

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS, on Behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008080509

**DECISION**

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Los Angeles, California on December 9-12, 2008, January 13-15, 2009, January 22, 2009 and February 4, 2009.

Student was represented by Mark Woodsmall, Attorney at Law. Student's mother (Mother) and father (Father) (collectively "Parents") were present each day of the hearing.

Respondent Los Angeles Unified School District (District) was represented by Debra K. Ferdman, Attorney at Law. Sharon Snyder, Cynthia Shimizu, Joyce Kantor, and Doreen Rubin, Due Process Specialists for the District were each present for portions of the hearing.

The Due Process Hearing Request was filed on August 14, 2008. The District's request for continuance was granted for good cause on October 3, 2008. At the conclusion of the hearing, the record remained open until February 23, 2009 for the submission of closing briefs.

**ISSUES<sup>1</sup>**

1. Did the District fail to conduct appropriate and comprehensive assessments of Student in all areas of known or suspected disability in physical therapy, occupational therapy, behavior, social skills, and assistive technology in 2007?

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<sup>1</sup> On the first day of hearing, Student proffered a Motion to Reallocate the Burden of Proof to the District and District filed a Motion to Preclude Issues. The ALJ declined to hear the motions because good cause did not exist to excuse the untimely filing of the motions after the prehearing conference. The issues have been reorganized by the ALJ for clarity and organizational purposes.

2. Did the District deny Student a free and appropriate public education (FAPE) by substantially impeding Parents' participation in the decision-making process by:

(a) failing to timely initiate an Individualized Education Program (IEP) meeting after Parents' February 2008 notification to the District of Student's regression;

(b) failing to provide prior written notice of its refusal to furnish additional OT and PT; and/or

(c) predetermining its May 2008 offer concerning occupational therapy (OT) and physical therapy (PT)?

3. Did the District fail to provide Student a FAPE during the school year 2007-2008, the extended school year (ESY) 2008, and the school year 2008-2009 by:

(a) Failing to place Student in the least restrictive environment (LRE);

(b) Failing to provide appropriate related services in OT and PT?

### REMEDIES REQUESTED

Student seeks reimbursement for a unilateral placement at SmartStart preschool (Smartstart) for the 2008-2009 school year, reimbursement for OT and PT assessments, compensatory education and an order that the District assess Student in the areas of assistive technology needs, behavior and social skills.

### FACTUAL FINDINGS

#### *Jurisdiction and Background*

1. At all relevant times, Student resided within the boundaries of the District.

2. Student is a four year-old boy born on October 16, 2004 who was designated eligible for special education and related services under the category of developmental delay.<sup>2</sup> Student suffers from Bannayan-Riley-Ruvalcaba Syndrome (BRRS), which is a rare genetic disorder associated with macrocephaly (large head) and an increase in intestinal polyps, adult cancer, hypotonia (low muscle tone), delayed speech/language development, and delayed motor abilities.

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<sup>2</sup> Developmental Delay is not a category of special education eligibility pursuant to section 56441.11 of the California Education Code. However, it is undisputed that Student is eligible for special education and related services.

3. Student attended an early intervention preschool class at SmartStart prior to his third birthday on October 16, 2004, at which time he became eligible for District special education services. At the time of hearing, Student was enrolled at SmartStart, a California-certified NPS and NPA, where his parents unilaterally placed him.

4. In preparation for Student's initial IEP on October 11, 2007, a psychoeducational assessment, adaptive physical education (APE) assessment, PT assessment, speech and language assessment, and an OT assessment were conducted by District.

5. On December 7, 2007, Parents entered into a settlement agreement with District pursuant to an Informal Dispute Resolution (IDR) session. Pursuant to the agreement, Parents released all issues pertinent to Student's education except occupational therapy as of December 7, 2007. In relevant part, the settlement agreement states: "This agreement constitutes a full and final resolution of all claims and issues arising from or related to [Student's] educational program through the date of full execution of this Agreement, with exception of Occupational Therapy. Acceptance of this offer settles the issue(s) raised in the IDR Complaint Form A dated 10/16/07. Acceptance requires the signature of both parties and must be signed by 12/7/07 to go into effect." Pursuant to the terms of the settlement agreement, the appropriateness of the District's OT assessment remains at issue, however the issue of the appropriateness of other assessments predating December 7, 2007, was released by the settlement agreement. All other District assessments predating December 7, 2007, are discussed only as needed for evaluation of the appropriateness of goals, services and placement after December 7, 2007. It is undisputed that Student received the services outlined in the agreement.

#### *OT Assessment*

6. On September 12, 2007, District OT therapist Christina Soria (Soria) conducted an assessment of Student. Soria received her Bachelor's and Master's degree in OT from the University of Southern California and is an experienced, licensed OT.

7. Soria utilized the Ecological Model of Student Performance in her assessment and acknowledged that it is best practice for OT based upon *The Guidelines for Occupational Therapy and Physical Therapy in California Schools* published by the California Department of Education (*The Guidelines*). It was uncontroverted that *The Guidelines* constituted best practice in school based PT and OT practice. According to *The Guidelines*, the goal of the assessment is to identify the components that affect a student's performance. *The Guidelines* further provide that generally, OT and PT assessments involve the review of records; interviews of the teacher, parents, and other personnel knowledgeable about the child; and observation of the student within the educational environment. In addition, and as appropriate, formal assessments, including standardized assessments and any relevant clinical observations, may be used to gather additional information about the student's functional levels. According to *The Guidelines*, student performance cannot be evaluated accurately without observation of the student in an appropriate educational setting. *The*

*Guidelines* provide that common standardized tests that assess student abilities do not evaluate student performance. The link between standardized tests and student performance can be made only through observation of the student in the educational environment and interviews with the student, teacher or parent.

8. Soria's assessment consisted of a parent interview and clinical observations. Her observations were made at Short Avenue elementary school. Student was unfamiliar with Short Avenue elementary school. Short Avenue elementary school was neither Student's neighborhood school nor his school of attendance. Soria claimed that the observation of Student at Short Avenue elementary was a classroom observation. Soria did not use standardized assessment tools in her assessment. She evaluated Student's ability to access the educational environment and curriculum. She did not evaluate whether his development was consistent with his chronological age.

9. Soria observed Student's visual perception skills and opined that he exhibited strengths in the sensory processing of vestibular and proprioceptive input. She observed Student: complete form board puzzles; locate objects from distracting backgrounds; grasp, rotate and stack objects; cut paper with scissors; draw and scribble; and play with toys including a train and track. According to Soria, Student presented with strengths in the full active range of motion in the upper extremities and trunk, but had low muscle tone. Soria opined that Student had adequate functional strength for sitting activities and wheelbarrow walking. Overall, Student demonstrated adequate sensory processing, attention, and arousal for school activities. She also noted that he was gaining independence in self-help skills. Soria opined that Student had decreased strength that impacted his fine motor and visual motor skills due to his disability. She found that his areas of need were in fine and visual motor skills for school readiness tasks such as prewriting and snipping paper. She indicated that general low tone and weakness in Student's hands contributed to his decreased fine motor skills. Soria opined that Student needed OT to assist him accessing his educational environment and curriculum.

10. Soria's assessment appeared to be more of a screening for occupational therapy needs than a full assessment. She made no efforts to observe Student in his school setting to determine how he functioned in a classroom, to speak to his teacher or to his then-current OT provider. Soria reasoned that she would not know the quality or experience of the OT provider and would have to rely upon her own analysis whether or not she contacted the OT provider. Soria expressed that she had time constraints in conducting the assessment and although it would have been helpful, she did not believe it necessary to speak with Student's teacher about his functioning in the classroom as part of her assessment. She felt she had a good idea of Student's abilities and did not need further information. She relied upon her own clinical observations inside the Short Avenue assessment room and input from the Parents. Soria did not observe Student on a playground structure outside or in the presence of other children. Accordingly, Soria's assessment is limited to the information and observations she made in the Short Avenue assessment room and only offers limited insight into Student's ability to access his educational program.

