

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2013090162

v.

TUSTIN UNIFIED SCHOOL DISTRICT,

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TUSTIN UNIFIED SCHOOL DISTRICT,

OAH Case No. 2013040960

v.

PARENTS ON BEHALF OF STUDENT.

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**DECISION**

On April 23, 2013, the Tustin Unified School District (District) filed with the Office of Administrative Hearings (OAH) a Request for Due Process Hearing in OAH case number 2013040960 (first case). On May 14, 2013, Student filed a motion to continue the due process hearing (DPH) on grounds of attorney unavailability. On May 31, 2013, OAH granted the continuance and scheduled the DPH for September 16, 2013, and a prehearing conference (PHC) for September 6, 2013.

On September 5, 2013, Student filed a Request for DPH in OAH case number 2013090162 (second case) accompanied by a motion to consolidate the first and second cases. At the PHC on September 6, 2013, OAH granted Student's motion to consolidate and scheduled the PHC for October 18, 2013, and the DPH for October 31, 2013.

OAH Administrative Law Judge (ALJ) Robert F. Helfand heard this matter in Tustin, California, on October 31, November 1, and 4 through 7, 2013.

Richard M. Peterson, Esq. and Gwendolyn Olinski, Esq., of the Special Education Advocacy Clinic of Pepperdine University School of Law, represented Student's parents (Parents) and Student (Student). Amanda Fletcher, a Pepperdine University law student assisted on November 8, 2013. Student's father (Father) attended the entire hearing.

Student's mother (Mother) was present for most of the hearing. Various law students observed the hearing.

Karen L. Van Dijk, Esq., of Best, Best & Krieger, LLP, represented the Tustin Unified School District (District). Dr. Lori Stillings, Assistant Superintendent and Special Education Local Planning Area Director, was present throughout the hearing.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Nancy Melgares; Jessica Lough; Susan Slonim; Whitney Krick; Marla Atteberry; Perry Passaro, Psy.D.; Chere Tetzloff; Donna Parker; Sandy Fitzpatrick; Lori Stillings, Ed.D.; Vivian Rodrigues-Eads; and Father.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on November 22, 2013. Rebuttal briefs were submitted by December 4, 2013, when the matter was submitted.

## ISSUES<sup>1</sup>

The following issues, as listed in the PHC Order of October 18, 2013, and altered by the Joint Stipulation Regarding Issues dated October 31, 2013, to be determined are:

(1.) Did the District deny Student a free appropriate public education (FAPE) during the 2012-2013 Triennial/Annual IEP meetings by committing procedural violations of the Individuals with Disabilities Education Act (IDEA) by:

- (A.) Denying Parents participation in the IEP decision-making process;
- (B.) Predetermining Student's placement; and
- (C.) Failing to provide to Parents appropriate Prior Written Notice?

(2.) Did the District deny Student a FAPE at the March 11, 2013 IEP meeting by:

(A.) Failing to offer Student an appropriate placement and consideration of the harmful effects to Student of the placement; and

(B.) Failing to offer an appropriate transition plan?

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<sup>1</sup> The ALJ has reformatted the issues. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

## SUMMARY OF DECISION

In the first case, the District contends that the March 11, 2013 Triennial/Annual IEP, which includes a change in placement to the District's Currie Middle School (Currie) special day class (SDC) from a program operated by the Orange County Department of Education (OCDE), constitutes a FAPE in the least restrictive environment based on the information available to it on March 11, 2013. The District requests that OAH issue an order permitting it to implement the IEP. Student denies that the March 11, 2013, change in placement is appropriate and contains a FAPE.

In the second case, Student contends that the District failed to consider Student's unique needs, did not appropriately provide for Student's transition to Currie, and failed to consider Parents' concerns in the areas of transition and regression. Additionally, Student contends that the District committed procedural violations of the IDEA as the District deprived Student's parents of having meaningful participation in the IEP decision-making process, predetermined placement, and failed to provide Prior Written Notice. The District denies Student's allegations.

The Decision determines that (1) the District's proposed change in placement to Currie and the March 11, 2013 IEP provides Student a FAPE and is appropriate, and (2) the District did not deny Student a FAPE by committing procedural violations of the IEP.

## FACTUAL FINDINGS

### *The Student*

1. The Student in this matter is a 13-year-old female who resides with her family within the jurisdictional boundaries of the District. She has been eligible for special education with the District since August 21, 2003, under the category of other health impaired (OHI). Student presently attends a moderate/severe SDC program operated by the OCDE.

2. At four months of age, Student experienced severe seizures. Student later started experiencing violent and long seizures. These seizures occurred many times per day. At the age of six, Student was diagnosed with Dravet Syndrome (Dravet).

3. Dravet, also known as severe myoclonic (involuntary muscle spasms) epilepsy of infancy, is a severe form of epilepsy that appears in the first year of life with febrile (fever-related) seizures. This later is followed by myoclonic seizures. Dravet is a progressive disorder characterized by multiple types of seizures. Dravet children typically experience poor development of language and motor skills, hyperactivity, and difficulty relating to others. As they get older, children with Dravet decline or regress in cognitive function accompanied by hyperactivity. Individuals with Dravet also have associated conditions such as behavioral and developmental delays; movement and balance issues;

orthopedic conditions; delayed language and speech issues; growth and nutritional issues; sleeping difficulties; chronic infections; sensory integration disorders; and disruptions of the autonomic (which relegates body temperature and sweating).<sup>2</sup>

4. Student requires monitoring for seizure activity as well as temperature regulation, as Student can go into seizure when she experiences temperature changes. Student also requires medical services to assist in feeding so as to ensure adequate nutrition and hydration, personal hygiene as Student is not toilet trained, and to ensure safety as Student has a history of elopement. Student is considered “medically fragile.”

5. Student has severe deficits in cognitive functioning. In an assessment in November 2004 by the District, Student, who was then four years two months old, scored at a level of 23 months for cognitive and 26 months for social-emotional on the Development Assessment of Young Children and a developmental age of 29 months on the Developmental and Social-Emotional Screening Instrument- Second Edition. In September 2006, Student was six-years-old when she was given the Vineland-II where she scored in the less than one year age in the areas of communication, daily living skills, socialization, and adaptive behavior.<sup>3</sup>

6. Parents’ chief concerns at school have been and continue to be safety and regression of skills. Student has a history of resistive and socially disengaged behaviors. Student’s resistive behaviors often interfere with going to school and involve refusing to exit her car at drop off. Other drop off problems include elopement and dropping to the ground. Student’s dropping had on a few occasions resulted in injury to staff and Student as she literally becomes a dead weight falling to the ground. As to regression, one of the symptoms of Dravet Syndrome is that a child will experience regression or the decline of cognitive function which can result in the child losing skills which had been previously taught to her.

7. Student’s neurological deficits along with her cognitive deficits are variables on Student’s ability to learn. To learn skills, Student requires repetition and constant exposure while utilizing constant strategies. In addition to being done at school, Parents must utilize the same strategies to prevent Student losing the skills learned at school. Student is a nonverbal communicator as she makes guttural sounds and some simple vowel sounds. She utilizes picture and visual supports and communication devices. She requires intensive individualized supports for feeding, toileting, and behavior.

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<sup>2</sup> “Dravet Syndrome Information Page,” the National Institute of Neurological Disorders and Stroke of the National Institute of Health ([www.ninds.nih.gov/dravet\\_syndrome/dravet\\_syndrome.htm](http://www.ninds.nih.gov/dravet_syndrome/dravet_syndrome.htm)); Dravet Foundation ([www.dravetfoundation.org](http://www.dravetfoundation.org)).

<sup>3</sup> These results were based on a summary of scores contained in the Multidisciplinary Assessment Report dated October 30, 2012. (Exhibit D-31)

### *The District's Medically Fragile Programs*

8. Prior to 2009, the District did not operate a program for medically fragile students. Medically fragile students were assigned to programs outside the District, such as OCDE programs as well as others run by nonpublic schools.

9 Around 2009-2010, the District developed a medically fragile program which included SDC's at elementary, middle, and high school sites. The District looked to OCDE's program in the development of the District program. Each location has a cluster of classes which include nursing services. A licensed vocational nurse (LVN) is at each site and is supervised by registered nurses. The middle school site has been and continues to be at Currie. The District intended to transfer students, who had been placed in programs outside the District due to insufficient District programs, to District programs which could also meet these students' needs. In deciding whether to return a student to a District program, the needs of the student would be reviewed to ensure that the District program would be appropriate. The outside providers, such as OCDE, would make recommendations as to whether the student should stay in their program or could be served by the District's program.

### *Placement with OCDE*

10. Student attended preschool in Seattle prior to moving to the District. Student attended a District special education preschool at Ladera Elementary School (Ladera). For kindergarten and first and second grade, Student attended a moderate/severe SDC program operated by the District at Benson Elementary School (Benson) with Extended School Year (ESY) services at Ladera. After starting third grade at Benson, Student was placed in an SDC with the OCDE at the Meadow Park School (Meadow Park) in Irvine in December 2008. Parents requested a transfer to the OCDE program because Benson did not have a LVN present on campus on a daily basis to deal with Student's significant seizure activity. Student required and received designated instructional services (DIS) in the areas of speech and language (speech), adapted physical education (APE), occupational therapy (OT), health and nursing, specialized physical health services, and psychological services. Student's transition from Benson to Meadow Park went without problem. The OCDE program included ESY. The OCDE ESY was one week longer than the District's ESY. In 2013, the OCDE ESY was changed and was the same number of days as the District's program although the OCDE ESY day was one hour longer than the District's.

