

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GARVEY SCHOOL DISTRICT.

OAH CASE NO. 2012061193

DECISION

Administrative Law Judge June R. Lehrman, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Rosemead, California, on September 4 and 5, 2012.

Student's mother (Mother) represented Student, and attended the hearing on all days. James Meeker, Attorney at Law, appeared on behalf of Garvey School District (District). District Interim Director of Special Education Carla Soronen attended the hearing on all days. District Program Specialist Eric Medrano attended the hearing for a partial day on September 5, 2012.

Mother, on behalf of Student, filed an Amended Due Process Hearing Request (amended complaint) naming District and Eastern Los Angeles Regional Center (ELARC) as respondents, on July 23, 2012. On July 26, 2012, OAH dismissed ELARC as a party, and the matter proceeded as to District, the remaining respondent.

At hearing, the parties requested and were granted a continuance to file written closing arguments by September 14, 2012. Upon receipt of the written closing arguments, the record was closed and the matter was submitted.<sup>1</sup>

## ISSUE

Did District deny Student a free appropriate public education (FAPE), by failing to offer speech and language services from July 27 through September 3, 2012?

## FACTUAL FINDINGS

1. Student is an eight-year-old girl, eligible for special education and related services under the eligibility category of intellectual disability. Mother and District disagree about Student's cognitive levels, with Mother believing Student is moderately intellectually impaired and District believing Student's intellectual disability is severe. Mother and District also disagree about Student's eligibility categories, with Mother believing Student should be classified as eligible under the qualifying condition of autistic-like behavior.

2. Student's initial individualized education program (IEP), dated June 15, 2007, was developed upon Student's enrollment into District at age three. At

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<sup>1</sup> Mother objects to District's closing brief, arguing that it was not timely served on her. The objection is overruled. District's brief was timely filed with OAH. Mother has had the opportunity to read it prior to the issuance of this Decision. The ALJ did not require a response to District's brief, therefore the manner and timeliness of District's service of its brief on Mother resulted in no prejudice to her.

an addendum IEP meeting on June 22, 2007, District offered, and Mother consented to, a placement in a special day class (SDC) with related services in speech and language therapy. Mother requested permission to attend District's speech therapy sessions. District declined the request, stating that it would cause disruption to the educational process.

3. At Student's next annual IEP meeting, on June 5, 2008, Mother reported that she had been permitted to attend District's speech therapy sessions once per month. She requested permission to attend more often. District declined the request, finding that Student would attend to Mother rather than the therapist, and would try less hard knowing that Mother would attend to her needs. In addition, District wanted to encourage a separation between home and school, with which parental attendance would interfere. Mother, who had conducted research, presented literature at the IEP meeting that indicated children achieved better results when a parent attended speech therapy sessions with the child. District's speech language pathologist, Julie Sena, expressed her disagreement.

4. In November 2008, District disallowed Mother from attending any of Student's further speech therapy sessions. District wrote Mother a letter to that effect, stating that Student's awareness of Mother's presence prevented Student from forming the necessary relationship with the speech therapist, Ms. Sena. Additionally, District opined that Mother's presence made it difficult for Ms. Sena to fairly evaluate Student's progress, because Student behaved differently in Mother's presence. Finally, District indicated its belief that Mother's presence at the sessions would hamper Student from learning independent skills.

5. At Student's next annual IEP meeting, on May 27, 2009, Mother renewed her request to attend Student's speech therapy sessions, specifically to

attend once per month. District declined, finding that Mother's presence at the sessions would be distracting to the sessions and to Student, who would attend to Mother rather than the therapist, Ms. Sena.

## 2010 TRIENNIAL ASSESSMENT

6. District conducted a triennial assessment of Student in 2010, when Student was six years old.

7. School psychologist Nancy Kugler performed a psycho-educational assessment. Ms. Kugler received her bachelor's degree from 1977, and her masters degree in school psychology in 1999. She had been a credentialed school psychologist since 2001 and had worked for District as its school psychologist since then. Prior to obtaining her credential, she was a credentialed elementary school teacher since 1978. She had known Student since 2007 when Student enrolled in District at the age of three. She had observed Student regularly since then in the classroom setting twice weekly for approximately 20 minutes each visit, as part of her role to observe teachers and provide support. She had also discussed Student with teachers and service providers and attended some of Student's IEP's.