*October 11, 2007 IEP Meeting*

11. An IEP meeting was held for Student on October 11, 2007. Present at the meeting were Parents, administrative designee Jack Shelp (Shelp), special education teacher Estrelita Banks-Bordenave, general education teacher Monique Rowles, OT Therapist Lisa Cerra, PT therapist Ted Pastrick (Pastrick), APE teacher Jackie Pierce, and Westside Regional Center (regional center) representative Troy Lane.

12. At the time of the IEP, Student was attending SmartStart three times per week and was receiving occupational therapy two times per week, speech therapy two times per week and physical therapy one time per week. Student's services were paid for by the regional center and Parents. Student also received four hours of floor time therapy per week at home through the Regional Center. The IEP team determined that Student was eligible for special education and related services under the category of developmental delay.

13. At the IEP team meeting, District OT, PT, APE and psychoeducational assessments were discussed. A speech and language final progress summary from speech pathologist Monique Eid was also discussed and outside OT and PT reports were summarized.

14. Shelp, a licensed school psychologist, shared the results of his assessment with the team. Shelp conducted the assessment using the Preschool Team Assessment III (PTA-3) and the Developmental Profile II (DPII). He also reviewed the APE, speech and language, OT and PT assessment reports. Shelp observed Student at Short Avenue elementary in the assessment room, but not at SmartStart. According to Shelp, only the speech and language pathologist observed Student at SmartStart.

15. Shelp found that Student had delays of more than 25 percent in areas of general development. Shelp opined that Student was functioning in the borderline average cognitive range. He saw delayed expressive language and sensory motor challenges. Shelp opined that Student had difficulty sustaining attention, shifting attention, coping with frustration, taking turns, and following adult directed activities, especially in larger groups. Shelp concluded that Student would need supports, modifications and accommodations to perform up to his potential. Shelp recommended that Student receive seating near the teacher or point of instruction, minimized distractions, high interest activities and materials, shortened or segmented assignments, individual or small group instruction for some time, a high degree of structure, and extra opportunities for physical/sensory activities. Shelp also recommended that Student be placed in an environment with a higher than typical adult to student ratio, opportunities for both structured and unstructured social interaction, and that positive behavioral supports be considered for Student. His recommendations were discussed and incorporated into the IEP.

16. The District's PT assessment was conducted by contract PT Grace Manning Lopes (Manning) and presented to the IEP team by Pastrick. Manning reviewed Student's

records, conducted a teacher interview, parent interview, clinical observations and an informal play assessment. Manning's observations occurred at Short Avenue elementary.

17. Manning's observations revealed macrocephaly (a large head) typical of persons afflicted with BRRS and low muscle tone. She noted that Student had functional sitting, standing and walking balance on even surfaces. Manning noted Student had decreased strength in his lower extremities and trunk. According to Manning, these weaknesses affected his ability to independently walk up and down stairs without close supervision and handhold assistance. She found his range of motion to be within normal limitations. She noted that Student had emerging running skills. She found Student hesitant to walk on uneven surfaces or play on unfamiliar playground equipment. She noted that he could throw and kick, but not catch a ball. Manning described Student's movements as slow and smooth in transitioning from sitting to standing. She noted that his walking and running movements were less coordinated. Manning concluded that Student's disability resulted in low muscle tone, which caused decreased strength. According to Manning, the low muscle tone and low strength affected his ability to maintain his balance and to navigate uneven surfaces, stairs, and unfamiliar play equipment independently. Manning noted that Student needed practice to reinforce his skills. She opined that Student required physical therapy services to assist him to benefit from his specially designed instruction.

18. Lisa Cerra (Cerra), an OT employed by District contractor BBS Health Care, read Soria's OT report to the IEP team and the present levels of performance (PLOPS) prepared by Soria. Cerra was not familiar with BRRS and had not done any research on its potential impact. She had neither met nor evaluated Student. Her role was merely to read the report and present the goals prepared by Soria. The original District recommendation had been for 30 minutes of OT once a week, but it was changed to 1 to 5 times per week for sixty minutes to address Student's sensory processing and motor planning issues as a compromise with Parents. Serra indicated that District's position was that Student's deficits were a result of low muscle tone and not from a vestibular sensory processing issue. She explained that tone is the resting tension of muscle and cannot be changed. For this reason, she said that clinic based suspension equipment was not necessary and Student's needs could be adequately addressed by the school based OT. Cerra has a strong background in general and school based OT principles, but had no substantive knowledge of Student, and could only address generalities.

19. The APE teacher and speech and language pathologist also presented their reports at the October 11, 2007 IEP meeting. After discussion, the IEP team accepted PLOPS drafted by the evaluators. From the PLOPS, the team determined that Student had unique needs in the areas of gross motor, motor planning, postural stability, visual motor and fine motor skills, expressive speech, pragmatics, articulation, cognitive development/school readiness, social-emotional, self-help and behavioral support.

20. The IEP team developed goals in each area of need. Three OT goals were developed for Student. In the visual motor domain, Student was to demonstrate increased visual motor and fine motor skill by copying lines and a circle without prompts four out of

five times as seen informally, observed and in work samples. An OT motor goal was developed for Student to show increased postural stability, endurance and postural control. According to the goal, Student was to maintain an upright-seated position and attend to a 15-minute classroom adult directed activity without cues for three of four times as measured informally, by observation and work samples. The third OT goal was for Student to plan, sequence and execute a two to three step novel adult-directed activity without cues three out of four times to show increased motor planning skills.

21. The IEP team offered Student the following educational placement and related services: placement in a special education preschool mixed (PSM) classroom at Westminster elementary school; transportation; ESY; APE once a week for thirty minutes to address gross motor issues; speech and language therapy one to five times weekly for sixty minutes to address expressive speech, pragmatic speech and articulation; OT one to five times per week for sixty minutes for motor and visual motor goals; PT once a week for thirty minutes for motor goals; and a Behavior Support Plan.

22. According to the IEP notes, a range of placements was discussed at the IEP meeting. The IEP team discussed preschool-kindergarten itinerant teacher, phonological program, intensive language education afterschool program, collaborative class in an early education center at Playa Vista elementary or special day class on a general education campus such as a PSM, preschool intensive program (PSI), or special day class on a special education campus. The IEP team specifically discussed a preschool collaborative program, but concluded that at the time, Student would benefit from a small group classroom such as the PSM classroom. Parents had visited the preschool collaborative class at Playa Vista elementary school, Student's school of residence. Parents were concerned by the size of the class and the amount of activity in the class. Parents believed that Student would be distracted with 19 other students in the classroom and unable to keep up with the general education students in the classroom. The class was approximately 75 percent typically developing students. Parents thought that Student would be overwhelmed in the class.

23. Parents consented to the placement at Westminster Elementary School PSM, school based APE, school-based language and speech, school-based OT and PT. Parents disagreed with the IEP in that they asserted that Student needed non-public agency (NPA) speech and language therapy and clinic-based OT for two hours a week each on a one-to-one basis. According to Parents, Student had multiple articulation errors, syllable deletion and significant delays in receptive, expressive and pragmatic language. Parents asserted that clinic-based OT was needed for sensory integration issues which resulted in significant delays in responding to questions and instructions, fine and visual motor skills, balance, coordination, stair climbing and low muscle tone issues.