11. From 2009 until the summer of 2013, Student was in the SDC class taught by Susan Slonim.<sup>4</sup> Ms. Slonim testified that Student had behavior problems such as eloping and

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<sup>4</sup> Ms. Slonim has been employed as a special education teacher with OCDE since December 1980. She has her B.A. in Liberal Studies and possesses a multiple subject and moderate to severe credentials from California. From 1978-1980, Ms. Slonim taught a general education third –fourth grade class at a private school.

dropping to the ground when Student did not want to do something. On occasion, staff members suffered injury when she pulled staff down with her. In fact, on one occasion, Ms. Slonim suffered an injury.

*October 8, 2009 IEP*

12. On October 8, 2009, Student's IEP team convened in her annual IEP meeting. The team determined that Student should continue placement in the OCDE SDC at Meadow Park through October 8, 2010. Donna Parker, a program specialist for the District, attended the meeting.<sup>5</sup> Ms. Parker discussed the District's intent to place Student in a District SDC at Currie when Student became middle school age in the 2010-2011 school year.

13. The team reviewed a multidisciplinary assessment conducted by an OCDE assessment team. Student was nine years two months old at the time of the assessment. Student scored a cognitive/verbal/preverbal portion of the Psychoeducational Profile- Third Edition at one year five months. On the Early Learning Accomplishment Profile (E-LAP) Student's scores in all areas ranged from 12 months and below to 22 months. OCDE also administered the Vineland Adaptive Behavior Scales, Second Edition. Student scored 13 months for receptive communication, seven months for expressive reception, 22 months for written communication, four months for personal daily living skills, one month for community skills, eight months for play and leisure, and 10 months for coping skills.<sup>6</sup>

*Fall 2010*

14. Student once again attended the OCDE program at Meadow Park in Ms. Slonim's class. On October 4, 2010, Student's annual IEP meeting was held. Ms. Parker informed Parents and the team that the District would offer placement for the next school year at a Currie SDC. Ms. Parker requested that Parents observe the proposed placement at Currie before the end of school year 2010-2011.

15. In February 2011, Parents accompanied by a representative of the Orange County Regional Center, Ms. Lough, and OCDE staff visited Currie. Ms. Parker directed the group to observe two SDC classes which she stated would be appropriate for Student. The group visited these classes which were taught by Whitney Krick, who had been Student's teacher in kindergarten and first grade, and Chere Tetzloff. Father felt that the two classes may have been too advanced for Student as the classes were singing a song using gestures.

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<sup>5</sup> Ms. Parker attended the IEP meeting in the role as District representative. Ms. Parker has a B.A. in sociology and an M.Ed. She possesses credentials in mild/moderate, moderate/severe, level II specialist, and clear administrative services. She has been a teacher and program specialist in special education since 1983.

<sup>6</sup> These results were based on a summary of scores contained in the Multidisciplinary Assessment Report dated October 30, 2012. (Exhibit D-31)

*March 11, 2011 IEP Amendment*

16. On March 11, 2011, an amendment IEP meeting was held regarding the District's proposed November 21, 2011 placement offer for Currie. The District formally proposed placement to Currie to commence in September 2011.

17. Parents stated that they were pleased with Student's progress in the Meadow Park class; they feared a change in placement may cause Student to regress because of her resistance to transitions. Parents also had concerns that the Currie classes appeared to be too advanced for Student's skill level. Ms. Parker explained that Student's IEP would be implemented by the District and that the proposed District classes were similar to Ms. Slonim's class.

18. The team discussed Student's behaviors and the need to closely supervise her as well effective strategies and interventions utilized by OCDE. Ms. Parker also reassured Parents that Student's seizure protocol and healthcare plan would be followed by the District with the District nurse consulting with the OCDE nurse.

19. Parents asked which specific class and teacher Student would be assigned. Ms. Parker replied that the District could not presently guarantee which teacher Student would have at that time.

20. Parents stated they were not agreeing to a District placement "at this time." Parents requested an opportunity to visit Currie in September 2011 and that they would consider a transition after the visit.

21. On March 30, 2011, Ms. Parker forwarded a letter to Parents which confirmed the District's offer and that Parents were not in agreement as they desired Student "to remain in her current placement with the OCDE for another school year." Parents requested another opportunity to visit Currie.

*The 2011-2012 School Year*

22. Student commenced the 2011-2012 school year attending the OCDE program at Meadow Park.

23. On November 16, 2011, Student's IEP team convened the annual IEP meeting. The IEP team included both of Student's parents; Ms. Slonim; Jessica Lough, the OCDE school psychologist; and Ms. Parker, the District coordinator assigned to Student. The team reviewed Student's progress on her 2010-2011 annual goals. Student met only three of her 13 goals. She met her goals for expressive communication (travel 10 feet to communicate to a partner), self-help/adaptive living skills (drink water), and self-help (independent lunch skills). Student failed to meet her goals in the areas of communication (verbal approximations), social-emotional (greet staff and peers), receptive communication (use

switch or toys), gross motor skills (ride a trike while keeping her feet on the pedals), fine motor (put together a 12 piece puzzle), self-help (using a zipper), and social-emotional (transition from outside of class activity). The team discussed Student's behavior support plan (BSP) and transition issues including when Student would engage in resisting behaviors including dropping. The meeting was adjourned until November 21, 2011, to complete Student's present levels of performance, goals, placement, and services.

24. The team reconvened on November 21, 2011. The team determined present levels of performance and goals. As to placement, the District offered placement in a District moderate-severe SDC at Currie. The team discussed the options of continued placement in the OCDE Meadow Park class and Currie. Ms. Parker stated that the District was no longer agreeing to fund placement at OCDE. It was agreed that the District SDC teacher would visit Meadow Park and observe Student in the class setting on November 29, 2011. Parents requested to meet with the District SDC teacher after her visit to Meadow Park before consenting to the proposed placement.

25. On January 13, 2012, Ms. Parker, on behalf of the District, forwarded a letter to Parents reiterating the District's offer of placement in a moderate/severe special day class taught by Chere Tetzloff.<sup>7</sup> Ms. Parker also stated that a transition from Meadow Park to Currie would include coordination between staff of the District and OCDE to "ensure a seamless transition for [Student]." Ms. Parker wrote:

If you were to consent to transition [Student] from her current placement at the OCDE Meadow Park site to Currie Middle School, in order to ensure a seamless transition for [Student], to follow is a summary of TUSD's plan to implement this change in placement:

- You are to bring [Student] to Ms. Tetzloff's classroom for a visit prior to her starting school at Currie. You may communicate with the teacher any additional information that you feel she may need in order to facilitate [Student's] transition.
- The OCDE nurse will consult with the TUSD nurse with regard to [Student's] health plan.
- [Student's] current teacher recommends that [Student] ride the bus to school in the morning to provider (sic) a smooth and consistent transition to the classroom each day. Transportation is offered to and from school daily in [Student's] IEP.

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<sup>7</sup> Ms. Tetzloff has a B.S. in elementary and art education, a second B.S. in special education, and a M.S. in special education. She possesses California credentials in multi-subject, mild/moderate, and moderate/severe. Prior to joining the District, she had been a special education teacher from August 2001 through July 2009, and a student services coordinator from July 2009 to July 2011. She had been an SDC teacher with the District from August 2011 to August 2012. Since August 2012, she has been a special education facilitator for the moderate/severe SDC program at Currie.

- If [Student] does not ride the bus to school, an instructional aide will be at the front of the school to meet [Student] and transition her to class.
- [Student's] behavior plan will be implemented in Ms. Tetzloff's class, using the same or similar strategies and reinforcing items, such as the DVD cover, which are currently being used at Meadowpark (sic).
- Ms. Tetzloff will have a BINGO book and the song for [Student] in the classroom as this is one of her favorite activities.
- The schedule strip from Ms. Slonim's classroom is available to go with [Student] to Ms. Tetzloff's class and can be used to during the transition period, and thereafter if appropriate.
- An IEP will be held within the first 30 days to review [Student's] program and transition to Currie Middle School.

Ms. Parker concluded: "In order to proceed with this transition, the District is requesting your consent to the annual IEP dated 11/16/2011, no later than January 23, 2012 (emphasis in original). If the District does not receive your consent to implement the current placement offer at Currie Middle School, the District is prepared to file a request for a due process hearing seeking authorization to implement this change in placement without your consent. The District would like to avoid this at all costs, however the IEP team has recommended this change in placement for [Student] for some time now and we can no longer postpone the implementation of this recommendation."

26. Parents visited Currie in February 14, 2012, and met with Ms. Parker, Ms. Tetzloff, and Vivian Rodriguez-Eads, who was and is a special education coordinator at Currie. Parents observed a SDC classroom. The group reviewed the transition plan and discussed various options for drop off areas when Student is brought to school. The group discussed Parents' safety concerns especially at drop off in the morning. Based on her observations of Student at Meadow Park, Ms. Tetzloff felt that Student was an appropriate student for her class.

27. On February 28, 2012, Ms. Parker wrote to Parents to review the District's proposal for transition to Student's proposed placement to the moderate/severe SDC at Currie as discussed at the February 14, 2012 meeting at Currie. Ms. Parker described the proposed transition plan thusly:

In order to ensure a seamless transition for [Student], the District continues to propose the following:

- The OCDE nurse will consult with the TUSD nurse with regard to [Student's] health care plan. In response to your recent question about the administration at (sic) Diastat, both the TUSD licensed vocational nurse (LVN) and the TUSD school nurse are authorized to administer Diastat per the directive in the health care plan. As we discussed on 2/14, the LVN is on site at Currie Middle School on a full-time basis.
- The classroom teacher provided examples of how instruction in her class will be individualized and modified as needed for [Student].