8. Ms. Kugler administered the following formal assessment instruments: Southern California Ordinal Scales of Development (SCOSD)-Cognition; Developmental Profile 3; Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) Survey Interview Form; Vineland-II-Teacher Rating Form; Gilliam Autism Rating Scale, Second Edition (GARS-II); Brigance Diagnostic Inventory of Early Development, Second Edition (Brigance-II). She also observed Student in the classroom, consulted with the school nurse and Student's teachers, and reviewed Student's educational records.

9. Results of the SCOSD showed Student performed at the functional developmental level known as "sensorimotor stage 4." At this level, Student engaged in the core areas of applying established behaviors to new problems; awareness of object constancy; and imitation. Student showed some emerging skills from sensorimotor stages 5 and 6, involving puzzle completion, and she was able to track items visually, sort objects by shape and color; and match colors to one another.

10. Results of the Developmental Profile 3 showed Student to be delayed, below the first percentile, in all domains including physical, adaptive behavior, social emotional, cognitive and communication. In the domains of cognition and communication, Student's results showed her with a cognition age equivalence of one year, and a communication equivalence of 10 months. Mother disagreed with these results.

11. Student's classroom teacher completed the Vineland II-Teacher Rating Form. The results showed low adaptive levels in all domains. In the area of communication, teacher reported that Student could point to three major body parts when asked, would make sounds or gestures to attract attention, and would repeat sounds made to her. Student was unable to identify letters of the alphabet, copy or state her name, was unable to say one-word requests, and could not name objects in a book. In the area of daily living skills, Student could feed herself, however, she was not toilet trained, was unable to button buttons, and could not complete school tasks without constant prompting. In the area of socialization, Student was reported to attempt social contact; to play simple games with interaction; to be interested in certain people and objects; and to sometimes wave "bye bye" when requested to do so. She was nonverbal and

needed adult supervision to play with others. She was not sharing toys or taking turns, and was reported to have difficulty with changes in routine.

12. Ms. Kugler interviewed Mother and reported the results on the Vineland II-Survey Interview form. Ms. Kugler interviewed Mother, and transcribed Mother's responses, in accordance with test protocols. The results of the interview showed that Student had low adaptive levels in all domains. In the area of communication, the report reflected information from Mother that Student could point to three major body parts when asked, understood the meaning of "yes" and no," could understand and follow simple one-step instructions, could wave goodbye, could say "dada" and "mama" for "father" and "mother," could point to objects, and could make one-word requests such as "up," "more," and "out." In the area of daily living skills, Student could feed herself, but was not toilet trained, and could clean up and help with household chores. In the area of socialization, Mother reported that Student smiled and imitated, showed affection for familiar persons, and had difficulty with changes in routine

13. The GARS-II was completed by Student's classroom teacher and reflected a score of 66, resulting in an "unlikely" probability of autism.

14. The Brigance-II was administered in Student's classroom, and revealed that in the academic domain, Student had a short attention span and required many prompts to complete tasks presented to her. Her gross motor skills allowed her to walk well and rarely fall, walk up stairs with alternating feet while holding a rail, run without falling, throw a ball with both hands, and kick a ball without losing balance. Her fine motor skills enabled her to nest a stack of objects in graduated size, build a tower with blocks, and scribble with crayons. In the self-help domain, she cooperated with dressing and undressing, was able to

take off a pullover, and had difficulty with buttoning and zipping. Student required assistance with toileting and hand washing.

15. Ms. Kugler generated a psycho-educational assessment report dated December 14, 2010. The report concluded that Student displayed signs of intellectual disability and was functioning in the very impaired range of cognitive ability. She displayed significant sub-average general intellectual functioning with deficits in adaptive behavior. Student met the eligibility for special education and related services under the category of intellectual disability.