*January 28, 2008 IEP amendment*

24. On January 28, 2008, the October 11, 2007 IEP was amended to add the speech and language services contained in the IDR resolution agreement signed by Parents on December 7, 2007, and District representative on December 14, 2007.

### *Request for Independent Assessment*

25. On February 10, 2008, Mother spoke with Student's special education teacher Tobi McKay (McKay) about Parents' concerns that Student had anxiety, fear and regression in upper body strength. At various times, Parents had previously expressed concerns about Student's PT and OT progress. McKay told them that if it was a fear-based concern it was behavioral and the District would not address that in school. McKay also told Mother that she did not think a new OT assessment would result in any changes to Student's program, but if Mother wanted one, to request it in writing at the school office. McKay opined that, at most, Student might get some treatment time in the District OT therapy room, but not the NPA services that Mother desired.

26. Mother's concerns grew as she watched what she believed to be regression. As an example, she noted that Student could not keep up with same aged children in the park and instead sought out younger children with similar physical abilities as playmates. In an attempt to communicate with them, he attempted "baby talk." Mother noted that this coincided with the arrival of Student's new baby brother. Father also observed what he believed to be regression in that Student expressed fear about using neighborhood playground equipment that he had previously mastered with his private OT Roxie Fernandez (Fernandez). McKay had opined that the "baby talk" and Student's separation anxiety were attributable to the new sibling. Fernandez agreed that the regression was in part due to the new sibling.

27. Mother left a note for Student's school based OT Jacinda Reiche (Reiche) on February 10, 2008, requesting an independent educational evaluation (IEE) for OT. Reiche called Mother on February 26, 2008. Reiche advised Mother that she would conduct a District assessment if Mother consented, but that she could not offer an IEE. Mother declined the District assessment and advised that she would obtain an IEE. Mother did not receive anything further from the District regarding her request for an IEE. By letter dated April 4, 2008, Parent requested a new IEP meeting and advised District that Parents would be seeking reimbursement for IEEs in OT and PT and reimbursement for privately obtained clinic-based OT and PT.

### *May 21, 2008 and June 17, 2008 IEP meetings*

28. On May 21, 2008, an annual review IEP meeting was held. Present at the IEP meeting were Parents, advocate Marilyn Barraza, Administrator Rochelle Berkowitz, special education teacher McKay, general education teacher and fifth grade magnet program coordinator Todd Lessner, APE teacher Kathy McCool, PT therapist Pastrick, OT therapist Reiche and speech and language pathologist Phyllis Ross.

29. The May 21, 2008 IEP meeting was an advanced annual IEP meeting. Parents did not request an "annual IEP" and were not aware that the meeting was an "annual IEP" until the meeting started. The meeting was held at the request of Parents due to their

concerns about Student's placement. At the IEP meeting, it was determined that Student met the objectives of many of his goals and showed emerging skills in other areas in the seven months since the initial October 11, 2007 IEP. Overall, Student was making good progress and was on track to meet his goals.

30. At the May 21, 2008 IEP meeting, a new goal was established for gross motor skills to be addressed by the PT. The goal called for Student to transition from the floor to standing independently using the half kneel strategy independently 80 percent of the time. The May 21, 2008 IEP had two goals for fine motor and visual motor skills to be addressed by the OT. The goals called for Student to copy a diagonal line and to cut a five-inch straight line with scissors. The IEP also contained a gross motor skills goal to be addressed by the APE teacher. The goal called for student to independently trap or catch an eight-inch ball tossed underhand 60 percent of the time. The May 21, 2008 IEP contained four speech and language goals, two cognitive development goals, and a motor-self-help goal.

31. Fernandez, an OT with Greco's World, completed an informal assessment report of Student on May 7, 2008. Fernandez's report was summarized and the summary was placed in the Welligent IEP system and in the IEP document, but there was no in depth discussion or analysis of the report at the meeting. The notes indicate that Fernandez found Student to have moderate levels of over arousal with distraction and a need for sensory intervention to tolerate vestibular input to help him stay alert. Fernandez recommended two hours of clinic-based OT per week using suspended swings and other equipment to work on Student's sensory integration, tolerance, endurance, postural stability and balance. At hearing, Fernandez opined that the suspended equipment and swings were necessary because they challenged Student's balance and sensory integration in ways that the equipment utilized in the classroom could not. Specifically, there were 8 different swings available in her clinic. The swings were suspended so that Student's feet were at least one foot off the ground at all times, nets and safety equipment were available and the swings could be moved in a variety of ways to give different vestibular and proprioceptive input.

32. Reiche has been an OT in California for 14 years. She has worked with the District as an OT since 1997. She has a Bachelor's Degree in Occupational Therapy from the University of Minnesota. She has received advanced training and participated in seminars on sensory integration. She worked for three years as a traveling OT for a Virginia-based clinic and, at that time, was licensed in multiple states. She was the assigned OT for Westminster elementary school. According to Reiche, Student made significant progress and was able to access his educational environment. She recommended a reduction in time and frequency of OT from 60 to 30 minutes per week in a small group collaborative model. The 60 minutes Student received at the October 11, 2007 IEP was a compromise with Parents. Reiche did not believe that Student needed 60 minutes of OT service to access his educational environment or curriculum.

33. Reiche worked in the classroom with Student in a group setting for approximately 45 minutes of each 60-minute session. She estimated that approximately 15 minutes per week was spent with Student individually. According to Reiche, Student's

biggest challenges were fine motor skills and sensory intergration. She also saw OT needs in the areas of low muscle tone, visual motor, sensory strategies and motor planning. Although Student's diagnosis of BRRS was new to Reiche, the needs Student demonstrated were consistent with those of many other students she had observed and treated. Although the level of prompts to be used was not clear in the IEP, Reiche started with the least invasive prompting and used as little prompting as necessary with Student. Reiche worked on the three OT goals in the IEP. She indicated that sensory strategies sometimes worked on Student, but often did not. Student had the most difficulty with distraction when given non-preferred tasks. He also displayed hesitancy with novel tasks.

34. Reiche did not believe Student needed clinic-based OT because his needs were being addressed adequately in the classroom. She did not see a need for suspended equipment. Although Parents had apprised her of what they described as Student's inability to swing, she did not address the issue because District does not have swings on its campuses and she did not believe swinging was necessary for Student to access his educational program or environment. According to Rieche, Student would often initially refuse to engage in a novel or non-preferred activity, but with verbal prompts and encouragement nearly always complied. Student displayed some tactile defensiveness with certain, but not all textures. According to Reiche, Student sometimes needed sensory input to complete tasks. He did not overly seek or avoid sensory input and did not need sensory input all of the time. Student was more likely to engage in a novel or non-preferred activity if all of the other students were engaged in the same activity. When others were engaged in different activities, Student became distracted by their movements and activities.

35. Reiche saw that Student was able to engage in a non-preferred activity for 10 minutes with verbal prompting. He was able to engage in a preferred activity on the playground for thirty minutes and was able to engage in tabletop preferred activities for 15 to 30 minutes with prompts. Student was able to complete three step activities on the outdoor obstacle course and two step activities in gross motor and fine motor activities. She occasionally saw him leaning in to his classmates at circle time and at those times provided sensory strategies. Student displayed an immature grasp. Although no specific goal was written to address grasp, Reiche considered it to be one of Student's needs. Part of the fine motor goal had activities such as picking up small items, using 1-inch crayons, cutting, tearing paper and stringing beads to improve grasp. Reiche believed that Student improved in the areas of fine motor, postural stability, visual motor and endurance while receiving school-based OT at the Westminster PSM class.

