's testimony was informative and credible.

32. Ms. Schleyhahn shared her assessment results with the IEP team. The CTONI-2 assesses the nonverbal cognitive abilities of students by measuring sequential reasoning, categorical classification, and analogical reasoning. Student scored “very poor” on the CTONI-2, which is equivalent to “less than the first percentile.” On the VMI-2, which assesses both visual and motor perception, Student’s scores were rated “very low.” Ms. Schleyhahn noted that Student’s scores were not surprising, as his results were consistent with his previous scores since age three.<sup>7</sup>

33. In conjunction with the cognitive assessments, Nathan Molina, an educational specialist for the District, conducted an academic assessment of Student. Mr. Molina holds a multi-handicap teaching credential and has been a special education teacher with the District for 12 years. He has administered over 150 academic assessments. Mr. Molina administered the WJ-III, which assesses a student’s current level of academic achievement in reading, math, written language, oral language, and general knowledge. The assessment results indicated that, when compared to others at his age level, Student’s standard scores were very low in broad reading, broad mathematics, math calculation skills, broad written language, and written expression. His oral language scores were in the very low range; his academic skills were in the very low range for his age; and his fluency with academic tasks and his ability to apply academic skills were also both within the very low range.

34. Student’s cognitive scores were analogous to his academic scores. There was no discrepancy between the two. As a result, Ms. Schleyhahn opined the “diploma track” is not appropriate for Student. Instead, a certificate of completion is more realistic, as Student requires more functional skills to be come as independent as possible. Mr. Molina concurred. It was his opinion that Student cannot meet diploma standards. Mother did not accept this information quietly.

35. Ms. Schleyhahn also administered the BASC-2, to assess Student’s social-emotional and behavior functioning. The BASC-2 examines 14 areas of emotional and behavioral disorders of children. The assessment consists of questionnaires which were provided to Ms. Ansari (Student’s teacher at Pacific Academy) and Mother. On the BASC-2, Mother rated Student “at risk” in the areas of atypicality, withdrawal, adaptability, social skills, executive functioning, resiliency, and developmental social disorder. Ms. Ansari rated Student “at risk” in the areas of internalizing problems, anxiety, depression, somatization, hyperactivity, learning problems, social skills, and emotional self-control. Both Mother and Ms. Ansari were also given questionnaires for the ABAS-II which is designed to provide a comprehensive, norm-referenced assessment of Student’s adaptive skills.<sup>8</sup> Ms. Ansari’s

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<sup>7</sup> Although Dr. Wetter’s psycho-educational IEE was not presented at hearing, Ms. Schleyhahn references Dr. Wetter’s assessment as follows: “Dr. Wetter testing in March 2013 revealed cognitive scores in the range of first to 16th percentile that he believed were highly impacted by deficits in memory, processing, and executive functioning skills.”

<sup>8</sup> Mother’s ABAS-II questionnaire was unable to be scored due to the amount of guessed items.

ABAS-II scores reported the areas of self-care, functional academics, self-direction, communication and school living as areas of concern regarding Student.

36. As with the other assessors, Ms. Schleyhahn testified to the validity of her 2013 psycho-educational assessment pursuant to the criteria contained in paragraph seven.

37. Ms. Schleyhahn and Mr. Adams both recalled that all IEP team member including Mother and Ms. Ansari participated in the discussion and determination of Student's PLOP's in each area of need, specifically, reading, written expression, mathematics, communication development, fine and gross motor development, speech and language, social emotional/behavioral issues, vocational skills, and adaptive/daily living skills.

38. Ms. Ansari, Student's teacher at Pacific Academy, attended both IEP meetings, and was named on Mother's witness list. Although Ms. Ansari did not testify, the IEP reflects her participation in the creation of Student's PLOP's. Specifically, the academic/functional skills section of Student's PLOP's state that Ms. Ansari observed that Student is able to operate and socialize with same age peers at a mature level. She noted, however, that this behavior is contingent upon the supportive nature of the environment and Student's familiarity with those in attendance. Ms. Ansari further reported Student's comprehension can be at or above grade level when he is fully attending to a task. It was further noted that, although Student sometimes demonstrated conceptual understanding, he had significant deficits in the application of grade level concepts.