16. Ms. Sena completed a Speech and Language assessment as part of Student's triennial assessment. Ms. Sena obtained a master's degree in speech pathology in 1997. She obtained her California license as a speech language pathologist in 1998. Ms. Sena had worked with Student since September 2007. She did not utilize any formal assessment tools, but relied on observations, a teacher interview, and communication with Mother.

17. Ms. Sena generated a Speech and Language assessment report, dated December 16, 2010. The report reflected Ms. Sena's observations of Student's receptive and expressive language abilities, oral placement foundations, articulation/intelligibility, pragmatics, fluency, and voice. In the area of receptive language, Ms. Sena observed that Student could follow simple commands such as "sit down" and "stand up" and could imitate simple actions when requested. In the area of expressive language, Ms. Sena observed that Student could use a picture system to indicate preferred objects without prompting. She was able to sign over 40 signs, with various levels of prompting, indicating "I," "want," "more," "all done," "eat," "sleep," "open," "go," "fish," "book," "bird," "duck," "ball," and other words. She produced sounds and word approximations, with minimum to moderate prompting ("bye-bye," "buh" for "bubbles," "dada" for

"father," and various sounds to indicate various animals). Student had variable oral placement skills when presented with different objects on which to bite, whistle, and blow. In terms of articulation and intelligibility, Ms. Sena observed that Student babbled randomly. In terms of pragmatics, Student made good eye contact and had increasing attention to task. She had not been observed to have fluent connected speech, and often made noise through her nasal cavity rather than by vocalizing.

18. Ms. Sena concluded that Student was eligible for speech language services due to significant delays in receptive and expressive language, intention to communicate (pragmatics) and oral placement skills. Ms. Sena reported that Student had shown gradual progress over the past three years, especially in comprehension of signs and pictures, and in the use of sounds, word approximations and pictures to communicate her interests. She was a candidate for oral placement therapy, also known as oral motor exercise, to physically strengthen the jaws and mouth as necessary for speech production.

#### APRIL 1, 2011, IEP

19. On April 1, 2011, Student's IEP team met for Student's triennial IEP.

20. Student was listed as eligible for special education and related services under the eligibility category of intellectual disability.

21. Her present levels of performance indicated that Student was able to point to four body parts with minimal physical prompts. She could not identify letters of the alphabet and did not speak words. She was able to use five signs indicating "I want," "more," "eat," "all done," and "open." With items in view, she could use signs or gestures in her speech therapy sessions, i.e. nod her head for "yes," shake her head for "no," and indicate "I," "want," " more," " all done,"



"sleep," " open," " eat, "go," " fish, " "book, " "bird," "duck," and "ball," with minimal prompting.

22. The IEP proposed five speech and language (S&L) goals. S&L goal number one, which addressed pre-linguistic receptive and expressive language, stated that Student would match five sets of toys (i.e. all balls in a basket, all bubbles, all trains) with 70 percent accuracy over four weeks, as measured by speech language pathologist observation, with physical, verbal and visual cues. S&L goal number two, which addressed picture communication, stated that Student would consistently use 12 photos to communicate her wants, as measured by observation with 70 percent accuracy for a six-week period, with minimum prompts allowed. S&L goal number three in the area of need of basic communication stated that Student would use 20 signs and/or gestures with minimum prompting (visual cues) to express her wants, with 70 percent accuracy over six weeks, as measured by speech-language pathologist observation. S&L goal number four and five addressed oral placement. Specifically, goal number four provided that Student would show oral placement mastery with eight horns and/or blowers, with 70 percent accuracy over four weeks, as measured by speech language pathologist observation with physical, verbal and visual prompts, while goal number five stated that Student would participate in jaw strengthening exercises, with 70 percent accuracy over six weeks, as measured by speech language pathologist observation, with physical, verbal and visual prompting, in addition to physical rewards and/or verbal praise. After the team discussed these goals, the team added another S&L goal (goal number six) addressing verbal expression and phonology, which stated that Student would imitate 12 single consonants and four vowels, and sequence them together after speech language pathologist modeling, into eight consonant-vowel or vowel-

consonant combinations, with 70 percent accuracy over four weeks, with visual, verbal and tactile prompts as needed.