36. The IEP meeting was not finished on May 21, 2008, and was reconvened on June 17, 2008. Reiche and the speech therapist were excused from attendance at the reconvened meeting. Pastrick discussed the PT goals from the October 2007 IEP and noted that Student had met those goals. Pastrick recommended a decrease in time and frequency of PT from 30 minutes per week to 30 minutes per month and new goals. According to Pastrick, Student was able to do most of the tasks outlined in the goals before PT therapy was undertaken. Pastrick worked with Student to better his performance and to help him keep up with his peers. He felt that a significant decrease was in order because Student had met his

goals and could access his curriculum in the PSM class. Pastrick had not reassessed Student at the time of his recommendation. He also did not consider that Student received private individual PT services.

37. A privately funded outside PT assessment report from Christy Kura (Kura) of Therapy West, Inc. Play Studio (Therapy West) dated March 10, 2008, was reviewed. The report contained only clinical observations from therapy room sessions. According to the report, Student's behavior, fearfulness and fatigue, affected his performance on the tests. Per the report and IEP notes of the discussion, Student scored two standard deviations below age average on the Bayley Gross Motor subtest administered by Skura. According to the report, Student required a handhold while using a step-to gait when walking on a balance beam and up and down stairs. His kicking leg and leg swing were observed to be immature. The assessor opined that Student had impaired leg strength when jumping, was not able to jump from the floor or a stair, was not able to transition from a kneel to stand position without using hands for stability and did not demonstrate trunk strength sitting on a therapy ball. Student climbed up a small toddler play structure independently, but fatigued after two attempts. Skura opined that Student was fearful of some activities.

38. Pastrick reviewed the PT assessment report prepared from Therapy West. He did not believe the report accurately reflected what Student could do based upon his experience providing Student with therapy once a week since November of 2007. According to Pastrick, Student was able to stay on a balance beam and step down from a balance beam without adult assistance. Pastrick observed Student ride a tricycle unassisted. In fact, the tricycle had become one of Student's favorite activities. Sometimes, Student was able to catch a ball at close range and could climb four steps with a step-to gait. According to Pastrick, Student was able to follow two-step motor planning activities, had improved his leg strength by climbing ladders, and was generally less fearful. Pastrick's concern was Student's functional ability to access the curriculum and educational environment. He worked with Student to use stairs, uneven surfaces and playground equipment. Although, Student is the only person he has treated with BRRS, Student's needs manifested in ways similar to those of other special education students that Pastrick had treated. According to Pastrick, Student had low muscle tone. Pastrick described low muscle tone as a slow firing muscle. While strength can be improved to compensate and help with navigation of obstacles, keeping up with others and postural stability, low muscle tone cannot be increased. According to Pastrick, Student had functional postural stability but was reluctant to engage in activities or tasks that challenged his balance. Pastrick also reasoned that Student was receiving assistance from the APE teacher and OT which addressed playground skills, posture and balance deficits.

39. Parents were represented by Marilyn Barraza, a privately retained lay advocate, at the May 21, 2008 and June 17, 2008 IEP meetings.<sup>3</sup> The advocate spoke for Parents. Generally, the District participants came to the meeting with PLOPS already drafted and read from those drafts. The draft goals were adjusted, edited and finalized over the

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<sup>3</sup> Student's Mother is an attorney, but had no practice experience in special education law.

course of the two meetings held on May 21, 2008 and June 17, 2008. The advocate had input and dialogue with District members of the IEP team about some of the goals and PLOPS. Parents attached their own comments to the IEP document. Nevertheless, Parents felt that District IEP team members ignored their concerns.

40. The IEP team found that Student's language and speech skills were mildly delayed. The team offered speech and language services on a consultative and collaborative basis for sixty minutes per month, once a week, and a block of forty hours of NPA speech hours to be completed by the next IEP meeting. The IEP team recommended 30 minutes of small group OT to help Student access his curriculum. The IEP document notes that 30 minutes was recommended in the prior October 11, 2007 IEP, but 60 minutes was given as a compromise.

41. The May 21, 2008 and June 17, 2008 IEPs offered Student the following educational placement and related services: Westminster PSM for two hours and twenty minutes, four days a week; ESY; transportation; school-based collaborative and consultative speech and language therapy once a week for 60 minutes; 40 hours of NPA speech services; school-based OT once a week for thirty minutes; collaborative APE once a week for thirty minutes; and PT once a month for thirty minutes. The IEP provided for the following additional supports, accommodations and modifications: minimized distractions; scaffolding; repetition and review of instructions; shortened/segmented tasks; preferential seating; modeling of skills; additional response time; multi-sensory approaches; high interest activities/materials; and advanced notice of transitions.

42. Parents disagreed with the 30 minutes of school-based OT a week and requested NPA clinic-based OT for an additional sixty minutes per week. Parents also disagreed with the recommendations to reduce school-based PT and OT time and frequency.

43. Although the offer of FAPE made on June 17, 2008 was the Westminster PSM with related services, McKay offered to check with the Playa Vista Preschool collaborative class and other collaborative classes to ascertain whether there were any openings in the classes if Parents were interested in revisiting possible later enrollment in a collaborative class. In August of 2008, McKay called Father and advised that there were openings in the Playa Vista Preschool collaborative and asked if he would like to reconvene the IEP meeting to discuss the appropriateness of such a placement. Father declined the IEP meeting and consideration of the placement. He advised her that Student would return to SmartStart in the fall of 2008.

#### *The Westminster PSM Class*

44. The Westminster PSM class is a special education preschool class taught by special education teacher McKay. McKay has a Bachelor of Arts degree in special education from the University of California at Los Angeles, a master's degree in educational psychology from the California School of Professional Psychology and has also completed all courses for a Ph.D. She has an early education special education credential and a

moderate to severe special education credential. McKay has been a special education teacher for 14 years. McKay was trained in discrete trial training and specific behavioral techniques. She also spent a summer as a volunteer at SmartStart, observing their implementation of floor time.

45. McKay teaches a morning and afternoon class. Student was offered placement in the morning class. The morning class had 8 students and six adults in the classroom. Four of the adults in the classroom were adult assistants with primary responsibility for specific students. McKay also had a classroom aide. She supervised and coordinated the adult assistants and service providers that came into her classroom as a team. She met with staff regularly to instruct them on strategies.<sup>4</sup> The PSM class was a mild to moderate special education class for preschoolers. The class focused on kindergarten readiness. McKay considered Student to be on the mild end of the spectrum of students in the class.

46. The physical layout of the class was set up for preschoolers to have multiple centers of activity going on at the same time. The classroom had a large carpet, a white board and visual displays throughout. The PSM class had areas with street signs and other indications, a large Lego table, a kitchen area, a dramatic play area, a quiet area, a fine motor choice area, a child level sink and water fountain, a kidney shaped table, an area where sensory equipment was stored, and a teacher's desk.

47. Typically, the PSM class day started with a ten-minute transition time when the students said goodbye to their parents and put away their jackets and backpacks. Then, the students had floor time activities with puzzles and boards for 10 to 20 minutes followed by gross motor activities outside such as tricycles, beanbags and climbing for 20 to 30 minutes. After outside activities, the class schedule called for circle time for pre-academic themes based on district curriculum followed by fine motor tabletop activities. The class was completed with students sitting on the carpet for goodbyes and sticker distribution.

48. McKay addressed sensory issues in her classroom in a variety of ways on a daily basis through group OT sessions and collaboration with OT Reiche. McKay used an obstacle course with an array of sensory equipment. McKay brought in different items and changed the obstacle course at times. The obstacle course was for development of praxis and motor skills. Student initially hesitated, but was coaxed into completing the obstacle course. Student's interaction with non-disabled peers consisted of 15 to 20 minutes per day with Kindergarten and first grade students that chose to come in to the class and interact with the students during their own recess and 20 to 30 minutes of gross motor activities conducted with another set of preschool-aged children from the early education center on the playground. The early education center children were all preschoolers.