39. Amanda Gretsch is a licensed occupational therapist, and an independent contractor with the District. Ms. Gretsch administered Student's OT assessments in 2011 and 2013. Additionally, she previously provided direct OT services to Student in 2010-2011. Mother did not challenge Ms. Gretsch's 2013 assessment. Ms. Gretsch explained that educational OT primarily involves a student's fine motor and visual motor skills which are necessary to function in a school setting. She indicated there were some limits on testing due to Student's cognitive abilities. Based upon her assessment, Student continued to demonstrate motor skills within the "well-below average" range for his age. He demonstrated overall visual perceptual skills within the less than one percentile range. Student had difficulties with handwriting consistency. Further, Student continued to demonstrate difficulty integrating sensory input. In somewhat of an overlap with PT, Ms. Gretsch reported that Student had decreased postural control and decreased body awareness, such as difficulty navigating between items, bumping into others, and difficulty grading force. The OT assessment report proposed 11 educational interventions and accommodations to address Student's OT needs. She did not recommend direct OT services in her report. Ms. Gretsch's testimony was credible.

40. The draft IEP presented on July 19, 2013, contained 25 proposed goals. After the IEP team's initial discussion of the goals, including input from Mother, the goals were revised and further discussed at the July 25, 2013 IEP meeting. The goals and support services are as follows:

### *Speech and Language*

41. Mr. Lewis recommended speech therapy goals in the areas of social language and problem solving and auditory comprehension. Goal One addresses Student's auditory comprehension and memory, and seeks to increase Student's ability to answer "who/what/where/when/why" questions. Goal Two addresses Student's social problem solving skills and seeks to increase Student's ability to verbally identify social problems and solutions. Goal Three addresses Student's conversational skills and pragmatics, and seeks to increase Student's ability to participate in age appropriate group discussion, make appropriate comments, and stay on topic. Mother consented to the speech therapy goals. Mr. Lewis opined the speech goals were appropriate for Student and addressed his unique needs. The IEP team offered 60 minutes of individual speech therapy per week to accommodate Student's speech goals. Mother disagreed and requested more direct speech services.

### *Occupational Therapy and Physical Therapy*

42. As part of Student's OT assessment, Student's teacher was interviewed by Ms. Gretsch. This information, along with the OT and PT assessment results, formed the basis of Student's PLOP's in these areas. Ms. Ansari reported that Student sometimes needed directions repeated; he requires clarification of directions; he requires extra time to process; and he requires visual supports to support auditory information. Student sometimes transitions between tasks easily. With regard to in-class work, Student is able to finish his work in a timely manner and his overall quality of work is variable. Student will sometimes complete his homework. With regard to organization and agenda use, Ms. Ansari reported "it depends" with regard to his organization of materials and he typically requires assistance to write it in his agenda. Student's handwriting is typically legible; however, he needs extra time to write and requires copies of notes due to being unable to keep up with note taking. He is very good with self-advocacy; he asks questions and participates. Lastly, Ms. Ansari reported that Student sometimes appears anxious or stressed, and will comment about being overwhelmed by test and homework.

43. Ms. Gretsch agreed with Dr. Criger's contention that OT and PT overlap in several areas. Further, after the July 19, 2013 IEP meeting, and partially in response to Mother's request for OT goals and services, Ms. Gretsch and Dr. Criger collaborated to restructure Student's OT and PT goals. Four PT goals were crafted. Goal Four addresses Student's balance and lower extremity strength. Goal Five addresses Student's core stability and lower extremity strength. Goal Six addresses Student's lower extremity flexibility. Goal Fifteen addresses Student's need for safe ambulation on stairs.

44. Although not initially recommended, the IEP team adopted four OT goals for Student. Goal Eleven addresses Student's motor skills through increasing his typing skills. Goal Twelve addresses Student's visual motor integration, and seeks to increase his ability to copy sentences from a far point model. Goal Thirteen addresses Student's fine motor skills, and seeks to improve his ability to manipulate a variety of fasteners, e.g., buttons, zippers,

water bottles, and small packages. Goal Fourteen is an OT/PT combination goal which addresses Student's fine motor skills and is intended to increase Student's endurance in maintaining an upright sitting position and holding a pencil with a functional grasp while engaging in table-top/writing activities.

45. Both Ms. Gretsich and Dr. Criger opined the OT and PT goals crafted for Student were appropriate and addressed his unique needs. The IEP team offered 60 minutes of individual OT per week; 30 minutes per month of OT consultation; 60 minutes of individual PT per week; and 24 weekly sessions of vision therapy. Mother consented to the implementation OT and PT goals and services as redrafted.