- A transitional aide is offered for the first 60 days of [Student's] placement into the Currie Middle School classroom for purposes of providing support to [Student] during the transition to Currie. The aide, under the direction of the teacher, will provide 1:1 instruction to [Student] when appropriate, implement reinforcement strategies and provide support during in-school transitions. The aide will also provide support during non-instructional times such as nutrition break, lunch, and restroom.
- The aide will greet [Student] at the drop off location each morning if she does not ride the bus. The drop off location will be in the pull over area in the parking lot located at the west end of the campus, adjacent to field. If [Student] rides the bus, the pick time is approximately at 6:30 a.m. The aide will meet [Student] as she gets off the bus. The bus drop off area is located directly in front of Currie where the curb is painted blue.
- [Student's] behavior plan will be implemented in Ms. Tetzloff's class, using the same or similar strategies and reinforcing items, such as the DVD cover.
- Ms. Tetzloff will have a BINGO book and the song for [Student] in the classroom as this is one of her favorite activities.
- The schedule strip from Ms. Slonim's classroom is available to go with [Student] to Ms. Tetzloff's class and can be used during the transition period.
- The pocket communication system currently used by [Student] will be implemented during the transition period.
- An IEP (meeting) will be held within the first 30 days to review [Student's] program and transition to Currie.

28. On March 13, 2012, the District filed with OAH a request for due process hearing (OAH case number 2012030433) seeking an order permitting it to implement the proposed IEP of November 16 and 21, 2011, and subsequent written notice correspondence (hereafter referred to as case 2010030433).

29. On May 12, 2012, the parties entered into a settlement agreement to settle case 2010030433. The parties agreed that Student's IEP would continue to be implemented until the completion of her triennial IEP, scheduled in November 2012, with the exception that she would continue to be placed in the OCDE program at Meadow Park. Parents agreed to make "Student reasonably available for any and all appropriate educationally-related assessments" necessary to complete her triennial evaluation to be scheduled on or before October 31, 2012. The effect of the settlement was understood by all parties that the question of Student transferring to the comparable District program was deferred until the next IEP annual meeting.

30. Student continued attending the SDC at Meadow Park through ESY 2012 and for school year 2012-2013 in Ms. Slonim's class.

### *The Currie SDC*

31. The Currie SDC is similar to the Meadow Park SDC where Student attended. The Currie SDC taught by Ms. Krick, which Student would be assigned, comprised seven students, one teacher, and three aides. A LVN was present in the classroom approximately 90 plus percent of the time. Ms. Krick has a B.A. in communications. She possesses a mild/moderate, moderate/severe and educational specialist credentials. She has taught a moderate/severe SDC with the District since 2003 in grades kindergarten through fourth and sixth through eighth. She taught Student in kindergarten and first grade prior to her being placed at Currie. The class is highly structured and uses a visual schedule. Each student has opportunities to receive one-to-one instruction as needed. Classroom routine is flexible enough to accommodate Student's day-to-day behavioral and academic needs. The Currie class is located on a comprehensive campus which permits exposure to and opportunities for interaction with typically developing peers on a daily basis. This compares to the OCDE class which has few, if any, opportunities for exposure to typically developing peers.<sup>8</sup> Like Meadow Park, the Currie program included community based instruction where the class goes on field trips into the community.

### *Triennial Assessment*

32. In Fall 2012, a joint OCDE and District team conducted Student's triennial assessment. The team comprised an OCDE person along with a District person in each area. The assessment team members were school psychologists, Sherri Koch (District) and Ms. Lough (OCDE); special education teachers, Ms. Tetzloff and Ms. Slonim; APE teachers, Linda Wright (OCDE) and Megan McCann (District); physical therapists, Sara Shaeffer (OCDE) and Brett King (District); school nurses, Chris Etow, R.N. (OCDE) and Pam Atkins, R.N. (District); speech pathologists, Marla Atteberry (OCDE) and Michelle Brenner (District); and occupational therapists, Sandy Fitzpatrick, OTR/L (OCDE) and Holly Van Meeteren, OTR/L (District).<sup>9</sup>

33. The team noted that Student, who was 12 years and two months old at the time of the assessment, had concerns in the areas of cognition, adaptive skills, social-emotional skills, speech and language skills, fine motor skills, and gross motor skills. Student's developmental age on the cognitive verbal/preverbal subtest of the Psychoeducational Profile, Third Edition, was two years four months. On the Southern California Ordinal Scales Development: Scale of Cognition, Student scored at a functional level in the eight to 10 month range, with scattered skills up to age 18 months. On the Vineland Adaptive Behavior Scales, Second Edition, Student's adaptive/social skills ranged from eight months

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<sup>8</sup> Ms. Slonim estimates typically developing peers were invited to two events per year at the Meadow Park SDC.

<sup>9</sup> Since the appropriateness of the Triennial evaluation is not at issue herein, the assessment will not be discussed in detail.

to two years per teacher report as compared to one year to two years one month per parental report. Student's fine and gross motor skills are "significantly below her chronological age."

34. Student's speech and language skills "appear to be around a 12 month level and these results are consistent with cognitive functioning and information gained in previous assessments." Student was noted to be a nonverbal communicator who integrates pictures in her communications with verbal and physical prompts. It was also noted that Student has been "successful in a classroom with high visual input incorporating pictures with a posted daily schedule."

35. The team found that Student was eligible for special education and related services under the categories of OHI due to her Dravet syndrome; Intellectually Disabled; Speech-Language Impaired, and Multiple Disabilities. The report also contained specific recommendations in the areas of psychological (seven), speech (21), occupational therapy (six), APE (six), and nursing (17).

#### *Functional Analysis Assessment and Behavior Support Plan*

36. Ms. Lough, aided by Ms. Slonim, conducted a functional analysis assessment (FAA). Data was considered from Fall 2011 and Spring/Fall 2012. Student demonstrated less incidents of behavioral resistance to transitioning to a new activity. The 2012 data showed that Student engaged in resistance by dropping to the floor seven times per week, and was resistant to sitting in a chair for an average of 30 minutes for motivating activities and two minutes for non-preferred activities. Student may drop instantly when presented with an undesirable instruction. Student's resisting time, when dropping, would last between three to 20 minutes with an average of six minutes. The report noted that Meadow Park staff had used positive attention by involving Student in the transition process by making her a "helper" by having her hand-out their transition cards to her classmates. Reinforcers noted were to use playground balls; being teacher's "helper;" music and songs during story time; DVD cases; puzzles; going for outside walks; watching birds fly; watching *The Wiggles and Dora the Explorer* DVDs; and watching others play Wii including on YouTube clips.

37. A Behavior Support Plan was authored by Ms. Lough. Antecedents included demands, transitioning to a non-preferred activity, redundant activities, unpredictable changes to routine, being outside during free time, and having access to preferred items. It was noted that Student's behavior chain before engaging in the targeted behavior was (a) Student would protest a demand by making a short whining sound; (b) she would pull away, pull down, turn away, push items/staff hand; and (c) she would engage in the targeted behavior. To modify her behaviors, Ms. Lough recommended (1) use a first-then card where Student could chose the "then" activity from her communication belt; (2) minimize positive and negative attention following dropping and noncompliant behavior by using reinforcers; and (3) move classmates and dangerous furniture away from Student if her behavior escalates or persists and monitor her safety until she calms.

*October 29, 2012 Visit to Currie*

38. On October 29, 2013, a team from OCDE, comprising Nancy Melgares, a program administrator; Ms. Slonim; and Ms. Atteberry, visited Currie. Also present were Ms. Parker and Ms. Tetzloff, who was now a coordinator who assisted the Currie SDC teachers. The team visited two SDC classes which were moderate/severe. One of the classes was taught by Ms. Krick. Ms. Slonim felt that the two classes were appropriate, but she felt that the Krick class was not as well structured as her class as the classroom had an open area where balls and other such items were located. She offered suggestions to Ms. Krick as to specific changes which could be made to support Student including rearranging the classroom. Ms. Krick later made the changes to her classroom to address specific needs of some of her students. The OCDE staff were also shown drop off options. The OCDE staff had discussions about Student with the District staff as to Student's needs and strategies used to support Student plus safety concerns including at drop off in the morning. The OCDE staff felt that the Currie placement was appropriate.

*The 2012-2013 Annual IEP Meeting*

39. Student's Triennial/Annual IEP meeting commenced on October 30, 2012. The IEP team met on five other occasions- November 24, 2012; December 6, 2012; December 14, 2013; January 23, 2013; and March 11, 2013. The IEP team was comprised of approximately 20 persons including Parents; Susan Lavell, from the Orange County Regional Center; the persons who conducted the Triennial Assessment, and various others from both OCDE and the District including Ms. Krick, Ms. Tetzloff, and Lucy McDonald, the OCDE principal of the Meadow Park program. Ms. Melgares chaired the meeting as the administrative designee from OCDE, Ms. Parker and Ms. Eads attended as District representatives. Written notes were taken by both Ms. Eads and Ms. Melgares.

40. The six sessions took in excess of 18 hours. Ms. Atteberry, the OCDE speech and language pathologist (SLP) who has provided services for Student at Meadow Park and assisted in the Triennial Assessment, described the IEP meetings as a "tedious and long process." She termed the meetings as an "open forum" and the most detailed process she has ever experienced.<sup>10</sup> Ms. Fitzpatrick, the OCDE occupational therapist, observed that the IEP team spent a lot of time listening to parental input and discussing safety and regression issues. The IEP document contains 85 pages. Ms. Melgares observed that the OCDE IEP team members spent hours collaborating with the District staff who became well informed as to Student's unique needs. Ms. Krick stated that she went to the IEP with an "open mind" and wanted to review the Triennial Assessment results. Ms. Tetzloff and Ms. Fitzpatrick both noted that during discussions about goals that Ms. Slonim discussed strategies and methods she was then utilizing while Ms. Krick offered her observations and recommendations as strategies that could be done in her class. Ms. Parker stated that the

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<sup>10</sup> Ms. Atteberry has been a SLP with OCDE since September 2008. Before joining OCDE, She had over four years experience as an independent contracted SLP with the Irvine and Laguna Beach school districts.

District did not finalize its placement offer until prior to the sixth session after consideration of the assessment report and determinations of goals and services Student required.