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<sup>4</sup> McKay was out on leave from March 12, 2008 to May 16, 2008. Reena Melokian taught the class in McKay's absence. Melokian was a long time substitute and had received some instruction in floor time strategies from McKay. McKay spoke with Melokian or school staff regularly to ascertain the status of the class and check in with the administration.

49. According to McKay, Student has some sensory needs and motor planning issues. She believed his mild sensory needs are close to within limits. She did not perceive that Student had a low arousal level. Instead, she believed Student had low muscle tone. She had seen him excited, but not necessarily over-stimulated. She saw some postural stability issues in which Student would lean on one arm to maintain himself in a criss-cross leg position on the floor. She noted mild defensiveness to tactile stimulation and for new substances and experiences. She witnessed his hesitancy, but saw that with gentle prodding and reassurances he was able to explore tactile experiences, such as vanilla pudding finger painting and use of gritty play dough. She noticed a mild delay in Student's fine motor skills. In general, she found Student to be anxious about new experiences. Student had no significant behavioral issues. His most significant weaknesses were in pragmatics, hand strength, low muscle tone, distractibility, inattention and fine motor skills.

50. Student made progress toward his goals and was on track to meet his goals on or before his annual IEP at the time he left the District. While in McKay's class, Student learned to categorize items, organize objects, ride a tricycle, hop, climb playground equipment and had emerging skills in social interaction. He also showed improvement in motor skills, cognition; pretend play and accepting novel situations. He demonstrated increased stamina by sitting up in circle time in a criss-cross leg position for twenty minutes, but still experienced postural instability due to his low muscle tone. Student gained greater confidence in his skills in the Westminster PSM class.

### *SmartStart*

51. Parents unilaterally placed Student at SmartStart in September of 2008. He was initially placed in the jumpstart preschool program that he had been in when he left SmartStart in November of 2007. Although SmartStart offers individual PT and OT services, Parents did not engage those services due to the expense. Student received the group OT and speech and language assistance that all students receive as part of the curriculum. DanaKaye Bonahoon (Bonahoon), the Director of SmartStart, described SmartStart as an early intervention program for children six years or younger. The jumpstart program is a preschool program comprised entirely of children with disabilities. The children have the opportunity to interact with nondisabled peers during recess for 20 to 30 minutes. Additional mainstreaming is arranged on an individual basis and may include reverse mainstreaming or bringing the typically developing children into the special education classroom. The program uses a developmental model, is relationship-based and uses floor time extensively. Parents were familiar with floor time methodology and believed that Student received great benefit from floor time. At hearing, Parents expressed a strong preference for the methodology. According to Bonahoon, the program focuses on coordination between home and school. The jumpstart teacher was a credentialed special education early childhood teacher and licensed OT. In addition to the teacher, three additional adults with advanced education assisted in the jumpstart classroom.

52. Student transferred from the jumpstart program to the developmental Kindergarten program in early December of 2008. The developmental kindergarten has a

range of students from high functioning to mild to moderate cognitive impairment. Student is in the middle of the range. There are two teachers in the classroom and neither has a special education credential. Two aides, one of which had been in the jumpstart program, assist the teachers. Both aides have advanced degrees. There are twelve students in the classroom. Some children have mild tantrums and are not toilet trained. Two typically developing children are in the class. The other ten students are children with a variety of special needs. Student is exposed to the two typically developing children throughout the day in activity groups. Additionally, five more typically developing children interact with Student's class throughout the week. Student participates in the OT groups and benefits from the collaborative services of the OT. Student has the opportunity to participate in the OT and speech groups and has a choice to participate. He most often participates enthusiastically in the groups. Student has experienced fatigue in the six hour a day program.

53. According to Bonahoon, Student is an enthusiastic learner with developmental delays and sensory issues. Bonahoon related that Student has unique needs in the areas of fine motor, motor planning, distractibility, articulation and sensory needs. Student does not have tantrums, but he does whine when he does not want to engage in a non-preferred activity. She opined that Student was mildly to moderately impaired and that although not a candidate for general education at this time, he might be capable of full inclusion with support when older.

54. Student's expert, Sean Surfes (Surfas), an educational psychologist and behaviorist, observed Student in the developmental kindergarten class and opined that Student was in the mid-range of abilities in the classroom and seemed to fit in with his peers in the classroom. Surfes attempted to observe the District's proposed placement at the Westminster PSM. At hearing, Surfes discovered that instead of observing the end of the morning PSM class that was offered to Student, he had inadvertently observed the beginning of the afternoon PSM class. The two classes are materially different. Accordingly, Surfes' observations were not relevant to evaluating the appropriateness of the PSM program offered to Student.

#### *Private OT and PT Clinical Therapy*

55. Parents believed that Student needed more OT and PT than was provided by District and believed that the District should have provided NPA clinic-based OT and PT. Accordingly, Parents obtained private clinic-based OT and PT to supplement the school-based OT and PT.

56. Student received clinic-based PT from PT Brigitte Jameson (Jameson) at Therapy West once a week for 60 minutes from March 25, 2008 to July 1, 2008 at a cost of \$150 per session. Jameson received a bachelor's degree from California State University, Long Beach in 1986 and had 22 years of experience as a PT. Jameson's treatment plan was based on the PT assessment by Skura, which had been provided to the IEP team. Skura used the Bayley Scales of Development, Third Edition to assess Student. Based upon the information she gathered, Skura determined that Student was two years delayed in his skill

development and functioning. Per the evaluation results, Student's PT therapy was devised around goals of improvement of balance, postural control, strength and coordination.

57. According to Jameson, Student required clinic-based PT due to his overwhelming sensory issues, need for a challenging motor planning environment and a safe environment for balance activities. Jameson believed that Student had extensive sensory issues that impacted his ability to participate in PT. She referred him for an OT assessment at Therapy West to determine the extent of his OT needs. Jameson's approach to Student's therapy encompassed his school, home and community needs. Although Jameson saw improvement, she could not determine whether it was a result of school based PT, private PT, other therapy or simply a product of Student's continued development. Due to the expense, Parents were not able to fund both PT and OT. Jameson advised Parents that OT was the most pressing need.

58. Fernandez provided clinic based OT therapy to Student once a week for 60 minutes at a cost of \$88 per session during the period of March 2008 to August 2008. Fernandez had 10 years of experience as a licensed OT in both hospital and clinic settings. She is the owner and director of Greco's World, an OT provider for the regional center. She provided OT services to Student through the regional center before he turned three years old. Fernandez opined that Student had regressed in the interim between November of 2007 when he was discharged from Greco's World and his return in March of 2008. She observed Student to be fearful of movement, unable to tolerate higher levels of activity without vestibular input and to have difficulty with swings and movement of his head through space. Fernandez opined that sometimes as children with low muscle tone, grow, gain weight and height, the muscles do not support the extra weight and height causing regression. She also opined that Student continued to demonstrate gross motor delays. Specifically, Fernandez saw that Student was reluctant to use the clinic climbing structure he had previously mastered.

59. Fernandez utilized seven different suspended swings to give Student vestibular input. Fernandez believed that the vestibular input helped Student to deal with his over-arousal and helped him organize himself. Additionally, the suspended swings challenged Student's balance and built his confidence. Each of the swings was suspended and caused different movement and sensation. Fernandez's swings differed from the Sit 'n Spin, scooter board and other devices used by District because of the distance from the ground. The District's devices all gave Student some way to stabilize himself, either through proximity to the ground, a pole or a foot on the ground. Fernandez's swings required Student's feet to be a minimum of 12 inches from the ground. Fernandez opined that vestibular input would be necessary for Student in school because he would otherwise be distractible and subject to over arousal. She recommended that Student receive two hours of clinic-based OT per week. Her testimony was candid and credible. She neither embellished nor attempted to provide favorable testimony to either side and readily admitted that she had no knowledge of Student's school performance and had never observed him in a school setting. Fernandez no longer treats Student and had no financial interest in the continuation of Student's therapy.