### *Academic Goals*

46. Student's academic goals were primarily based upon the information provided by the District assessments. It is clear from the testimony of each witness that Mother participated in the IEP discussions, albeit in a loud and disruptive manner, when she did not get her way. Several of the IEP team members believe Mother to be in denial regarding Student's cognitive abilities. Mother, with Ms. Ansari's support at the IEP meeting, insisted that Student was not markedly cognitively impaired, and he should remain on the diploma track. The consensus of the District IEP team members, based upon their information and Student's consistent scores obtained in his comprehensive assessments, suggested that Student's autism and documented cognitive deficits required more functional academics to allow Student to become as independent as possible. Therefore, Student's academic goals were more geared toward obtaining a certificate of completion rather than a diploma. Mother did not agree with this concept.

47. Goal Seven addresses basic mathematics and seeks to have Student demonstrate the accurate use of addition and subtraction to solve math problems. Goal Eight addresses reading and seeks to increase Student's ability to orally generate the sounds from all the letters and letter patterns, consonant blends, long/short vowel patterns, and multi-syllabic words. Goal Nine addresses written language and seeks to have Student increase his ability to spell independently using pre-phonetic knowledge and sounds of the alphabet. Goal Sixteen addresses word identification and seeks to increase Student's reading of functional and sight words. Goal Seventeen addresses reading and seeks to have Student read 20-30 sentences on a grade appropriate high interest topic with no more than five prompts in 12-20 minutes. Goal Eighteen addresses writing and seeks to have Student construct a three-paragraph essay of at least four sentences each related to a grade appropriate topic. Goal Nineteen addressed writing and seeks to have Student take essays that have been edited and reconstruct a final draft using proper grammar. Goal Twenty addresses mathematics and seeks to have Student use addition, subtraction, and multiplication to solve math problems, once a new math baseline is established. Goal Twenty-one addresses mathematics and seeks to have Student calculate perimeter, area, and volume with the use of a calculator, once a new math baseline is established. Goal Twenty-two addresses mathematics and seeks to have Student use a calculator independently. Goal Twenty-three addresses functional mathematics and seeks to have Student compute addition

and subtraction money problems with the aid of a calculator. Goal Twenty-four addresses functional mathematics and seeks to have Student learn to determine the amounts of various combinations of coins and money bills. Goal Twenty-five addresses mathematics and seeks to have Student write and memorize his multiplication tables.

#### *Accommodations*

48. The IEP team also developed a series of accommodations for Student, which included: (1) simplification of complex directions and repetition of instructions; (2) preferential seating and sensory/movement breaks; (3) homework and test accommodations; (4) access to word processing software, calculator and audio book tablet (iPad); (5) copies of lecture notes, visual support for auditory information and text to speech; (6) extended time on tests/quizzes and a flexible test environment; (7) use of a structured self-regulation program; (8) graphic organizing software; and (9) appropriate one-to-one instructional academic and social support.

#### *Transition Plan*

49. The IEP team also developed an Individualized Transition Plan (ITP) as part of Student's IEP. Student's transition from the high school setting is scheduled for June 15, 2014. The ITP indicates that Student will participate in high school curriculum leading to a certificate of completion. To date, Student has not passed either part of the California High School Exit Exam (CAHSEE), nor is he expected to do so. Additionally, Student has not passed Algebra I, and he has completed only 135 of 230 credits required for graduation with diploma.

50. Mother and Ms. Ansari disagree and want Student to graduate with a diploma. Ms. Ansari stated her belief that Student *could* access the curriculum in a one-to-one setting. Further, Student's grades at the Pacific Academy did not reflect the cognitive delays reported by the District.<sup>9</sup>

51. When interviewed about his post-school interests and goals, Student was unable to provide much information. It is questionable whether Student grasped the concepts of the vocational questions, as he would change the subject to a topic of his interest. Instead, Mother provided most of the information regarding Student's aspirations. While Student expressed an interest in computer games, Mother reported that Student would like to pursue the Post-Secondary Innovative Transaction Technology Project (Post-ITT) and a college education in the areas of computer technologies, leadership, business management and auto mechanics.

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<sup>9</sup> Mr. Adams testified that Ms. Ansari acted as an advocate for her school and Student's continuing attendance there.

52. Mr. Adams feels Mother has unrealistic expectations of Student.<sup>10</sup> Student's test scores, which are consistent across assessments and generally score Student in the first percentile, do not support continuing Student on the diploma track. Instead, Student continues to require a small, structured classroom environment with significant one-to-one teaching. He also needs a functional skills program, including community based interventions (CBI).