*October 30, 2012 Meeting*

41. The triennial/Annual IEP meeting commenced on October 30, 2012. An agenda was distributed which called for the following:

- (1) Introductions/Sign-In
- (2) Review of Parents rights/Procedural safeguards
- (3) Purpose of Meeting
  - Review Triennial Assessment Report
    - Health and Nursing by Nurses
    - Psychological/Cognitive by psychologists
    - Academics by Educational Specialists
    - Communication/Augmentative Communication by SLP's
    - Fine Motor by OT's
    - Gross Motor by APE's
    - Gross Motor by Physical Therapists
  - Discussion of results
  - Review recommendations
- (4) Review FAA
  - Review BSP
  - Additional information/comments from Parents
- (5) Review prior year IEP goals and review progress since 11/16/11
- (6) Review new proposed goals
- (7) Schedule Part II of IEP meeting
- (8) Review IEP team meeting notes/signatures

IEP

42. The team began to review the 40-page Triennial Assessment written report from the beginning. The sections written by the nurses, psychologists, education specialists, and on communication were reviewed on a page-by-page basis. The team was able to review the first 22 pages of the report. Parents, specifically Father, gave input in each area often requesting changes or additions to the written report. Some of the changes reflected Student's behavior within the home environment. These suggestions were written into the report by Ms. Melgares. The meeting was adjourned to a date to be determined by Father's availability.

*November 29, 2012 Meeting*

43. The team reconvened on November 29, 2012. Ms. Atteberry and Ms. Brenner, the OCDE and District SLP's, finished reviewing their portion of the Triennial Assessment report. Parents offered their thoughts on what would be the best communication system for Student. Parents actively participated in all these discussions. The APE expert reviewed the

gross motor portion of the assessment report. The team adjourned the meeting to December 6, 2012.

*December 6, 2012 Meeting*

44. The IEP team reconvened on December 6, 2012. The team reviewed and discussed the remaining portions of the Triennial Assessment report. The team specifically reviewed the gross motor/APE, gross motor/PT portions, and fine motor portions. The team then reviewed and discussed the results and eligibility recommendations plus the recommendations of the OCDE-District assessment team. Based on parental requests, over 30 additions and changes were made to the 40-page Triennial Assessment written report.

45. The team then reviewed the FAA and BSP prepared by Ms. Lough. Parents asked how the behavior data was collected in the FAA and the levels of consistency of prompts and interventions. It was agreed that staff would collect data in 15 minute intervals and the number of times Student would drop in the time period. Parents emphasized that they believed that a primary reason for Student's behaviors was her frustrations in communicating. Ms. Lough reported that eloping behavior occurred rarely due to continued close supervision. It was agreed to add Parents' input to the BSP. Parents consented to the FAA and BSP.

*December 14, 2012 Meeting*

46. The IEP team reconvened for the fourth part of the IEP meeting on December 14, 2012. Changes made to the FAA and BSP were reviewed. Father again provided input on additional information as to reinforcers and again emphasized that observers may not be aware that Student's behaviors resulted from her intent to communicate. Ms. Tetzloff and Ms. Van Meeteren, District occupational therapist, made suggestions on how to use "first/then" strategies to provide greater motivation for Student to avoid bad behaviors.

47. The team reviewed Student's progress on the previous year's IEP goals. Student failed to meet any of her 12 goals although Parents indicated that Student did make progress on her goals. OCDE staff indicated that Student had made progress on some of her goals. Present levels of performance were also discussed. The team also reviewed Student's primary handicapping condition. The team determined that the primary eligibility category should be changed to "Multiple Disability" instead of "Other Health Impaired," which would now be a secondary category. The team started the process of adopting new goals and discussed the first two proposed goals in the areas of Functional Academic/Fine Motor and Language/Expressive. The team agreed to reconvene on January 23, 2013.

*January 23, 2013 Meeting*

48. The IEP team reconvened the fifth part of the Triennial IEP meeting. The team commenced the meeting by re-reviewing goals one and two. The team reviewed proposed goals which were then discussed in detail. Parents made suggestions as to

baselines and specifics of the individual goals including who would be responsible for each goal. Parents joined in discussions relating to strategies which should be utilized including in the area of toileting and specific vocabulary words. The notes by Ms. Eads also indicated:

Parent shared concerns related to the IEP process and “side bar” conversations. Parent will provide the notes/feedback on goals to the administrator from OCDE. Those notes will be provided to TUSD and relevant service providers. The team will then have informal conference calls with parents and relevant service providers for the goals in need of revision.

The meeting was adjourned to either February 8 or 12, 2013.

49. Because of illness to Parents, the February 8, 2013 IEP team meeting was cancelled and rescheduled for March 11, 2013.

*March 11, 2013 Meeting*

50. The IEP team convened the sixth session of the Triennial/Annual IEP meeting on March 11, 2013. The meeting lasted three hours and 15 minutes. Parents actively participated throughout the entire length of the meeting. Ms. Melgares, who chaired the meeting, opened the meeting saying: “And again we acknowledge that, you know, you probably won’t agree with everything in terms of the goals and placement but we at least wanted to give the District an opportunity to explain that.” After introductions were made, the team once again discussed the proposed annual IEP goals. Ms. Parker stated that she felt parental concerns had already been considered in revising the goals at prior meetings. Father indicated that he had shared additional thoughts with OCDE team members regarding issues and details which he desired to be incorporated into the goals. The team then reviewed Father’s proposed revisions to five of the 13 goals.

51. The team next directed its attention to placement and services. Ms. Parker testified that the District had not decided to offer Currie until the IEP goals and services had been mostly determined by the team to see if Currie would be appropriate. Ms. Melgares was given a paper which contained the District’s offer of placement and services. Ms. Melgares presented the offer, which included specialized academic instruction for 360 minutes per day in the moderate/severe SDC at Currie. Parents were informed that Student would be assigned to Ms. Krick’s class. The team discussed the proposed services including how speech and languages services were to be delivered at Currie and the difference between collaboration and consultation services. The team also discussed that Currie provides OT and APE services in the same manner as was done at Meadow Park. There was also a discussion on how nursing and health services, including feeding and adult assistance during seizures, would be implemented at Currie. During goal discussions, Ms. Krick and others had spoken of strategies that could be used to assist Student in meeting her goals. Father asked for clarification as to the exact amount of services which were being offered. Team members then explained that the amount of services would be based on the Currie day. The District offered transportation services in the morning and afternoon. Parents and other team

members were asked if they had any questions two or more times. Neither Parents nor any other team member had any questions or offered any comments; although Father said he may have specific questions after visiting Currie. Ms. Atteberry noted that Parents and other team members had an opportunity to voice their input due to the open nature of the meeting.

52. Ms. Eads read from a paper the proposed transition plan. The transition plan, as described in the IEP notes written by Ms. Eads, reads:

--The OCDE nurse will consult with the TUSD nurse with regard to [Student's] health care plan. Both the TUSD licensed vocational nurse (LVN) and the TUSD school nurse are authorized to administer Diastat per the directive in the health care plan. The LVN is on site at Currie Middle School on a full-time basis.

-- The classroom teacher provided examples of how instruction in her class will be individualized and modified as needed for [Student].

-- A transitional aide is offered for the first 60 days of [Student's] placement into the Currie Middle School classroom for the purpose of providing support to [Student] during the transition (sic) Currie. The aide, under the direction of the teacher, will provide 1:1 instruction to [Student] when appropriate, implement reinforcement strategies and provide support during in-school transitions. The aide will also provide support during non-instructional times such as nutrition break, lunch and restroom.

-- The aide will greet [Student] at the drop off location each morning if she does not ride the bus. The drop off location will be in the west area in the parking lot located at the west end of the campus, adjacent to (to the) field. If [Student] rides the bus, the aide will meet [Student] as she gets off the bus. The bus drop off area is located directly in front of Currie where the curb is painted blue.

-- Student's behavior plan will be implemented in Ms. Krick's class, using the same or similar strategies and reinforcing items, such as the DVD cover, I-Touch, ball.

-- Ms. Krick will have a BINGO book and the song for [Student] in the classroom as this one of her favorite activities.

-- The schedule strip from Ms. Slonim's classroom is available to go with [Student] to Ms. Krick's class and can be used during the transition period.

-- The pocket communication system currently used by [Student] will be implemented during the transition period in her new class.

-- An IEP will be held within the first 30 days to review [Student's] program and transition to Currie. It was discussed that the SDC teacher from TUSD (Ms. Krick) will visit the SDC at OCDE."

53. Ms. Tetzloff informed Parents that the proposed drop off area on the west end of campus near the field had physically changed in that the fencing and gate were now closer to the drop off area. The District representatives and Parents discussed the actual location for Parents to stop their car. Parents were assured that the Currie principal would meet with them to work out details. Father asked whether handicap parking spaces located in the elementary school portion of the parking lot would be available to Parents during drop off.<sup>11</sup> A second option was discussed where Student could be dropped off at the school office

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<sup>11</sup> Currie shares its campus with Thorman Elementary School.

location where Student would then proceed through the office through the recess area and onto the classroom when she arrived late. Parents had no questions as to the transition plan nor did anyone offer any further comments.

54. Ms. Parker stated that Student could commence attending Currie “immediately.” She and Ms. Tetzloff stated District transportation services takes about three to four days to commence after the transportation department is notified. Parents indicated that they prefer to drive Student to school in the morning as there are problems getting her to the school bus timely. They did accept transportation from school to home. Ms. Melgares suggested that it would be more appropriate to delay the transition to after OCDE’s spring break as easier on Student who was known to have extreme problems in transitioning. The team agreed to the proposal. Ms. Krick informed Parents as to the make-up of her class. Ms. Krick also informed them that the LVN for Currie was present in her classroom approximately 90 percent of the day where he assists with the medical needs of her students and assists in toileting, feeding, and with academics. OCDE staff offered to assist in the transition. Parents requested that the Currie aide visit Meadow Park and confer with OCDE staff to prepare for Student’s transition. Ms. Parker suggested that Parents visit Currie as soon as possible and observe the Krick class. Ms. Parker asked that the visit take place during the week of March 18, 2013. Father stated that Parents will try to visit that week, but he cautioned that he was busy at work and may not be able to visit Currie until March 27, 2013.