23. The team discussed Student's assessments and present levels of performance. Mother disagreed with the speech pathologist, and with the psycho-educational assessment, concerning the precise number of signs Student was able to utilize, parts of the body she was able to point to, and consistency of her signing abilities. Mother interpreted the disagreements to indicate that Ms. Sena was not able to understand Student's intended meanings. This increased Mother's conviction that she should be permitted to attend the speech therapy sessions and she requested permission to attend once per month. District declined.

24. Mother also disagreed with the psycho-educational assessment's conclusion that autism was unlikely.

25. The IEP offered placement in a SDC with related services of occupational therapy, physical therapy, speech language therapy, and a 1:1 aide. The offer of speech language therapy comprised group sessions totaling 30 minutes each week, and individual sessions totaling 90 minutes each week, during the academic school year starting in April 2011, and continuing until Student's next annual IEP in April 2012. The academic school year covered the period September to June, excluding winter, spring, and summer breaks. District also offered the same frequency and duration of individual and group speech sessions during extended school year for the period from June 27, 2011 until July 28, 2011. The duration of the extended school year services was determined by the IEP team. Mother consented to this offer.

26. Mother requested services for the time period between the end of the extended school year and the beginning of the next academic year,

corresponding approximately to the month of August, a time period Mother referred to as the "summer gap." The IEP team discussed the request. Mother expressed her concern about possible regression. The District team members, including Ms. Sena and the classroom teacher, stated that they had not seen regression previously when Student returned to school each September. According to Mother, this was due to the fact that ELARC had previously funded summer gap speech therapy services. District declined Mother's request, considering that its offer consisted FAPE.

#### SUMMER 2011 PROGRESS REPORTS

27. On June 10, 2011, Ms. Sena reported that Student had met all short term objectives toward S&L goals number one (matching toys); two (using photos to communicate); three (using 20 signs); and six (imitating 12 consonants and 4 vowels). She was progressing on goals number four (oral placement mastery with horns and blowers) and five (jaw strengthening exercises).

28. In summer 2011, ELARC funded private speech therapy for the "summer gap" period corresponding approximately to August 2011.

29. In September 2011, Students' private "summer gap" speech therapist that had been provided by ELARC, wrote a progress report that indicated Student was producing 12-15 meaningful consonant-vowel combinations per session, was producing animal sounds; and could vocalize "shhh" for "sheep;" "bah" for "bird," shhh for "fish," and could oink to indicate "pig." Student was dependent on cues and prompts to accomplish these results. The therapist also indicated Student could sign over 60 words. Mother was permitted to attend those sessions.

## AUGUST 2011 INDEPENDENT PSYCHOLOGICAL ASSESSMENT

30. Student obtained an independent psychological assessment in August 2011, conducted by Licensed Psychologist Larry Gaines, PhD. Dr. Gaines, who was not called to testify at hearing, administered the Leiter International Performance Scale-Revised, the Beery Buktenica Development Test of Visual Motor Integration (Beery VMI) and the Autism Diagnostic Observation Scale (ADOS) Module One, as well as conducted a clinical interview and reviewed Student's educational and regional center records. The reason for the referral was Mother's concern that Student presented with autistic-like behaviors, for which Student had not been previously assessed. Mother reported to Dr. Gaines that Student exhibited self-stimulatory behavior, babbled and cooed, was not social; had tantrums; was defiant and aloof; and was not affectionate.

31. Dr. Gaines noted that the prior ELARC assessments had identified Student with unspecified levels of intellectual disability secondary to Down syndrome. Dr. Gaines observed Student exhibiting self-stimulatory hand and finger movements, and to show no interest in playing with toys. Dr. Gaines noted that such behaviors were consistent with autism but also with the severe ranges of intellectual disability.