53. Based upon the vocational information obtained, the ITP placed Student on track for a certificate of completion, and created three goals designed to improve the academic and functional achievement of Student, and to move Student toward his post-secondary goals.

### *Placement*

54. Lastly, the IEP team discussed Student's placement in the least restrictive environment. In testimony, Mr. Lewis best expressed the consensus of the District IEP team members regarding appropriate placement for Student. Student required an educational environment and program which would provide a hybrid and balance of functional life skills and academics, so Student's overall learning and progress in core academic skill areas such as reading, writing, listening comprehension, and reading comprehension, would not be abandoned, but he would also be provided with functional life skills to prepare him for transition into young adulthood as independently as possible. While it is apparent that Mother and Ms. Ansari believed Student far more academically capable than the District, it does not appear that either of them supported Student's placement in anything less than a small, structured educational environment with one-to-one teaching. Mother and Ms. Ansari, however, wanted Student to continue attending the Pacific Academy.

55. The IEP team discussed a continuum of placement possibilities. The IEP team discussed placement in a general education setting at San Diego Academy; however Mr. Santos, the general education teacher, noted the requirement of elective courses are often similar to core content classes. Attendance, work completion and attention to task are all required to be successful in general education classes. Additionally, most general education classes in the district have at least 30 students. The IEP team discussed the district-based special education programs including home instruction, special day class (SDC), resource (RSP), and Learning Center. Student does not require home instruction. Neither the RSP nor the District's SDC's would provide Student with sufficient one-to-one teaching AND the recommended functional programs or CBI. The IEP team also discussed a variety of non-public schools, including TERI Country School, Sierra Academy, and Pioneer Day School. The IEP team also discussed Mother's choice of the Pacific Academy. In spite of Mother's agitated objections, the IEP team selected TERI Country School (TERI) as Student's placement in the least restrictive environment.

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<sup>10</sup> The IEP notes reflect that Mother wanted Student to take Japanese as an elective class for 2013-2014.

56. TERI is a certified non-public school in San Diego County. Shane Hamilton, the Director of TERI, is familiar with Student, as Student attended TERI six years ago. Mr. Adams admitted having great confidence in Mr. Hamilton; he (Hamilton) would tell you if a student's needs cannot be met at TERI. Mr. Hamilton read Student's IEP and determined it could be implemented at TERI.

57. Mr. Adams, Ms. Schleyhahn, and Mr. Molina also visited TERI to determine if it would be appropriate for Student. Each agreed TERI is appropriate. TERI can provide Student with a non-traditional learning environment, and an intense focus on Student's individual needs. There is a high ratio of teachers to students; classes are structured, and held in a small setting or one-to-one. TERI has other students with autism, and the teachers and staff are trained and can work on Student's goals and behaviors. Student would have access to specialized services (DIS) and supports, as contained in his IEP. Of great importance, TERI can deliver CBI which will provide Student with functional learning and allow him time to interact with peers. Student's CBI also provided Student with appropriate mainstreaming, and as such, represented the least restrictive environment for Student.<sup>11</sup>

*Offer of FAPE*

58. Ultimately, at the end of the July 25, 2013 IEP meeting, the District provided Mother with a copy of the completed IEP and offered placement and services at TERI consisting of the following:

- (1) 360 minutes per day of specialized academic instruction (25 percent of which would be spent in the community for access to typical peers);
- (2) 60 minutes per week of individual speech and language;
- (3) 60 minutes per week of OT;
- (4) 30 minutes per month of OT consultation;
- (5) 60 minutes per week of individual PT (including direct service, collaboration, co-treatments, and consultation);
- (6) 24 sessions of vision therapy (one per week);
- (7) curb-to-curb transportation; and
- (8) extended school year.

This offer of placement and services, along with the IEP containing 25 goals, accommodations and ITP constitutes a FAPE in the least restrictive environment.

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<sup>11</sup> Mr. Adams noted that Mother's preferred placement of the Pacific Academy is a non-certified, for-profit private school which provides Student with no mainstreaming opportunities with peers. This makes it a far more restrictive placement than TERI.

## LEGAL CONCLUSIONS AND ANALYSIS

### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387], the party who files the request for due process has the burden of persuasion at the due process hearing. In this matter, the District has the burden of proof on all issues.

### *Legal Authority for Decision*

2. This special education administrative due process proceeding is brought under the authority of the Individuals with Disabilities Education Act (sometimes IDEA or Act). (See 20 U.S.C. § 1400 et seq.) The primary goal of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education or FAPE that emphasizes public education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*.)