55. Ms. Slonim testified that the District had made up its mind to place Student at Currie. She noted that placement at Currie had been discussed for “awhile.” Ms. Lough stated that the District offer was read to the team, while Ms. Eads noted that the Currie offer had been decided prior to the March 11, 2013 meeting. Ms. Krick, as did Ms. Melgares, observed that the only placement option discussed was Currie. These testimonies must be looked at in context. At the 2009 IEP, the District indicated its desire to have Student return to a District program, when she became middle school age, as the District had a program similar to the OCDE program. Since the 2010-2011 annual IEP meeting, the District had proposed that Student transition to the Currie moderate/severe SDC for medically fragile children. Both Parents and OCDE staff visited Currie to observe the class and physical set-up. Thus, on March 11, 2013, both Parents and the IEP team members were well aware of the Currie program. There had been much discussion as to the Currie program at IEP meetings and during visits to Currie. Parents had seen Currie and the SDC classes as well as the physical set-up. They had asked numerous questions, met with Currie teachers, and had input as to safety and other issues. OCDE personnel also visited Currie on several occasions and were familiar with the Currie program. At the prior IEP meetings, the IEP team had adopted a transition plan. The March 11, 2013 meeting was run as an open forum where people would speak their thoughts. Parents, and in particular Father, actively participated in all areas at all six meetings. Parents and other team members had an opportunity to give their thoughts, opinions, raise concerns, and ask questions relating to the placement offer. In fact, Parents asked numerous questions and raised concerns as to safety issues including drop off procedures. Thus, there was ample opportunity for any IEP team member to discuss the

alternative placement at Meadow Park, or to raise concerns related to placement or the transition plan.

56. The team then returned to reviewing and revising the proposed goals at Father's request. The team agreed on revisions suggested by Parents in five goals. During discussion of the toileting goal, Ms. Krick explained how toileting is handled in her class. Parents agreed to goal number one (vocational/functional reading), but Father insisted on approving what pictures would be utilized in implementing this goal.

57. Ms. Parker suggested that ESY be deferred to the 30-day IEP meeting following Student's attending the Currie class as the District would then be in possession of data which would be analyzed as to ESY eligibility and what ESY program would be appropriate for Student including determining her skills and regression problems. The District maintains an ESY program and also an extended program which is referred to as "EESY." The EESY program was for a longer period of time than the District's regular ESY. Ms. Parker explained that just because a child was eligible for ESY in prior IEP's, this does not mean that a child automatically is deemed eligible for ESY. Ms. Parker informed Parents at the meeting that "[w]e take data to support that recommendation because the ESY, the purpose of extended school year is to provide maintenance of the skills and progress that they've made" and to determine how much the student would regress or lose critical skills. Father asked Ms. Parker whether there was anything she saw in the Triennial Assessment which would make Student not eligible for ESY. Ms. Parker responded "no." Interestingly, the IEP document, which was prepared after the meeting, indicates on page 26 that Student demonstrates a handicapping condition which made her eligible for ESY and cited pages in the notes that stated that the District "will provide a recommendation for ESY at the 30 day IEP meeting."

58. The meeting ended with parents agreeing to visit Currie during the week of March 18, 2013. Father indicated that he may not be available during that week. If he was unavailable, he agreed to complete the Currie visit no later than the week following.

59. On March 19, 2013, Ms. Parker forwarded a letter to Parents requesting that Parents inform the District in writing "whether you are agreeing to some or all of the proposed IEP." If the District does not receive Parents' response, the District intends to file a due process complaint as "we believe [Student] requires the goals, program, and services set forth in her proposed IEP to receive a FAPE." Ms. Parker did not then, or later, forward a Prior Written Notice letter to Parents which contained a description of the action proposed by the District; a description of the basis for the District's decision; a statement of procedural rights; sources of assistance for parents to contact; a description of other options considered and reasons why these options were rejected; and a description of the factors relevant to the District's proposal.

*March 27, 2013 Visit to Currie*

60. On March 27, 2013, Parents visited Currie to observe the Krick class and the school physical layout plus review drop off procedures. Also present were Ms. Slonim and Ms. Parker. The group observed Ms. Krick's class. Ms. Slonim noted that the class seemed more structured than it had during an earlier visit and that changes to the layout of the room had also been made. Both these changes, in Ms. Slonim's opinion, would be beneficial to Student. The group also discussed and observed the location of the bathroom, lunch area, and the speech and language therapy room. Ms. Tetzloff assured Parents that Currie would follow Student's BSP and utilize the same or similar strategies, including reinforcing items, as did the Meadow Park staff.

61. Currie is on a neighborhood street. It shares a campus with an elementary school. There is also a Catholic parochial school on the street. Traffic is busy during the beginning and ending of school. The group also observed the drop off areas which were being proposed. They saw where the school bus which Student could ride would drop off its load in the morning. They also saw the area at the west end of the campus adjacent to the field where drop off was proposed. The proposed drop off location is inside the school property in a parking lot area with three rows of parked vehicles. The drop off would be at a gate in the fence surrounding a large athletic field. Student would proceed through the gate and then be escorted to her classroom. There was a discussion as to arrival procedures. Ms. Parker explained that the school procedure when a student arrives late is to go through the office and then to class. Parents objected to this. Ms. Parker stated that Parents could work with the school's principal to avoid going through the office and work out details. She noted that the principal has worked with parents of another student who has similar needs as Student. Father brought up using one of four handicapped parking spaces in the lot which were assigned to Thorman Elementary School, which shared the parking lot with Currie. Parents felt that no plan had been developed but only "possibilities" discussed. Ms. Parker felt that all of Parents' questions had been answered and their concerns addressed.

*April and June 2013*

62. On March 28, 2013, Father forwarded an email to Ms. Parker. He asked that Parents be given an extension of time to inform the District whether they would consent to all or portions of the proposed IEP. Father stated that the requested extension "will give us more time to figure if and how we can make this work." Father also requested a meeting to "have an honest discussion about how all this would work."

63. On March 29, 2013, Father emailed Ms. Parker which confirmed that the District had "refused our request for a short extension of time in which to respond to your demand that we consent to change the placement of our daughter." Father also requested that the District fund a Psychoeducational Independent Education Evaluation (IEE) as "[w]e disagree with important aspects of the" Triennial Assessment "and particularly the recommendations made by the Tustin Unified School District in connection with that evaluation."

64. On April 19, 2013, Ms. Parker forwarded a three-page letter to Parents denying their request for an IEE. On April 23, 2013, the District filed a Request for Due Process with OAH.

65. In mid to late April, Parents were informed by OCDE that the Meadow Park class was being closed and consolidated with existing programs. On May 2, 2013, Ms. McDonald forwarded a letter to Parents, copied to Ms. Parker and Ms. Melgares, officially informing Parents of the closing of the Meadow Park class and that comparable programs were available at Hillview High School (Hillview) and Irvine High School. Parents visited both campuses and chose for their daughter to attend the SDC at Hillview.

66. In the beginning of June 2013, Father contacted Ms. Melgares about Student attending ESY at the OCDE class at Hillview. On June 13, 2013, Dr. Stillings wrote to Parents responding to Parents' request to have Student attend an ESY at an OCDE program at Hillview. The District granted Parent's request. On June 17, 2013, Father emailed Dr. Stillings stating: "We are happy to have [Student's] ESY placement resolved, and we look forward to resolving her fall placement as quickly and amicably as possible." Student filed her due process request with OAH on September 5, 2013.

#### *Transition to Hillview*

67. On July 1, 2013, Student began attending ESY at the moderate/severe SDC at Hillview. Student entered a class with a new teacher. Hillview is a continuation high school.<sup>12</sup> It is located at Foothill Boulevard and Hewes Avenue in North Tustin across from the campus of Foothill High School.<sup>13</sup> Foothill is a major thoroughfare with a speed limit of 40 miles per hour. Hillview is not fenced as is Currie. Student's drop off area was inside the driveway entry. The entry is not gated and only ingress and egress lanes were between where Student was dropped off to the street. Mother would arrive at the entry and get Student exited from her vehicle to a picnic table. One or two staff members would then meet them and escort Student to the classroom. Ms. Lough estimated that the Hillview class location was further away from drop off than was the Currie classroom was to the proposed drop off area.

68. The Hillview SDC is for high school aged students. Student was the youngest in the class. The SDC is segregated on the campus so that there is no opportunity for SDC students having contact with typically developing peers. The Hillview class contains eight to nine students aged 14 to 19. Ms. Lough, the OCDE psychologist, noted that the Hillview students had more severe behaviors than Student or those students in the Currie class.

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<sup>12</sup> [www.tustin.k12.ca.gov](http://www.tustin.k12.ca.gov).

<sup>13</sup> The ALJ takes official notice of the location as shown on Google Maps.

69. OCDE did not have a written transition plan for the move to Hillview. Ms. McDonald, Ms. Lough, and Ms. Atteberry facilitated the transition which included implementing the BSP. Student was assigned a new teacher at Hillview. Parents and Student visited Hillview prior to her start date so she could see the location and meet her new teacher. Ms. Lough trained the aide and class staff as to reinforcers and other strategies to aid in Student's transitions.<sup>14</sup> On the first day, Student was met at drop off by Ms. McDonald and Ms. Atteberry. Problems were manageable the first week. Problems increased in the second week as Student realized she was at school where demands would be put on her. Student became resistant by refusing to leave the car at arrival. Various strategies were used including using reinforcers such as DVD covers, and using a stroller to wheel Student to class. Because Student's behavior at drop off was not consistent, there was a need to be flexible to modify strategies. The transition was completed by the end of July 2013. As expected, Student did regress in her skills. Ms. Melgares noted that Student did recoup those lost skills.