32. Student's results on the Leiter International Performance Scale-Revised showed an IQ of 36, and functioning within the moderate range of intellectual disability, consistent with individuals with Down syndrome. Student only engaged with tasks that were at attainable levels of difficulty. As the difficulty of tasks increased, Student disengaged. She was unsuccessful at all conceptual related tasks, consistent with Down syndrome.

33. Student's results on the Beery VMI showed that her visual motor and perceptual skills fell at a one-year, four month level of development, within

the moderate to severe range of deficiency. She showed no interest in social engagement or trying to imitate. According to Dr. Gaines, the lack of social reciprocity suggested an autistic connotation.

34. Student's results on the ADOS showed elevated clinical scales into the autism cut-off level, however Dr. Gaines noted that these scales were meant to be interpreted in light of Student's other conditions and disorders.

35. Due to Student's young age, Dr. Gaines concluded that issues of severe intellectual disability should be revisited as Student grew older, with appreciation for the self-stimulatory behaviors that can be associated with the more severe levels of intellectual disability. At the time of assessment, however, Dr. Gaines could not interpret Student's self-stimulatory behavior to be due only to her cognitive functioning. Her language skills were consistent with Down syndrome individuals who do not speak, or who speak in single words or simple phrases which can be unintelligible. Dr. Gaines did not interpret Student's language delay alone to indicate autism, did not observe Student to babble or speak during his observations of her, and found overall that the language criteria for autism were still in question. Dr. Gaines found that the level of Student's intellectual disability, i.e. as moderate or severe, should be monitored over time. Although her levels at the time of assessment indicated moderate functioning, many of her self-stimulatory behaviors would be consistent with severe intellectual disability, and would not warrant a diagnosis of autism. On the other hand, Student's aloofness was inconsistent with many individuals with Down syndrome who are social and engaging at their younger developmental and cognitive levels.

36. Overall, Dr. Gaines suspected autism due to Student's self-stimulatory behavior, but found that this could also be explained by her cognitive

functioning, which needed to be monitored over time. He diagnosed Student as moderately intellectually disabled, and provisionally as having autistic disorder, with recommendations to rule out pervasive developmental disorder, severe intellectual disability with autistic characteristics, and self-stimulatory behavior associated with Down syndrome.

#### WINTER 2011-EARLY SPRING 2012 PROGRESS REPORTS

37. On December 6, 2011, Ms. Sena reported that Student had met all short term objectives toward S&L goals number one through five. With respect to goal number six (imitating of consonants and vowels), Student was progressing and could say "m-e" and "m-ah" for "more," "a-n" for "Andy"; "d-e" for "Desiree," "d-a" for "Jack", "ah-n" for "Caroline," "dah" for "dog," "ah-f" for "off," "ooh-uf" for "wuff," "r-uh" for "ruff," "e-t" for "eat," and other combinations to indicate "Julie," "all done," and "hi."

38. On February 29 through March 1, 2012, Ms. Sena reported that Student had met all short term objectives toward each of her S&L goals number one through five. With respect to goal number six (imitating of consonants and vowels), Student was progressing, but had been less cooperative in this area during the trimester.

39. On March 30, 2012, Ms. Sena reported that Student had met her S&L goals one through three and five. With respect to goal number four (oral placement mastery with blowers and horns), Student had proceeded with all the whistle exercises, but demonstrated difficulty with the lip protrusion required to blow horns. With respect to goal number six (imitation of consonants and vowels), Ms. Sena reported that while Student had cooperated previously, over the course of the school year she had become less cooperative. She was requiring maximum prompting to participate, and was refusing to copy Ms.

Sena's sounds. Ms. Sena could not explain why Student refused to engage, opining that sometimes children "just need a break."

#### APRIL 2, 2012, IEP

40. On April 2, 2012, the IEP team met for Student's annual IEP. Mother attended, as did Ms. Sena, Student's classroom special education teacher, a general education teacher, District's director of special education, an occupational therapist, a school nurse, and a representative from ELARC.