3. The Supreme Court determined that, in enacting the IDEA, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 192 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the disabled child’s IEP, then the assumption is that the child’s program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a “basic floor of opportunity.” (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a “potential-maximizing education.” (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that “confers some educational benefit upon the handicapped child.” (*Id.* at p. 200.)

4. Additionally, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

5. The term “special education” means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) “Specially designed instruction” means the adaptation, as appropriate to the needs of the disabled child, the content, methodology or

delivery of instruction to address the unique needs of the child that result from the child's disability. (34 C.F.R. § 300.39(b)(3)(2006).) In the context of the IDEA, "special education" refers to the highly individualized educational needs of the particular student. (*San Rafael Elementary v. California Educ. Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.) The term "related services" means transportation and developmental, corrective or other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006).) In California, "related services" are called "designated instruction and services" or "DIS." (Ed. Code, § 56363, subd. (a).)

6. In terms of special education law, a "related service" is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) An educational agency, in formulating a special education program for a disabled pupil, is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*).)

7. An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progress, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) The focus must be on the placement of the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*).) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

### *Procedural Issues*

8. A state must comply both procedurally and substantively with the IDEA. (*Amanda J. v. Clark Cnty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 881 (*Amanda J.*).) While the IDEA does not define the particular substantive level of education that must be provided to a child, the state must provide an education that is "reasonably calculated to enable the child to receive educational benefits." (*Rowley, supra*, 458 U.S. at pp. 206-07.)

9. Although the IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE, in certain instances a procedural violation may constitute a denial of FAPE. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07.) Both the IDEA and California Education Code provide that a procedural violation constitutes a denial of FAPE only if the violation (1) impedes the child's right to a FAPE; (2) significantly impedes the parent's opportunity to participate in the decision making process; or (3) causes a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W. G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F. 2d 1479, 1482 (*Target Range*).)

**Issue One:** Did the District appropriately assess Student in the areas of speech and language and physical therapy?

*Assessments and Independent Educational Evaluations:*

10. Special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code, § 56381.)

11. Testing and assessment materials and procedures used for the purpose of assessment and placement of individuals with exceptional needs must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be conducted in the student's native language or mode of communication. (20 U.S.C. § 1412(a)(6)(B); Ed. Code, § 56320, subd. (a).) Further, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B).) An assessment must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability and matters relating to the child's IEP. (20 U.S.C. § 1414(b)(2)(A).) The tests and other assessment tools must be provided and administered in the language and form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, and the assessment materials must be technically sound and used for the purposes for which they are valid and reliable. (20 U.S.C § 1414(b)(2)(C); Ed. Code, § 56320, subd. (2)(b)and (c).)

12. California Education Code section 56320, subdivision (g), requires that the assessment be conducted by persons knowledgeable of the suspected disability. Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd.(b)(3) and 56324.) Assessments must be conducted by persons

competent to perform assessments, as determined by the school district, county office, or special education local plan. (Ed. Code, § 56322.)

13. When a parent disagrees with an assessment obtained by a district, the parent has the right to an independent educational evaluation (IEE) from a qualified specialist at public expense unless the district demonstrates at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329(b), (c), 56506 subd. (c); 34 C.F.R. § 300.502 (2006).) If a parent requests an IEE at public expense, a district must, without unnecessary delay, either initiate a due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense, unless the district demonstrates in a hearing that the assessment obtained by the parent did not meet educational agency criteria. (34 C.F.R. § 300.502(b)(2)(2006); *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School Dist.* (9th Cir. 1999) 1999 U.S. App. Lexis 3121.

### *Analysis*

14. In this matter Mother requested IEE's for both speech and language and physical therapy. The District contends that its assessments in speech and language and PT were appropriate and complied with statutory requirements.

15. Dr. Criger is a licensed physical therapist, who has extensive experience conducting PT assessments, and has previously assessed Student. (Factual Finding 8.) Dr. Criger assessed Student in order to document Student's current baseline of foundational skills, gait and gross motor abilities, and to identify areas of need that impacted his ability access all aspects of his education (Factual Finding 8.). The assessment was completed in Student's primary language (Factual Finding 9.). Further, she considered and complied with the other statutory requirements of Legal Conclusion 11. (Factual Findings 7 and 14.) Dr. Criger used a variety of assessment tools, including review of records, observations, interviews and standardized testing. (Factual Finding 9.) Although she did not utilize the entire BOT-2, the two subtests used were in conjunction with the concurrent OT assessment, and such practice is valid and allowed by the BOT-2 protocols. (Factual Findings 10 and 43.) Student's PT assessment complied with statutory requirements, and produced valid results. (Legal Conclusions 11 and 12; Factual Findings 8 through 12.) Mother did not express any disagreement with the PT assessment or findings at the IEP meeting. (Factual Finding 13.) The District filed this complaint to defend its PT assessment within two weeks of the completion of Student's 2013 IEP and Mother's request for a PT IEE. Pursuant to Legal Conclusion 13, the District's PT assessment is appropriate and Student is not entitled to a physical therapy IEE at public expense.