#### *Parent's Partial Consent to IEP*

70. On October 31, 2013, the first day of hearing, Parents consented to the implementation of the March 11, 2013 IEP with respect to goals and related services.<sup>15</sup>

#### *Parents' Attitude towards District*

71. Father stressed that Parents feel that it is important that school staff know and understand Student. He cited an incident at Benson where Student received an injury which he blamed on the District's failure to follow her safety plan. He termed OCDE as being more collaborative with Parents. He opined that OCDE was more individualized in its education approach, while the District stresses more class activities in its teaching method. Father felt that the OCDE staff know and understand Student to the degree that he felt that, at the time of transition to Hillview, he was not leaving his daughter with strangers. Father stated that the District does not understand his daughter and did not have a good awareness of her behaviors and tendencies. During the IEP process, Father would contact OCDE personnel about his thoughts and desired revisions and not anyone from the District. Although Father testified that he had never said "no" to Currie, he had never said "yes" either. In short, Father clearly was very comfortable with OCDE staff while he was not with the District staff.

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<sup>14</sup> Reinforcers utilized were iPad, iPhone, and an adapted tricycle.

<sup>15</sup> Parties entered into a joint stipulation regarding issues which included parental consent to the IEP goals and related services.

### *Appropriateness of Currie Placement*

72. Dr. Perry Passaro testified as Student's expert. Dr. Passaro possesses a B.S. in Biology, an M.S. in education, and a Ph.D. in educational psychology. He served as a school psychologist for over 14 years with almost six years at the Santa Ana Unified School District. From 1994 to 1995, Dr. Passaro served as Director of Special Education at the Hot Springs, South Dakota school district. Since December 2005, he has been a licensed psychologist in private practice. He has served as an independent education evaluator for 11 school districts in Southern California. Dr. Passaro was retained by Student's attorney as a consultant in this matter.

73. Dr. Passaro opined that the Triennial Assessment was "good," and there was no need for further testing. He also observed Student at her Hillview class about three weeks prior to the hearing. He also observed the proposed Currie placement about two weeks prior to the hearing. He reviewed the March 11, 2013 IEP, which he termed as overall "pretty good." His criticism of the IEP was to issues of safety, regression, and ESY. He also "endorsed" the BSP approved at the annual IEP. Dr. Passaro admitted that if instruction was equal in both classes, it would be beneficial for Student to be in a class with same age peers.<sup>16</sup> Thus, Dr. Passaro found that the proposed Currie placement was appropriate.

74. OCDE IEP team members also were of the opinion that the Currie class was appropriate. Ms. Melgares<sup>17</sup> stated she was of the opinion that the District could implement the IEP at Currie and that Student could obtain educational benefit at Currie. She also remarked that OCDE team members did not comment on the appropriateness of Currie during the March 11, 2013 meeting because they all agreed that the Currie placement was appropriate. Ms. Lough opined that Currie was appropriate for Student, and that Student's IEP could be implemented at Currie.<sup>18</sup> Ms. Atteberry, the OCDE SLP, stated that she felt the

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<sup>16</sup> Hillview students were high school age, while Currie students were middle school age like Student.

<sup>17</sup> Ms. Melgares has a B.A. in social science and a B.A. in linguistics. She also possesses a M.A. in communicative disorders. She served as a SLP (1979-1987) and a special education teacher (1987-1995) in the Irvine Unified School District. From 1995-2002, she was a program specialist, and from 2002-2008, Ms. Melgares was the Director of Special Education at Irvine. She joined OCDE in 2008. Ms. Melgares was principal of Administrative Unit III, which included Meadow Park, for 2008-2009. Since 2009, she has been a Program Administrator for OCDE's special education schools.

<sup>18</sup> Ms. Lough possesses a B.A. in psychology and a M.A. in educational psychology. She has been employed as a school psychologist in the in special education services by OCDE since 2005.

Currie class was appropriate.<sup>19</sup> Ms. Fitzpatrick, Student's current occupational therapist, opined that she had no concerns as to Student being placed at Currie as it was appropriate. Ms. Slonim, Student's teacher at Meadow Park, opined that she had found Currie appropriate for Student at her first visit even though she offered suggestions on how the classroom could be altered to benefit Student. She noted that at her last visit following the March 11, 2013 meeting, she found that her suggested changes to the classroom had been made.

#### *Credibility of the OCDE Witnesses*

75. Student challenges the testimony of the OCDE witnesses in two ways. First, Student cited the Memorandum of Understanding (MOU) between the District and OCDE which requires the parties "agree to collaborate and fully cooperate in any due process proceeding." Ms. Melgares testified that the provision refers to making personnel available for testifying at due process hearings. Secondly, Student asserts that the OCDE team members engaged in a "code of silence."<sup>20</sup> Dr. Passaro testified that Ms. Lough had concerns and that Ms. Atteberry stated she had reservations with the Currie placement. Both denied that they had made such statements and stated that their conversation with Dr. Passaro were short. No evidence was offered, such as contemporaneously made notes or tape recordings, to confirm Dr. Passaro's testimony. Both had concerns as to Student's transition to Currie in general, which may have been what was being referred to during their brief conversations with Dr. Passaro. All the OCDE witnesses demonstrated that they were concerned over Student's welfare and were sympathetic to Parents. Father testified of his confidence in the OCDE staff and specifically Ms. Lough. No credible evidence was presented to demonstrate that the testimony of the OCDE witnesses should be discounted in any way. The OCDE witnesses are experienced educational professionals who had worked with Student for a long period of time. Thus, the ALJ gave considerable weight to their testimony and opinions.

#### *Appropriateness of the Transition Plan and Drop Off*

76. Dr. Passaro opined that the transition plan in the March 11, 2013 IEP is not appropriate. Dr. Passaro's opinion is based on the transition problems encountered when Student began attending Hillview, which occurred after the March 11, 2013 IEP meeting. Thus, Dr. Passaro's opinion is based on information which did not exist at the time of the meeting and was not considered by the IEP team. Dr. Passaro did experience Student running out of his office to the waiting room when she did not want to engage in a test. He emphasized that the threat of her engaging in past behaviors must be accounted for in the transition plan. Based on the difficulties experienced during the Hillview transition, he recommended that two aides be present at arrival until it is determined that one aide would be sufficient. He indicated that a second aide should be provided in case hands-on

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<sup>19</sup> Ms. Attebury has provided speech and language therapy services to Student since September 2008.

<sup>20</sup> Student's Closing Reply Brief, p. 10.

techniques might be required or that Student engages in eloping. Dr. Passaro opined that Student could transition to Currie, and he offered that children need to learn how to transition.

77. Father reported that Student required assistance at drop off and that eloping and dropping to the ground were problems encountered at drop off. The transition plan includes the implementation of Student's BSP which had just been adopted following Ms. Lough's FAA. The FAA and BSP take into account Student's behaviors based on data collection. The FAA showed that Student averaged six drops to the ground per week, which included the entire school day. The behavioral antecedent for dropping was resisting redirection to stand up or sit in a chair. There was no mention of Student engaging in drops at drop off in the FAA. There was also no mention of eloping in the FAA as this problem did not occur with any frequency due to close supervision of staff.

78. Ms. Lough opined that the transition plan was appropriate. She indicated that she expected that there would be transition issues but that the plan would meet these potential problems. It must be noted that Ms. Lough also testified with the benefit of knowing the problems encountered during Student's Hillview transition. Ms. Lough did indicate that Currie staff could manage the transition. Ms. Lough offered to have OCDE staff present during the transition and to train Currie staff in dealing with Student.

79. Ms. Fitzpatrick had been involved in Student's drop off. She observed that eloping was not a problem due to the close supervision by staff. Ms. Slonim noted that Student did not require assistance getting to class after drop off every day. When there was a problem day, Mother would wave (the class overlooked the drop off area) or she would call so that OCDE staff would respond to assist getting Student into the classroom. Most of the time assistance was needed, Mother and one aide would get Student to class. Ms. Slonim was clear that had she had any feelings that the transition plan, safety measures or placement was not appropriate, she would have vocalized these feelings. Ms. Slonim opined that the transition plan was appropriate and a good plan as well as being proactive.

#### *Appropriateness of Deferring ESY until the 30-Day IEP Meeting*

80. In the past, the OCDE ESY was for one week longer than that of the District's ESY. In 2013, both programs were for the same number of days except that the OCDE day was one hour longer. The District did run another program for a longer period of time which was referred to as EESY.<sup>21</sup> Ms. Tetzloff noted that there was not enough data to determine whether Student should attend ESY or EESY. She did indicate that she did not feel there was a question as to whether Student would be found eligible. Father asked whether Ms.

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<sup>21</sup> Because the OCDE program included ESY and there was only one program, there had been no discussions by Student's past IEP teams as to eligibility or what program was appropriate for Student.

Parker saw anything in the assessment report that Student would not be eligible for ESY. Ms. Porter said she did not see anything which would prevent Student's eligibility.

81. Dr. Passaro noted that although it was appropriate for the District to address ESY at the 30-day IEP meeting, he opined that the March 11, 2013 team should have addressed the ESY issue because of the concerns of Parents. Ms. Slonim, noting that ESY is "critical," stated that data is always "helpful" in deciding how much support Student would require. Ms. Lough agreed with Dr. Passaro that ESY is not always offered at the initial annual IEP.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>22</sup>*

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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<sup>22</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

### *Procedural Violations*

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the decision whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, fn. 9.)

### *Did the District Commit Procedural Violations?*

6. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) There are two principal considerations in claims brought pursuant to the IDEA; substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *Target Range*, 960 F.2d at 1483-1484; (*Rowley, supra*, 458 U.S. at p. 200.)