41. Student's present levels of performance indicated that Student was able to point to six body parts with minimal physical prompts. She was able to match the letters of her first and last name. She had shown progress in nonverbal communication through signing and photo/picture use, and was able to use a total of 44 signs for words such as "book," "open," "more," and "ball." She could pronounce ten consonant sounds (b,d,m,t,f,z,h,k,sh,r) and three vowel sounds (long e, short u, and short o). She could use some word approximations such as "bah" or "bah bah" for "mama," "bye," "ball," "sheep," "buh" or "buh buh" for "bubbles," and "dah" or "dah dah" for "daddy."

42. The IEP proposed five speech and language goals. S&L goal number one addressed attention, language comprehension and cooperation, and stated that Student would identify photos from sounds indicating five separate categories such as animals, foods, transportation, clothes, basic nouns, and basic verbs, with 70 percent accuracy in four out of five trials, as observed by the speech pathologist, with visual, verbal and tactile prompting in addition to verbal praise and tangible rewards as needed for success. S&L goal number two addressed language comprehension and expressive communication, and stated that Student would imitate and/or produce signs when nouns and verbs were presented, with a total of five signs from five separate categories such as animals,

foods, transportation, clothes, basic nouns, and basic verbs, with 70 percent accuracy in four out of five trials, as observed by speech pathologist, with visual, verbal and tactile prompting in addition to verbal praise and tangible rewards as needed for success. S&L goal number three addressed expressive communication and syntax, and stated that Student would chain two to three signs together to make requests, comments and protests, three such utterances every other session for six weeks, with 70 percent accuracy in four out of five trials, as observed by speech pathologist, with minimum visual, verbal and tactile prompting in addition to verbal praise and tangible rewards as needed. S&L goal number four addressed expressive communication, and stated that Student would use pictures or a communication device to communicate her requests and comments, with 70 percent accuracy in four responses every other session over six weeks, as observed by speech pathologist, with minimum visual, verbal and tactile prompting in addition to verbal praise and tangible rewards as needed. S&L goal number five addressed voice, oral placement and body awareness, and stated that with visual and tactile feedback, Student would participate in touching basic body parts/ facial components and engaging in oral placement and vocal activities, with 70 percent accuracy each session over six weeks, as observed by speech language pathologist with visual, verbal and tactile prompts. Ms. Sena opined that this goal was related to the production of speech, in terms of awareness of the body parts that produce speech.

43. Ms. Sena proposed dropping the previous goals from the previous year's IEP, numbered four and six, that had related, respectively, to horn and whistle blowing and to consonant vowel production, due to Student's decreased cooperation. The team discussed Student's present levels of performance and goals, in pertinent part, Student's failure to meet her S&L goals four and six, and



the fact that no new goals were proposed to address vocal production. In lieu of those goals, Ms. Sena recommended focusing instead on signs and picture communication methods. Mother wanted to see more emphasis in speech production.

44. The team also discussed Student's eligibility category. Mother advocated for an eligibility category of autism, based upon the assessment by Dr. Gaines, feeling that this explained some of Student's functional levels, speech delays, and lack of socialization. The District members of the team responded that Dr. Gaines' assessment diagnosis was provisional only. District team members further stated that, in any event, the offer of placement and services was appropriate to Student's unique needs, regardless of her eligibility category.

45. The IEP offered placement in a SDC with related services of occupational therapy, physical therapy, speech language therapy, and a 1:1 aide. The offer of speech language therapy comprised group sessions totaling 30 minutes each week, and individual sessions totaling 90 minutes each week, during the academic school year starting in April 2012, and continuing until Student's next annual IEP in April 2013. The academic school year covered the period September to June, excluding winter, spring and summer breaks. District also offered the same frequency and duration of individual and group speech sessions during extended school year for the period from June 25, 2012 until July 26, 2012. Mother did not consent to this offer. The IEP meeting was continued due to the pendency of another assessment.