60. From July of 2008 to September of 2008, Student received clinic-based OT from Janet Sumi Hifumi (Hifumi), a licensed OT employed by Therapy West at the rates of \$140 and \$150 per hour. Parents also paid Hifumi \$450 for an independent assessment. She has both a bachelor's and master's degree in OT and has completed courses toward earning a doctorate in OT, including advanced training in sensory integration and certification in the sensory intergration and praxis test (SIPT) through the Western Psychological Association and the University of Southern California. She is the Administrator of Clinical Services at Therapy West and a staff OT. She supervised OTs, PTs, speech pathologists, early interventionists, and teachers at Therapy West. Hifumi worked with Student in therapy to improve his gross motor skills, fine motor skills, balance, confidence, postural stability and sensory processing. Additionally, she assessed Student over the period of July 2008 to September 2008 using clinical observations, interviews, and the Miller Function and Participation Scales. Hifumi used information she obtained from McKay and parents in addition to her clinical observations to assess fine motor skills, gross motor skills, visual motor skills and sensory integration. Hifumi noted that McKay gave Student average quantitative scores but McKay's qualitative observations indicated below average performance. Based upon the qualitative and quantative scores and the clinical observations, Hifumi opined that Student fell below average in his skills.

61. Hifumi found Student to have mild delay in visual motor skills and severe delays in fine and gross motor skills. She noted that Student had low muscle tone and was slow to process instructions. Student had problems locating objects in a picture and using a marker in small pictures or to trace objects. Student displayed deficits in grasping, crossing the midline, visual motor coordination, bilateral coordination, manipulating objects, regulating appropriate force, and overall decreased strength. Hifumi opined that Student had deficits in gross motor skills, motor accuracy, motor planning, balance and weight shifting. Hifumi found Student had low hand strength and problems with stability and coordination in gross motor activities. She also noted that Student required vestibular input to help with his distractibility and was defensive when confronted with some tactile textures. Hifumi found Student to have severe deficits in fine motor skills necessary for school activities.

62. Based upon her observations and assessment, Hifumi recommended that Student receive two hours per week of clinic-based OT in addition to any school-based OT therapy he received. She opined that Student needed clinic-based OT to meet his developmental needs in sensory processing and to keep pace with peers. She also noted that Student needed suspended equipment for vestibular input and the challenges and safety of a clinical setting to address his needs.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

*Issue 1: Did District fail to conduct appropriate and comprehensive assessment of Student in all areas of suspected disability including physical therapy, occupational therapy, behavior, social skills and assistive technology needs in 2007?*

2. Student contends that District failed to appropriately assess Student in the areas of PT, OT, behavior, social skills, and assistive technology needs. District contends that Student was appropriately assessed in all areas of suspected disability. District further contends that all claims related to the assessments were waived by parents when they signed a settlement agreement and release on December 7, 2007.

3. A student's parent or the responsible public educational agency may request an initial evaluation to determine whether a child is eligible for special education and related services on the basis of a qualifying disability. (20 U.S.C. §1414(a)(1)(A), (a)(1)(B).) The initial evaluation must consist of procedures to determine whether a child is a child with a qualifying disability and to determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(c).) In conducting the evaluation, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability and the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320.) The district may not use any single assessment as the sole criteria for determining eligibility and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)&(c); Ed. Code, § 56320.)

4. District's shall ensure that: (1) assessment materials used to assess a child under this section are selected and administered so as not to be discriminatory on a racial or cultural basis; (2) are provided and administered in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless it is not feasible to do so; (3) are used for purposes for which the assessments or measures are valid and reliable; (4) are administered by trained and knowledgeable personnel; and (5) are administered in accordance with instructions provided by the producer of such assessments. (20 U.S.C. §1414(b)(2)(C)(3).)

5. For purposes of evaluating a child for special education eligibility, the District must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (*See Vasherese v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

6. Here, Parents released all claims concerning Student's education through December 7, 2007 except as to OT. Accordingly, all issues concerning assessments conducted before December 7, 2007, except as to OT have been released and are no longer at issue.

7. As to the OT assessment, it was not sufficiently comprehensive. Soria was an experienced, licensed OT that had conducted many OT assessments for preschoolers. Soria was amply qualified to conduct the assessment. However, the October 11, 2007 OT assessment was more of a screening than a full assessment. Soria was limited by time constraints and made no attempts to either contact Student's teacher at SmartStart, observe Student at SmartStart or contact Student's treating OT therapist. Furthermore, she did not assess Student on the playground equipment even though equipment was available to her, and Parents had identified playground participation as a barrier to Student's full participation in the curriculum.

8. All of the District OTs acknowledged that the Ecological Model of Student Performance was best practice for OT assessment in California and was based upon the *The Guidelines* published by the California Department of Education. *The Guidelines* specifically provide that Student performance cannot be evaluated accurately without observation of the student in an appropriate educational setting. *The Guidelines* also provide that assessments must address both individual and student activities and functioning within the educational environment. Here, however, Soria's assessment was conducted in an assessment room at a local elementary school. The setting was not consistent with *The Guidelines* and had no relation to Student's then or proposed educational setting. Furthermore, had Soria contacted Student's teacher, OT therapist or conducted a classroom observation, she would have obtained a broader picture of Student's sensory needs and ability to participate in the classroom. While preschoolers often come to District without a teacher or OT in place, that was not the case with Student and Soria had no need to extrapolate. Instead, she needed to gather readily available data to obtain a complete picture. The Ecological Model of student performance utilized by District takes into account the curriculum, the educational environment, and the student's abilities to determine current level of performance. Soria's assessment was not comprehensive and did not give a complete picture of Student's unique needs as evidenced by his performance at the Westminster PSM, the testimony of McKay, Reich, Parents, Fernandez, Jameson and Hifumi. Accordingly, District's OT assessment was not sufficiently comprehensive to assess all of Student's OT needs. (Factual Findings 1-10 and Legal Conclusions 1-8.)

*Issue 2: Did the District fail to provide Student a FAPE by committing procedural violations of the IDEA, which impeded Parents' rights to meaningful participation in the IEP process and/or caused a loss of educational benefit by:*

- (a) failing to timely initiate an IEP meeting after Parents' February 2008 notification to the District of Student's regression;*
- (b) failing to provide prior written notice of its refusal to furnish additional occupational therapy and physical therapy and/or*
- (c) predetermining its May 2008 offer concerning occupational therapy and physical therapy?*

9. Student contends that District denied him a FAPE by failing to timely initiate an IEP meeting after Parents' February 2008 notification to the District of Student's

regression, failing to provide prior written notice of its refusal to furnish additional occupational and physical therapy services and predetermining its May 2008 offer concerning OT and PT therapy. District contends that Parents did not notify District that they desired a new IEP meeting and that an annual IEP meeting was held on May 21, 2008 and June 17, 2008 in response to Parents' concerns when District became aware of those concerns. District further contends that Parents were part of the May 21, 2008 and June 17, 2008 discussion about placement and services for Student. According to District, it was at that IEP team meeting that the team determined that Student should be placed at the Westminster PSM and what level and frequency of services were needed.

10. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401 (26).) In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); *L.M. ex. rel. Sam M. v. Capistrano Unified School District* (9th Cir. 2008) 538 F.3d 1261, 1269; *R.B. ex. rel. F.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 940.)