### *Parent Participation in the IEP Process*

7. Student contends that the District interfered with Parents' right to be part of the IEP decision-making process as to placement, including ESY, by refusing to consider Parents' input and respond to their questions. The District contends that Parents were not denied participation in the IEP decision-making process in that Parents were active participants in all areas of the IEP and were given an opportunity to share their thoughts.

8. The development of an IEP is a collaborative activity accomplished by an IEP team convened by the school district. A parent is an integral and required member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1)(2006); Ed. Code, § 56341, subd. (b)(1).) A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133 (*Vashon*).)

9. In determining educational placement, a school district must ensure that the placement decision is made by a group of persons including the child's parents. (34 C.F.R. § 300.116 (a)(1)).<sup>23</sup> Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(a)mong the most important procedural

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<sup>23</sup> See also 34 C.F.R. §§ 300.327 and 300.501(c).

safeguards.” (*Amanda J. ex rel Annette J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 882.)

10. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304.) .) Parents have meaningfully participated in the development of an IEP when they are informed of their child’s problems, attend the IEP meeting, have an opportunity to express their 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 (*Knox*.) Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. ex rel J.E.W. v. Fresno*, (9th Cir. 2010) 626 F.3d 431,461.) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y 2010) 682 F.Supp.2d 387, 394.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d at p.1036.)

11. The evidence clearly demonstrates that Parents were not denied meaningful participation in the IEP process, including as to the issue of placement.

(A.) The Triennial/Annual IEP meeting occurred over six sessions comprising over 18 hours in time. The meeting, as characterized by Ms. Atteberry, was run as an open forum in which Parents were actively involved in every aspect.<sup>24</sup> The IEP team, as Ms. Fitzpatrick observed, spent a considerable amount of time listening and discussing Parents’ input and concerns. The Triennial Assessment written report was reviewed and discussed on a page-by-page basis over three sessions, which resulted in it being amended over 30 times at the request of Parents. At the December 6, 2012 session, the FAA and BSP prepared by Ms. Lough was discussed and reviewed. The IEP team agreed to add at Parents’ request that a cause of Student’s behaviors was her intent to communicate. Proposed goals were discussed on December 14, 2012, January 29, 2013 and March 11, 2013. Parents were deeply involved in the decisions relating to goals including baselines, the details of each goal, who would be responsible for each goal, how progress was to be measured, and the manner of data collection for each goal. As to goal one, Father insisted, and the team agreed, to approve the actual pictures to be utilized in measuring progress.

(B.) At the March 11, 2013 meeting, the District placement offer was presented along with a transition plan, both of which had been discussed at previous annual meetings. All IEP team members, including Parents, were given opportunities to voice their opinions, concerns and ask questions. In fact, OCDE team members voiced concern in

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<sup>24</sup> This is evidenced by the meeting recordings in addition to the testimony of the witnesses including Father. (Student exhibit 65.)

having Student almost immediately transition to Currie. Their recommendation that the transition occur after spring break was accepted. This indicates that the District would consider input from the team. Parents, although not voicing their input to the proposed placement, actively participated in discussions regarding the delivery of speech and language, OT, APE, health care services, and the location for dropping Student at Currie.<sup>25</sup>

(C.) Prior to having to consent to the District offer, Parents were permitted to visit Currie and to observe the proposed class taught by Ms. Krick. As to ESY, the District suggested deferring discussion of ESY until after the District had an opportunity to gather data after Student transitioned to Currie. This deferral does not amount to an attempt to deny Parental involvement in the IEP decision-making process.

*Failure to Consider ESY on and after March 11, 2013*

(D.) Student correctly points out that “ESY is not simply ‘summer school.’” (Student’s Closing Brief, p. 12.) Student rightly contends (Student’s Closing Brief, p. 14):

Consideration of [Student’s] ESY needs for 2013 did not just involve making a simple decision of yes or no as to eligibility. The IEP team needed to consider whether or not [Student] needed a longer period of ESY, such as was provided in the OCDE program at Meadow Park during the years she was there.

A school district shall consider the child’s strengths, parental concerns, assessment results, and the child’s academic, developmental and functional needs when developing a child’s IEP. (Ed. Code, § 5634.1, subd. (a).) This necessarily includes ESY.

(E.) The evidence clearly demonstrates that the District did not prevent Parents from participating in the IEP decision process as relates to ESY. The IEP agreed to conduct another IEP meeting 30 days after Student commenced attending Currie. The District requested to defer consideration of ESY so as to be able to collect data on Student, who had not attended a District class since the beginning of third grade. The collection of data would assist the IEP team in deciding whether Student needed EESY as opposed to the regular District ESY. Ms. Tetzloff noted that the reason for the deferral until the 30-day IEP meeting was to collect necessary data to permit the District to know Student and her needs including regression. Dr. Passaro, Student’s expert, noted that ESY is often not addressed at the initial annual IEP meeting and that such practice is appropriate.

(F.) Student also contends that, by not holding an IEP meeting following the March 11, 2013 meeting as to the ESY, the District further denied Parents the right to

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<sup>25</sup> It should be noted that Parents were familiar with Currie having visited the Currie classes on two prior occasions. They were also familiar with the proposed transition plan which was identical to that proposed the preceding school year.

participate in the IEP decision-making process. When Parents requested that Student attend the OCDE ESY, Dr. Stillings, for the District, granted the request; to which Father responded by email that the ESY placement was “resolved.” Thus, Student was not deprived of educational benefit and the matter became moot.<sup>26</sup>

### *Predetermination*

12. Student contends that the District “made up its mind to change [Student’s] placement at Currie far before her triennial IEP was first convened.”<sup>27</sup> Student also alleges that the District failed to keep an open mind as it failed to consider any options or alternatives to the Currie placement. The District denies that it predetermined Student’s placement.

13. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.*, (6th Cir. 2004) 392 F.3d 840, 858 (*Deal*)). A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008), 552 F.3d 786, 801, fn. 10 (*Douglas County*)). The IDEA permits a school district to engage in preparatory activities to develop a proposal or respond to a parent proposal which will be discussed at a later IEP meeting. (*S.P. ex rel Penalsa v. Scottsdale Unified School Dist.* (D. Ariz., October 17, 2013) 2013 WL 5655527, at 4.)

14. When developing each pupil's individualized education program, the individualized education program team shall consider the following: (1) the strengths of the pupil, (2) the concerns of the parents or guardians for enhancing the education of the pupil, (3) the results of the initial assessment or most recent assessment of the pupil, and (4) the academic, developmental, and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) In order to determine the components of a FAPE, the IEP should also establish measurable annual goals, address the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specify the measurement tools and periodic reports that will be used to evaluate the child’s progress. (20 U.S.C. § 1414(d)(1)(A), 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a).)

15. In determining placement, school districts must ensure, to the maximum extent appropriate: (1) that children with disabilities are educated with non-disabled peers; and (2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services

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<sup>26</sup> The District, in its closing brief, rightly observes that the “District was obligated to continue providing Student’s stay-put placement” at the OCDE program which includes ESY as part of the program. (District Closing Brief, p. 19.)

<sup>27</sup> Student’s Closing Brief at p. 5.

cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a); Ed. Code, § 56031.)

16. An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, and constitutes a procedural denial of a FAPE. (*Deal, supra*, 392 F.3d at p. 858; *Target Range, supra*, 960 F.2d at pp.1485-1487.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 F.Appx. 342, 344 [2007 WL 1989594, 107 LRP 37880, 48 IDELR 31] (*H.B.*)) A school district predetermines the child's program when it does not consider the parents' requests with an open mind, thereby denying their right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858.) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP team meeting, and may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*Douglas County, supra*, 552 F.3d at p. 801, fn. 10, citing *Vashon, supra*, 337 F.3d at p. 1131.) The IDEA does not require a school district to accept parents' choice of program, but it must consider suitable alternatives. (See *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

17. Placement determinations must be "based on the child's IEP." (34 C.F.R. 300.116(b)(2).) Only after an IEP has been developed to meet the unique needs of the student does the school district have a basis for determining where the student's needs can be served, and reversing that process creates a danger of denying the student a FAPE by developing an IEP to meet a predetermined setting. (*Spielberg v. Henrico County Pub. School* (4th Cir. 1988) 853 F.2d 256, 259.) After-the-fact parental involvement to justify, or excuse, a predetermined placement is not enough. (*Ibid.*)

18. Although development of an IEP is a team decision, if the team members do not agree, it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010). It is the school district that has an affirmative duty to review and revise, at least annually, an eligible child's IEP. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 688 F.3d 1047, 1056 (*Anchorage*); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Nothing in the IDEA makes these duties contingent upon parental cooperation with, or acquiescence in, the district's preferred course of action. (*Anchorage*, 688 F.3d at p. 1056.) School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Ibid.*)

19 Student relies heavily on *H.B.* in support of its position that the District predetermined placement at Currie. In *H.B.*, the hearing officer declined to rule on whether the District had predetermined changing student's placement from a nonpublic school to a district program as the issue had not been raised by student in his prehearing conference statement. Both sides had questioned witnesses on predetermination during the hearing. On appeal to the district court, the district court judge found that the District had predetermined the offered placement change. (239 F.Appx. at p. 344.) The school district appealed the

district court's ruling to the Ninth Circuit. The Ninth Circuit, in reviewing the evidence, noted that the child's parents remained silent at the IEP meeting and observed (239 F Appx. at p. 345):

It also noted that at the IEP meeting, the School District assumed that the student would be placed in a public school program, stated that the meeting participants would discuss a transition plan, and did not discuss alternatives to the district's proposed placements. This establishes that the School District desired that the student return to a public school and believed that its proposed placement was appropriate. It does not, however, necessarily establish that the School District was unwilling to consider other placements.