16. Gary Lewis is a licensed SLP, who conducts between 40-60 speech and language assessments each year. (Factual Finding 15.) Mr. Lewis conducted Student's 2013 speech and language assessment to determine Student's communicative abilities and progress in order to determine the appropriate services and placement for Student. He reviewed Student's records and prior assessment, and considered Student's cognitive delays in

selecting appropriate assessment tools. (Factual Finding 16.) Mr. Lewis utilized a variety of testing materials in his assessment. (Factual Finding 16 through 22.) Further, Mother did not express any disagreement with the speech and language assessment itself, but merely wanted more speech therapy service hours for Student. (Factual Findings 24 and 41.) Student's speech and language assessment complied with statutory requirements, and produced valid results. (Legal Conclusions 11 and 12; Factual Findings 7, and 15 through 23.) The District filed this complaint to defend its assessments within two weeks of the completion of Student's 2013 IEP and Mother's request for a speech and language IEE. Pursuant to Legal Conclusion 13, the District's speech and language assessment is appropriate and Student is not entitled to a physical therapy IEE at public expense.

**Issue Two:** Did the Individualized Education Plan (IEP) dated July 19 and July 25, 2013, offer Student a free appropriate public education (FAPE) for the 2013-2014?

*Individualized Educational Plans and Requirements for a Free Appropriate Public Education:*

17. Under the IDEA, a free appropriate public education (FAPE) is defined as follows: special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C) include an appropriate pre-school, elementary school, or secondary school in the state involved; and (D) are provided in conformity with the individualized education program (IEP) required under section 1414(d) of the Act. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

18. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

19. An IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, no less than one special education provider of the student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum, and who is knowledgeable about the availability of resources of the District; (5) an individual(s) who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and whenever appropriate, the student with exceptional needs. (Ed. Code, § 56341.)

20. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

21. States must establish and maintain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*Target Range, supra*, 960 F.2d at p. 1483.) Citing *Rowley*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p.1484.) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*Ibid.*)

22. For each student, beginning with the first IEP to be in effect when the student is 16, the IEP must include a statement of the transition service needs of the student. (20 U.S.C. § 1414(d)(1)(A)(i)( VIII).) Transition services are defined as a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

23. A transition plan that is procedurally deficient, but does not result in a loss of educational opportunity may not result in a denial of FAPE. The failure to properly formulate a transition plan warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276.)

24. In addition to providing a FAPE, a school district must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114 (2006); Ed. Code, § 56342, subd. (b).) This "least restrictive environment" (LRE) provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) Under the LRE mandate, a school district must consider a continuum of alternative placements which proceed from "instruction in

regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b) (2006); see also Ed. Code, § 56342, subd. (b).)

25. The IDEA’s requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child’s needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at p. 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036.) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child’s problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.)

26. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.)

27. A school district has the right to select a program for a special education student, as long as the program is able to meet the student’s needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O’Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an “education...designed according to the parent’s desires,” citing *Rowley*, *supra*, 458 U.S. at p. 207].)

#### *Analysis*

28. Mother did not consent to the July 2013 IEP and placement at TERI Country School as offered by the District. The District contends its July 2013 IEP, which is delineated in Factual Finding 58, including placement at TERI, constitutes a FAPE in the least restrictive environment.

29. The District provided Mother with a copy of Student’s assessment reports and a copy of the draft IEP a week prior to the IEP meeting. (Factual Findings 8, 15, and 26.) Mother was provided a copy of the Procedural Safeguards at the IEP meeting. (Factual Finding 28.) The IEP team consisted of all statutorily required persons. (Legal Conclusion 19; Factual Finding 27.) Each assessor attended the IEP meetings to discuss his/her

assessment, answer questions, and discuss the crafting of appropriate goals for Student. (Factual Finding 29.) Mother was provided a copy of the final IEP document which contained the District's offer of FAPE at the end of the July 25, 2013 IEP meeting. (Legal Conclusion 21; Factual Finding 58.)