11. An IEP team shall meet at least annually to review a student's progress and the plan. The IEP team shall also meet whenever a student has received an initial formal assessment and may meet when a student receives any subsequent formal assessment. The IEP team must meet when a student demonstrates a lack of anticipated progress or when a parent or teacher requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343.)

12. A procedural requirement, found in both state and federal law, requires that the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to their child. (34 C.F.R. § 300.501(b); Ed. Code, §§ 56304, 56342.5.) Parents are required members of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1); Ed. Code, § 56341, subd. (b)(1).) Education Code section 56341.1 also requires the IEP team to consider, among other matters, the strengths of the pupil, the academic development, functional levels and the results of the initial assessment or most recent assessment of the pupil. The IEP team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), (d)(3)(A), (d)(4)(A); 34 C.F.R. §§ 300.305(a), 300.324(a)(1)(ii), (b)(1)(ii)(C); Ed. Code, § 56341.1, subs. (a)(1) & (2), (d)(3) & (e).) A district commits a procedural violation of the IDEA when it predetermines an IEP. Predetermination occurs when the district assumes a "take it or leave it" position, and/or denies the parents an

opportunity to participate in the IEP process. (see *W.G v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1484; *Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1133;) Merely prewriting proposed goals and objectives does not constitute predetermination. The test is whether the district came to the IEP meeting with an open mind. (*Deal v. Hamilton County Bd. Of Education* (2004) 392 F.3d 840, 858; *Doyle v. Arlington County School Bd.* (1982) 806 F.Supp. 1253, 1262.) Parents have meaningfully participated in the development of an IEP when informed of their child's problems, attend the IEP meeting, express their disagreement regarding the IEP team's conclusions, and request revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

13. District must provide prior written notice whenever it proposes or 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); 34 C.F.R. §300.503(a); Ed. Code, § 56500.4.) Prior written 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 and a description of each procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (3) a statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguard can be obtained; (4) sources for parents to contact to obtain assistance in understanding their rights; (5) a description of other options considered by the IEP team and the reason why those options were rejected; and (6) a description of the factors that are relevant to the agency's proposal or refusal. (20 U.S.C. §1415(c)(1); 34 C.F.R. §300.503 (b).)

14. First, Student's contention that he was denied a FAPE because an IEP team meeting should have been held after February of 2008 is meritless. When Parents expressed a desire for an IEE and additional clinic based OT to McKay, she directed them to contact the school office. Parents contacted the school office and requested an IEE. When OT therapist Reiche called in response to the request, Mother requested an IEE not an IEP meeting. District did not need to call an IEP meeting. Parents never requested an IEP meeting from McKay or Reiche. Furthermore, Student was making progress so District was not obligated to convene the IEP. On April 4, 2008, Parents made a written request for an IEP meeting. District scheduled an IEP meeting upon receipt of the letter. New IEP meetings were held in May and June of 2008 in response to Parents' written request. Parents' questions and observations about Student's progress and request for an IEE prior to April 4, 2008, were not requests for an IEP meeting. (Factual Findings 25-43 and Legal Conclusions 1, 9-12.)

15. Student also contends he was denied a FAPE because the IEP offers of OT and PT were predetermined. Specifically, Student contends that predetermination was demonstrated because the District IEP team members had draft goals and PLOPs with them

at the May and June IEP meetings. The evidence did not support this contention. While it is true that team members prepared for the IEP meetings by drafting proposed goals, PLOPS and offers of service, the evidence indicates that each of those items was subject to discussion, revision and agreement by the team. The evidence is ample that the May and June IEP were fluid and candid discussions of Student's needs and appropriate placement, program and services. Parents and their advocate participated fully in both the May and June IEP meetings, including disagreeing with portions of the IEP and attaching their own comments to the IEP. The advocate, on behalf of Parents, worked on goals and expressed Parents' disagreement and concern with the level and frequency of OT and PT services offered by District.

16. Ultimately, the District members of the IEP team and Parents were not able to reach consensus on placement and services. District IEP team members made an offer of FAPE to which Parents did not consent. McKay, a District IEP team member, continued to investigate possible placement options for Student into the summer of 2008. When she contacted Parents to schedule an additional IEP meeting to continue the discussion of placement, Father, on behalf of Parents, declined to participate in the meeting and indicated that Student would be unilaterally placed at SmartStart for the 2008-2009 school year. The IEP team did not predetermine Student's placement or the level of services. Instead, there was open, frank and candid disagreement and discussion about the proposed placement and services. (Factual Finding 25-43 and Legal Conclusion 1, 10-12.)

17. As to prior written notice, the decision by District team members to offer reductions in time and frequency of OT and to not offer clinic based OT were made at the May and June IEP meetings of which Parents were a part as the decisions were being made. This was not an instance of decisions made outside of an IEP meeting or unilaterally without an IEP team meeting. Parents' notice of the actions occurred as the events unfolded and parents were given written notice in the form of the IEP that resulted from the meetings. Accordingly, Student and Parents were not entitled to prior written notice as contemplated by the IDEA and Education Code in this instance. (Factual Finding 28-43 and Legal Conclusion 1, 10-13.) In sum, as to all of Student's allegations of procedural deprivations of FAPE, there was no evidence to support a finding that Student was deprived of an educational benefit or that Parents were deprived of the opportunity to meaningfully participate in the May and June IEP meetings. (Factual Finding 25-43 and Legal Conclusion 1, 9-13.)

*Issue 3: Did the District fail to offer Student a FAPE for the 2007-2008 school year, 2008 extended school year and 2008-2009 school year by failing to provide appropriate related services in occupational therapy and physical therapy and failing to place student in the least restrictive environment?*

18. Student contends that he was denied a FAPE for the 2007-2008 school year, ESY 2008 and 2008-2009 school year because the District did not provide him with clinic-based OT and PT and because District offered him reduced time and frequency of PT and OT at the May and June 2008 IEP meetings. Student further contends that placement in the Westminster PSM did not provide Student with a FAPE in the LRE. Specifically, Parents

contend that the LRE for Student is placement at SmartStart. District contends that it offered Student a FAPE in the LRE for all relevant time periods. District further contends that it offered appropriate related services in OT and PT. District contends that clinic based OT and PT are not necessary for Student to receive a FAPE.

19. Regarding substantive appropriateness under the IDEA, the Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley v. Board of Hendrick Hudson* (1982), 458 U.S. 176, 198 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) *Rowley* stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.) A student derives benefit under *Rowley* when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P* (3rd Cir. 1995) 62 F.3d 520, 530.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.)

20. 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 District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*)

21. When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

22. An educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP in any one or a combination of public, private, home and hospital, or residential settings. The IEP team shall document its rationale for placement in other than the school and classroom in which the pupil would otherwise attend if the pupil were not handicapped. The documentation shall indicate why the pupil's handicap prevents his or her needs from being met in a less restrictive environment even with the use of supplementary aids and services. (Cal. Code Regs., tit. 5, § 3042.) The IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluations of the child and the academic, developmental and functional needs of the child. (34 C.F.R. § 300.324 (a).) The IEP team

shall consider whether or not the child needs assistive technology services and devices. (34 C. F. R §300.324 (a) (v).)

23. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the education benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects congressional recognition” that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.) To the maximum extent appropriate, children with disabilities must be educated with children who are not disabled.

24. Special classes, separate schooling, or removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. §300.114.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (1989) 874 F.2d 1036, 1050.)