The Ninth Circuit ordered the matter remanded for the district court to conduct an evidentiary hearing to determine whether the school district was willing to consider alternative placements. (*Ibid.*)

20. The weight of the evidence fails to prove that the District predetermined its offer of placement as there is no evidence to demonstrate that the District team members would not consider alternative placements if raised at the IEP meeting. As discussed in Legal Conclusion 11, the District did not deny Student's parents an opportunity to meaningful participate in the IEP decision-making process. Parents were active in discussing the District offer of placement and services, as specifically noted in Legal Conclusion 11(B), in that Parents discussed with the IEP team the delivery of speech and language, OT, APE, and health services at Currie. They were also given more than one opportunity to ask questions or voice their concerns. They opted not to. Ms. Krick's testimony that she entered the IEP process with an open mind and Ms. Parker's testimony that she had not finalized the District's offer until the final session after the assessment report review, general agreement as to goals and what services Student required was not impeached. The District's offer had been to commence Student's placement at Currie immediately. The District discussed the concerns of the OCDE staff about the timing of the transfer and adopted their suggestion to delay the transition to after Spring break. This demonstrates that the District was willing to consider alternatives to their proposal.

#### *Prior Written Notice*

21. The law requires that written notice be given to the parents of a child with a disability within a reasonable time before a school district: a) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or b) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3).) That notice must include: 1) a description of the action proposed or refused by the agency; 2) an explanation of why the agency proposes or refuses to take the action; 3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; 4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA and the means by which a copy of the

procedural safeguards can be obtained; 5) sources for parents to contact to obtain assistance in understanding the provisions of this part; 6) a description of other options that the IEP team considered and the reasons why those options were rejected; and 7) a description of other factors that are relevant to the agency's proposal or refusal. (34 C.F.R. § 300.503.)

22. The IDEA does not provide a specific timeframe in which a PWN must be issued. Rather it must be issued in a reasonable time before the proposed change is to take effect. While the PWN may have been issued earlier, the failure to timely issue a PWN would be a procedural violation. Petitioners failed to establish that the failure to issue the PWN before January 24, 2013, impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefit that denied Student a FAPE due to the procedural violation. (*Pointe Educational Services*, 113 LRP 44496.)

23. Ms. Parker admitted that she had failed to provide a Prior Written Notice following the March 11, 2013 IEP meeting. Further as stated earlier, Student's parents were active participants in the IEP meetings and were well aware of the District's offer. Placement was discussed at the March 11, 2013 meeting and all team members had an opportunity to ask questions or to comment on the District proposal. Just because they disagreed with the District's offer and the IEP team decision, this does not mean they did not receive proper notice of it.

24. Further, even if the District had committed a procedural violation with respect to prior written notice; that procedural violation did not result in a substantive denial of FAPE. Student's parents were well aware that the District had adopted an IEP placement at Currie. The lack of a PWN letter did not impede Student's right to a FAPE, significantly impede the opportunity of Student's parents to participate in the process, or cause Student a deprivation of education benefits. (See Ed. Code, § 56505, subd. (f)(2).) Thus, there was not a substantive denial of FAPE.

*Did the District Deny Student a FAPE?*

25. Legal Conclusions 2, 3, 14 and 15 are hereby incorporated by reference.

26. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*)

27. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

### *Appropriateness of the Currie Placement and the Transition Plan*

28. Student contends that the Currie placement was not appropriate in that the IEP team failed to consider potential harmful effects to Student during transition.<sup>28</sup> The District contends that the Currie placement was appropriate.

#### *Consideration of Potential Harmful Effects*

29. The evidence demonstrates that the IEP team considered potential harmful effects as to placement change, including transition. The team reviewed an extensive assessment completed jointly by teams from OCDE and the District. The assessing OCDE staff, who were very familiar with Student and her needs, collaborated with the corresponding District staff as to their experiences with Student. The OCDE assessors jointly made the recommendations included in the Triennial Assessment report and discussed in detail at meetings on October 30, November 29, and December 6, 2012. A FAA and BSP were prepared by the OCDE school psychologist, Ms. Lough, whom Father testified knew his daughter very well. The FAA and BSP were discussed at the December 6 and 14, 2012 IEP meetings. Parents brought up concerns as to Student's safety, including dropping to the ground and eloping, during the discussion. Father even questioned the basis of the data which Ms. Lough used in the FAA. During the IEP meetings, the OCDE and District nurses reviewed health services, Student's needs, and parental concerns. At the March 11, 2013 meeting, there was a discussion on how Student's health services would be delivered at Currie. Both OCDE and District staff also discussed how the delivery of speech, OT and APE services at Currie would occur. The team also discussed the transition to Currie including the drop off which included potential safety concerns. On the October 29, 2012 Currie visit, OCDE staff shared their observations relating to Student's needs including at drop off. During the six sessions, Parents repeatedly discussed Student's problems with safety, health, transitions, and regression. Thus the IEP team was aware of Student's needs, including her problem with transitions and regression, both of which were long time concerns.

#### *Appropriateness of the Currie Placement*

30. Every OCDE and District IEP team member testified that Currie was an appropriate placement where Student's IEP could be implemented. Ms. Slonim, Student's teacher at Meadow Park who probably knew Student the best of anyone, opined that the Currie class was appropriate. Ms. Melgares; Ms. Atteberry, Student's SLP; and Ms. Fitzpatrick, Student's occupational therapist, also opined that Currie was appropriate. Ms. Krick, the Currie class teacher, and Ms. Tetzlaff, a former Currie SDC teacher and now SDC coordinator at Currie, found the Currie class was appropriate for Student. In fact, Student's expert witness, Dr. Passaro, found the IEP "pretty good" and the Currie placement

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<sup>28</sup> Student had also contended that the Currie was not appropriate due to procedural violations of the IDEA. As stated above, the ALJ found no such procedural violations occurred.

appropriate. Dr. Passaro noted that if the instruction was equal in both classes, it would be beneficial for Student to be in a class with same age peers as she would be at Currie and not at Hillview.

#### *Appropriateness of the Transition Plan*

31. Student contends that the transition plan proposed at the March 11, 2013 IEP meeting was the same as one proposed in the February 12, 2012 letter from Ms. Parker. Student also alleges that important parts of the plan were neither explained nor discussed with parental input. Thirdly, Student avers that the classroom teacher had not provided examples of how instruction would be individualized for Student in her class. The fact that the same or similar plan had been proposed earlier does not make it inappropriate. As to the second allegation, Parents had attended the IEP and, as discussed above, were very active participants in the IEP decision-making process. At the March 11, 2013 meeting, Parents had the opportunity to make comments, suggestions and questions. They did, in fact, ask questions as to delivery of services and drop off areas. Additionally, Parents visited Currie on March 27, 2013 and met with Ms. Parker, Ms. Tetzloff, and Ms. Krick. During the visit, Parents and District staff discussed drop off and other parental concerns. Thirdly, Ms. Krick participated in all six sessions of the IEP meeting. Both Ms. Tetzloff and Ms. Fitzpatrick testified that Ms. Slonim offered the strategies and methods she utilized with Student while Ms. Krick offered her observations as to strategies and methods she would use in her class.

32. Ms. Lough of the OCDE opined that the transition plan was appropriate as the plan would be able to meet problems she expected would be encountered during the transition to Currie. Ms. Lough's opinion took into account her transition to Hillview. Additionally, Ms. Lough offered that she and other OCDE staff would be present during the transition to train District staff in dealing with Student. Ms. Slonim also opined that the transition plan was a good plan which was proactive. Both Ms. Lough and Ms. Slonim had been with Student during her time at Meadow Park (Ms. Lough also provides services to Student at Hillview).

33. Dr. Passaro opined that Student could transition to Currie. He was of the opinion that the transition plan was not sufficient due to the problems experienced during her move to Hillview. He also observed that Student had eloped from his office to his waiting room while he conducted testing on Student. He felt that the threat of her engaging in past behaviors should be accounted for in the transition plan. The possibility of Student engaging in past behavior was included in the transition plan as Student's BSP was to be implemented which was based on data from the FAA. The drop off portion was similar to what OCDE was using at Meadow Park.

34. In *Poway v. K.C. ex rel Cheng* (S.D. Cal. 2013) 2013 WL 990837, the ALJ considered Student's academic performance the school year following the IEP at issue to determine if an IEP had been appropriate. The district court noted: "Lastly, K.C. asserts that ALJ Tully assessed the IEP on K.C.'s academic performance after the IEP and not at the time the IEP plan was implemented. As to this argument, the Court notes that the ALJ addressed

K.C.'s academic performance in the fall of 2009 which is after the IEP meeting date of May/June 2009. To the extent that the ALJ relied on these facts to support her conclusion, they are disapproved.” Thus, Dr. Passaro’s opinion as to the appropriateness of the transition plan, which was based almost solely on problems encountered during Student’s transition to Hillview is not relevant to the analysis due to the “snapshot rule.”<sup>29</sup>

35. Based on the above, the evidence demonstrates that the transition plan was appropriate.

*There was No Denial of FAPE*

36. The evidence demonstrates that the IEP team considered Student’s strengths and weaknesses; parental concerns; assessment results including both the FAA and BSP; and Student’s academic, developmental, and functional needs. Placement was appropriate as Student’s IEP can be implemented at Currie and she will receive educational benefit.

ORDER

1. As to the District filed OAH case number 2013040960, the District’s March 11, 2013 IEP is appropriate and constitutes a FAPE in the least restrictive environment. The District may implement the March 11, 2013 IEP.

2. As to Student’s filed OAH case number 2013090162, Student’s requests for relief are denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: the District prevailed on the issues heard and decided in this case.

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<sup>29</sup> Dr. Passaro’s recommendation to have a second aide at drop off during transition may have merit in taking account the problems encountered during the Hillview transition.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: December 20, 2013.

/s/

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ROBERT HELFAND  
Administrative Law Judge  
Office of Administrative Hearings