#### DIAGNOSTICS CENTER ASSESSMENT, APRIL 16, 2012

46. The California Department of Education's Diagnostics Center (Diagnostic Center) performed a trans-disciplinary assessment of Student on or around April 16, 2012, and prepared a report dated June 1, 2012. The assessment

was geared toward Student's current levels of functioning in cognition, adaptive behavior, communication, sensory/motor and academics; recommendations for curricular components and supports; and recommendations for communication supports and strategies. The Diagnostic Center's assessment team consisted of a school psychologist, speech language pathologist, pediatrician, and an occupational therapist. The assessment team utilized formal and informal assessments, parent and school interviews, and observations, as well as reviewed medical and educational records.

47. The team administered the SCOSD-Cognition to assess Student's developmental level in thinking and understanding concepts. Results showed Student performed at a functional level of 12-18 months with a ceiling level of two-to-four years, and a basal level of eight-to-12 months. The team interpreted these results to mean that Student's thinking and reasoning skills were unevenly developed ranging from 12-14 months with her most reliable skills at the 16-18 month level. At this stage of development, Student would be developing mental images about objects and her actions upon them. She would be relying primarily on object exploration and simple forms of trial and error to expand her understanding of the relationship between actions and objects.

48. The team administered the Vineland-II Survey Interview Form. Results showed age equivalencies of six months to one and a half years of age for Student in all adaptive skills domains (including personal, domestic, community, daily living, interpersonal relationships, play and leisure time, coping skills and socialization), with the exception of the personal domain in which Student's results were at the two year, two month level. The team concluded that Student required adult support across all areas of her adaptive functioning. Behaviorally, the team found that Student exhibited problematic behaviors including dropping

to the floor, throwing items, whining and running away, which behaviors were more likely to occur when tasks were difficult, non-preferred, or interrupted, and when changes in her routine or schedule occurred.

49. In communication, the team assessed Student using the SCOSD-Communication. Student's results scored her functional level at "sensorimotor stage 5" and her ceiling level at "preoperational stage 1." The team found that Student's communication skills were significantly reduced, consistent with those that develop in typically developing peers within the first two years of life. Her skills scattered up to the two-to-four year level with most skills clustering at the 18 month level. Her receptive understanding was best when language used was simple, brief and visually supported by objects, models or demonstrations, such as recognizing the names of body parts or articles of clothing, and following simple and familiar one-step directions. Her expressive abilities were at roughly the same level, with her most reliable expressions consisting of pre-symbolic methods, i.e. pushing, pulling, touching, grabbing and reaching. She had some symbolic means of expression, using some signs and sign approximations and spoken word approximations; the report found these were emerging skills not yet reliable for communication. Although Mother reported the use of 80 different signs, the assessors observed Student spontaneously using approximately only ten meaningful signs. The team summarized Student's communicative abilities as commensurate with her overall developmental level, demonstrating many skills that typically develop by the age of 24 months.

50. In academics, the team utilized informal assessments, observations, interviews and reviewed educational records. Results showed Student's pre-academic skills were unevenly scattered between 18 months and 24 months. She had a reliable understanding of object permanence and cause and effect

relationships. She had emerging skills in picture and icon matching. Her receptive understanding of demands was best supported when verbal directives were paired with signs.

51. The report summarized the implications of its findings. It recommended repetition and practice, one-to-one interaction, and avoiding the mismatching of expectations beyond Student's developmental level. It recommended reducing prompts to enhance Student's initiation of interactions. It recommended a functional curriculum including functional academics, and personal care to increase independence at home and school. In terms of communication supports and strategies, it recommended promoting Student's independent, unprompted, initiation of communication. It also recommended responding to her communicative intent regardless of its form, and the expansion of the use of her most comprehensible forms of communication, which, at the time, were reaching, pulling and emerging use of signs and symbols. It also recommended repetition and immediate reinforcement. It further recommended use of objects for communication, careful use of assistive technology, and the provision of training and support for all team members, such that Mother, relatives, teachers and service providers could all learn to interpret Student's communicative intent.