25. As to the 2007-2008 school year, Student has met his burden of demonstrating by a preponderance of the evidence that he was denied a FAPE by provision of inadequate levels of OT services. As to his other contentions, Student failed to meet his burden. As discussed in Finding of Fact 5, all claims with respect to Student's educational program arising before December 7, 2007, except with respect to OT were released. Parents consented to Student's placement in the Westminster PSM prior to the time they executed the release, such that the issue of placement for the 2007-2008 school year and related services except OT were included within the release.<sup>5</sup> The only issue remaining in Student's due process claim for this time period is whether Student should have received clinic-based OT and if so, what frequency and duration should have been provided. Here, the District provided adequate school based OT, but failed to fully comprehend the extent of Student's sensory, balance, low muscle tone, gross motor, fine motor and overall lack of physical

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<sup>5</sup> Parents could have, but did not raise issues as to the implementation of the October 11, 2007 IEP for the period beginning December 8, 2007.

confidence which required individualized clinic based OT and the use of suspended equipment such as the swings that Fernandez offered in her clinic. While Student made progress on his fine motor skills and balance, his level of need far exceeded what the classroom teacher and school-based OT could provide him. McKay and Reiche were able to offer Student some sensory strategies, but only met Student's overall sensory needs on an occasional basis. This was evident in his level of distraction and inability to fully participate in the curriculum. Student suffers from a rare genetic disorder that has many developmental ramifications. The depth and breadth of its effect on Student's development and ability to access the curriculum was not fully examined by the District's OT assessment and was not fully understood by the IEP team. The District failed to provide Student a FAPE in the area of OT when it denied him clinic based OT. (Factual Finding 1-38, 44-53, 55-62 and Legal Conclusion 1, 10, 19 and 22.)

26. As to ESY 2008 and the 2008-2009 school year, the May/June IEP meetings resulted in an offer of FAPE with the exception of OT. Again, the IEP team accurately identified Student's unique needs in all areas except OT where the true extent and depth of Student's need for suspended equipment to assist him with sensory integration, balance, physical confidence and gross motor skills were not revealed by the assessment. Testimony from Reiche, McKay, Fernandez and Hifumi all confirmed that District's school-based group OT was not sufficient to mitigate Student's sensory integration issues, distractibility, balance and lack of physical confidence. McKay and Reiche worked admirably and creatively to address Student's needs, but had to admit that their efforts were only partially effective at times. Student made gains in fine motor skills and gross motor skills, but was still substantially delayed and unable to keep up with his classmates

27. Appropriate goals were set in all areas of identified need including OT. The IEP contained a description of Student's PLOPS in each of the areas based upon assessment, observation and IEP team discussion. The IEP team, of which Parents were a part, set goals in each of those identified areas of need. Pastrick proposed that PT therapy be reduced to 30 minutes per month from 30 minutes per week because Student had met his goals and was able to access the curriculum and educational environment. He also reasoned that the APE teacher and the OT were addressing much of what Student still lacked. While there is no doubt that Student would benefit from a continuance of school-based PT at the current level and an addition of clinic based physical therapy, he was able to access the school playground equipment, stairs and tricycles used by his class and would receive a benefit from his educational program without clinic-based PT and with a reduction in school based PT if, as here, appropriate school based OT and APE are in place. (Factual Finding 1-50, 55-62 and Legal Conclusion 1, 10, 19 and 22.)

28. Student's OT needs were by all accounts more severe and complicated than his PT needs. As set forth in Factual Findings 25 and 26, Student was in need of both school-based and clinic-based OT to assist him with his development of fine motor skills, sensory intergration, physical confidence and overall motor skills. A reduction in school-based OT from 60 minutes a week to 30 minutes a week was not appropriate given that Student had not met his goals in OT and was having substantial difficulty with sensory integration and fine

motor tasks. Every OT therapist that testified in the case found Student to have impaired fine motor skills and sensory integration issues which distracted him from non-preferred tasks. A reduction in school-based OT would make it difficult for Student to access his educational program. (Factual Finding 1-62 and Legal Conclusion 1, 10, 19 and 22.)

29. Finally, Student failed to meet his burden of demonstrating that he was not offered an appropriate educational placement in the LRE. Here, neither party contends that full time placement in a general education class is appropriate. Instead, the issue to be resolved is what is the LRE for Student on the continuum of placement options, i.e., what placement would give Student the greatest opportunity for mainstreaming.

30. Here, the Westminster PSM and the SmartStart classes offer similar opportunities to interact with same age non-disabled peers. The main difference between the placements is the extensive use of floor time methodology by SmartStart. The use of a methodology preferred by Parents is not part of the consideration in determining LRE. The developmental kindergarten program at SmartStart differs slightly from the Westminster PSM class in that the developmental kindergarten program has two typically developing children as members of the class. The contents of the program are substantially similar and each offers Student exposure to typically developing peers. There is no doubt that Parents prefer the SmartStart model and the floor time methodology, which focuses on the link between home and family. The District's offered placement at the Westminster PSM provides Student with similar benefits in a public school setting. SmartStart is an NPS which serves primarily disabled children all ages 6 and under in early intervention programs. The Westminster PSM offers Student the opportunity to participate on a campus with typically developing elementary school children up to sixth grade. Student is exposed to Kindergarteners, first graders and early childhood education center preschoolers regularly and on a daily basis in both structured and unstructured settings. On the other hand, SmartStart serves primarily a disabled population and children all six years and younger. Accordingly, the Westminster PSM on a general education public school campus is overall the LRE for Student and less restrictive than the placement advocated by Parents. (Factual Finding 1-62 and Legal Conclusion 19-24.)

### *Remedies*

31. Student contends that he is entitled to reimbursement for assessments, placement and services paid for by Parents, and compensatory education. Here, based on the Legal Conclusions above, Student is only entitled to remedies related to the District's failure to provide an appropriate OT assessment and level of OT services.

32. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Department of Education* (1996) 471 U.S. 359, 374 [85 L.Ed.2d 385, 105 S.Ct. 1996]; 20 U.S.C. § 1415 (i)(C)(iii).) Compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity.

*(Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of IDEA.” (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

33. Here, Student is entitled to compensatory education for the failure of District to provide an appropriate OT assessment in 2007 and clinic-based OT during the period of November 2007 to August 14, 2008. District should have provided Student with two hours per week of clinic-based OT in addition the school based OT offered and provided to Student. As to the assessment costs, Fernandez's report was not a formal assessment. Hifumi prepared a formal assessment for use in Student's treatment. Accordingly, it is appropriate to reimburse Parents a lump sum amount for OT clinic-based therapy received from Fernandez at Greco's World and for Hifumi's clinic based therapy and assessment. Based upon the testimony and documentary evidence, \$3000.00 is an appropriate amount to be awarded as total reimbursement for all OT therapy provided by Fernandez and Therapy West and the assessment performed by Hifumi. This amount takes into consideration the different rates charged by each of the providers, transportation costs and the overlap of service which resulted in Student receiving more than one hour per week of clinic-based OT in July of 2008.

34. For the period of November 2007 to March 2008, Student did not receive any clinic-based OT. For that period of time an award of compensatory clinic-based OT in the amount of 40 hours is appropriate based on the testimony of McKay and Reiche about Student's fine motor and sensory integration issues impacting which impact his access to and participation in the curriculum. Fernandez and Hifumi testified about Student's deficits in fine motor skills, balance, physical confidence and sensory processing. Both Fernandez and Hifumi recommended that Student be provided 2 hours per week of OT to remediate these issues. Because Student has an ongoing relationship with an OT, and is reluctant and hesitant in new situations, Student would most likely receive the maximum benefit from services from a therapist with which he is already acquainted. Accordingly, the 40 hours are best used with Student's current NPA provider, if available. (Factual Finding 1-62 and Legal Conclusion 32.)

## ORDER

1. Within 15 days of this order, District is ordered to reimburse Parents in the amount \$3000 for costs of an IEE in occupational therapy and clinic-based occupational therapy services rendered during the period of March 1, 2008 to August 14, 2008.