30. The IEP document includes a description of Student's current levels of academic and functional performance; provides a statement of measurable academic and functional goals; provides a statement of the special education and related services that are to be provided to Student; provides an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities. Provides a list of accommodations necessary for Student's academic achievement and functional performance. (Legal Conclusion 18.)

31. All IEP team members participated in determining Student's PLOP's. (Factual Findings 24, 34, 37, 38, and 39.) Mother and Ms. Ansari did not agree with the IEP team's final determination of Student's cognitive and academic PLOP's; however, they clearly participated in the assessment process and contributed information at the IEP meetings. (Factual Findings 13, 24, 25, 34, 35, 38, 42, 46, 50, 54, and 55.) Specifically Mother and Ms. Ansari believe Student's cognitive functioning is higher than reported, and he is capable of accessing grade level curriculum, thusly allowing him to graduate with a regular diploma. (Factual Findings 38, 46, 50, and 55.)

32. The District, on the other hand, finds Student's cognitive and academic deficits to be significant, therefore requiring more basic academic and functional skill goals. The District's determination of Student's abilities and PLOP's are highly substantiated in the 2013 assessments, as well as in Student's educational history. The District's 2013 psycho-educational Assessment was not challenged, and Ms. Schleyhahn and Mr. Molina used a variety of assessment tools to determine Student's cognitive and academic abilities. (Factual Findings 31 through 33.) Student's scores on the CTONI-2 and VMI-2 scored him at less than the first percentile or "very low" in comparison to his same age peers. Dr. Wetter's IEE assessment revealed cognitive scores between the first and 16<sup>th</sup> percentiles. Student's cognitive scores were consistent with his prior cognitive testing scores. (Factual Findings 32, and footnote 7.) Student's academic assessment was not challenged, and again, Student scored in low or very low levels in each academic subtest. Importantly, there is no discrepancy between Student's cognitive and academic assessment scores. (Factual Findings 32 through 34.) Ms. Gretsche, who conducted Student's unchallenged OT assessment, also reported some limitations on testing due to Student's cognitive abilities. (Factual Finding 39.) Mr. Lewis reported selecting speech and language assessment tools, which took Student's historical cognitive delays into consideration. (Factual Finding 16.) Although Ms. Ansari reported that Student's comprehension *could* be at grade level when full attending to a task, and *sometimes* demonstrate conceptual understanding, she still reported that Student had *significant* deficits in the application of grade level concepts. (Factual Finding 38.) It is also noted that most, if not all of Ms. Ansari's teaching, was one-to-one, in a small, structured classroom setting. (Factual Finding 54.)

33. The IEP team crafted 25 goals for Student, several of which were redrafted or added after the July 19 IEP meeting. Each of these 25 goals is directly related to one or more of Student's deficits and areas of need. Further, each goal presents a measurable objective, which is subject to four progress reports recorded over the school year. (Legal Conclusion 20; Factual Findings 40 through 47.)

34. It appears that Mother had little, if any, objection to the final OT and PT goals. The goals had been revised pursuant to her request and Ms. Ansari's information was considered as part of the goal drafting and redrafting. Additionally, the IEP team added direct OT services and OT consultation, which had not been initially recommended in Student's OT assessment. (Factual Findings 42 through 45.) Further, Mother consented to the implementation of OT and PT services which support these goals. (Factual Finding 45.)

35. The speech and language goals address Student's needs in the areas of social language and problems solving and auditory comprehension. (Factual Finding 41.) Mother consented to the implementation of the speech and language goals, but did not consent to the amount of services; Mother wanted more than 60 minutes per week of direct services for Student. (Factual Finding 41.)

36. Student's academic goals are clearly based upon the District's version of Student's present levels, and correspond to his more delayed academic needs in reading, writing and mathematics. The 25 goals also contain more functional skill goals, particularly in mathematics, to assist Student with daily living skills, such as counting money and using a calculator. Each of the goals were finalized after lengthy discussions over a two day period of time; considered the results of Student's most recent assessments in determining Student's academic and functional needs; and clearly included Mother's beliefs, concerns, and requests regarding Student's education. (Legal Conclusion 20; Factual Findings 46 and 47.)

37. The IEP includes appropriate accommodations for Student. (Legal Conclusion 22; Factual Finding 48.)

38. Student is 17 years of age, therefore his IEP included an ITP. Student's ITP is not a stellar example of an appropriate transition plan. Much of this, however, was beyond the District's control. Student was interviewed, however he had difficulty conveying any understanding the process, and provided little information. Student's difficulties lend credibility to the District's findings regarding his cognitive abilities. Mother provided most of the information regarding transition, and this information reflected her steadfast belief in Student's ability to obtain a regular diploma. As a result, the ITP references Student's desire to attend a four-year college and study computer technology, leadership, business management, and auto mechanics. These are areas of interest to Student, and the District created goals to further Student's exploration of these areas. Although the ITP determined that Student would work towards a Certificate of Completion (contrary to Mother's desire), little of the ITP was designed to move Student forward with appropriate living skills or post-secondary referrals. (Legal Conclusion 21; Factual Findings 49 through 53.) Student's ITP is marginally appropriate. In arguendo, however, even if the ITP failed to meet all procedural requirements, it did not result in a loss of educational opportunity or denial of

FAPE. (Legal Conclusion 22.) Student's adaptive living and functional skills were addressed in Student's goals and the IEP team's recommendation for CBI as part of Student's placement. (Factual Findings 46, 47, and 57.)

39. The IEP team appropriately discussed a continuum of potential placements for Student. (Legal Conclusion 24; Factual Finding 55.) Clearly a general education setting is inappropriate for Student. It is undisputed that Student required a small, structured educational setting, with significant one-to-one teaching. (Factual Finding 54.) Mr. Lewis's description of an appropriate placement for Student was well-stated and worth repeating. Student requires a hybrid and balance of functional life skills and academics, so Student's overall learning and progress in core academic skill areas such as reading, writing, listening comprehension, and reading comprehension is not abandoned, but he is also provided with functional life skills to prepare him for transition into young adulthood as independently as possible. (Factual Finding 54.) The selection of the TERI Country School, a non-public school, can provide Student with this hybrid or balance of Student's educational needs. Student's core academics and social behaviors can be addressed by trained teachers and staff familiar with autism. Just as important, TERI can provide Student with functional learning and CBI. The CBI experience is also designed to provide Student with mainstreaming and interaction with peers, thus providing Student in the least restrictive environment for his unique needs. (Legal Conclusion 24; Factual Finding 57.)

40. It is understood Mother does not want Student's placement at TERI. It is also apparent Mother feels she is being ignored and overlooked when her opinions and desires are not implemented. Clearly, Mother has not been ignored in any stage of the special education process. The IEP team has painstakingly considered Mother's concerns and information regarding her child. Mother attended the IEP meetings. Her opinions were considered by the IEP team which resulted in requested changes to the IEP. (Legal Conclusion 25; Factual Findings 13, 24, 25, 27, 37, 40, 44, and 51.) Mother must understand that she has not been cheated, violated or treated unfairly when her personal agenda is not unvaryingly adopted. A parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (Legal Conclusion 24.) Further, under the IDEA, the focus is on the placement offered by the school district; not on the alternative preferred by the parents. (Legal Conclusion 25.)

41. The District has the right to select a program for a special education student, as long as the program is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. Further, there is no requirement for an IEP conform to a parent's wishes or maximize Student's education, in order to be sufficient or appropriate. (Legal Conclusions 3 and 27.) In this matter, the District has acted in compliance with the procedures set forth in the IDEA, and therefore, pursuant to *Rowley*, it is presumed that Student's program is appropriate. (Legal Conclusion 3.) Beyond this presumption, the IEP team developed Student's IEP for the 2013-2014 school year, based upon valid assessments and information regarding Student's cognitive abilities and present levels of performance in all areas relating to Student's education. The

goals created comport with these needs, and the IEP is reasonably calculated to enable Student to receive educational benefit. (Legal Conclusion 4.) The July 2013 IEP offers Student a free appropriate public education in the least restrictive environment.

#### ORDER

The District's requested relief is granted. Specifically:

1. The District appropriately assessed Student in the areas of speech and language and physical therapy and therefore the District is not responsible for funding an independent expert evaluation (IEE) at public expense; and

2. The July 19 and 25, 2013 IEP offered Student a FAPE for the 2013-2014 school year and may be implemented by the District without parental consent.

#### PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) The District has prevailed on both issues.

#### RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a) (2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b) (2006); Ed. Code, § 56505, subd. (k).)

Dated: October 11, 2013

/s/

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JUDITH PASEWARK  
Administrative Law Judge  
Office of Administrative Hearings