52. The report recommended continuing speech and language services, recommending that these focus on identifying opportunities to use and expand social communication skills such as targeting communicative behaviors, and reinforcing the forms of communication Student used spontaneously.

53. Mother disagreed with the conclusions of the report, feeling that Student's receptive language abilities far exceeded her expressive language abilities. Mother felt Student's receptive understanding was at the three to three

and a half year level. She also found the report to be indicative of autism, a conclusion she believed was consistent with Dr. Gaines' assessment.

#### MAY 21, 2012 PROGRESS REPORTS

54. On May 21, 2012, Ms. Sena reported that Student had, as of March, met S&L goals number one through three and five. With respect to goal four (oral placement mastery with horns and blowers), Ms. Sena reported that Student was making minimal progress using the horns and not progressing to the lip protrusion necessary to make certain sounds. Ms. Sena felt that Student just did not understand the task, and gave up on it out of boredom or frustration. With respect to goal six (consonant and vowel imitation), Ms. Sena reported that Student had increased her cooperativeness and was imitating and spontaneously producing simple consonant sounds, and adding vowels, with maximum prompting.

#### JUNE 6, 2012, IEP

55. On or around June 1, 2012, Mother and members of the IEP team received the Diagnostic Center assessment and met with Diagnostic Center assessor Melissa Naftalis to review the report. The IEP team reconvened on June 6, 2012, to discuss the assessment. Mother and Ms. Sena disagreed over whether Student used signs consistently. In Mother's view Ms. Sena was not sufficiently familiar with the signs Student used.

56. There was no change in the offer of placement and services that had been made at the April 2, 2012 meeting, and Mother continued to decline consent.

## SUMMER GAP 2012

57. During the summer of 2012, ELARC declined to fund summer gap speech therapy services.

58. Mother therefore funded four sessions privately during August 2012, at a cost of \$100 each, for a total of \$400, for which she seeks reimbursement.

59. At hearing, Ms. Sena opined that from her experience working over several years with Student, she noticed no differences in Student's performance after winter, spring or summer breaks. The only consistent differences Ms. Sena had noticed were when Student had been ill and returned to school in a weakened condition. Ms. Sena would not expect any regression during the summer gap, and instead felt Student would actually benefit from a short break.

60. At hearing, school psychologist Ms. Kugler opined that a five week break in the summer would have no impact, given Student's global delays and the fact that her communication levels were overall commensurate with her developmental levels, which Ms. Kugler considered to be severely intellectually impaired.

61. At hearing, Mother opined that the summer gap speech therapist was more successful with Student than Ms. Sena, both in terms of reduced prompting and allowing Student to initiate, and in terms of recognizing Student's meaning and communicative intent. Since Mother was permitted to attend the summer gap speech therapy services, Mother could also help the private therapist interpret and recognize subtle signs from Student.

62. The private summer gap therapist hired by Mother was not called as a witness at hearing but submitted a declaration that corroborated Mother's views, stating the opinion that Student required consistency in her speech

therapy, and that a gap of five weeks would cause regression, especially with her verbal goal. The declaration, however, did not state any facts supporting this opinion.

## LEGAL CONCLUSIONS

1. Mother contends that Student was denied a FAPE by not being offered speech therapy services for the period of time between the conclusion of ESY and the commencement of the regular academic school year in 2012. Mother contends that this resulted in a concomitant denial of the training that Mother claims she was entitled to by law, as she was only permitted to attend the summer gap services provided by her private speech therapist, but was not permitted to attend District speech therapy sessions. Mother also contends that the summer gap services were in furtherance of Student's IEP goals that were abandoned by District's speech pathologist, and were therefore necessary in order to provide Student with a FAPE. Mother further contends that Student was moderately intellectually disabled, and required an educational component during the summer gap to enable her to continue her education without regression. District contends that Student, as an eight year old girl with Down Syndrome and significant global delays, was cognitively in the 12-24 month range with communicative skills commensurate with her cognitive abilities. As such, a five week gap in speech services would be unlikely to result in regression, such that Student did not need the services to receive a FAPE.

## BURDEN OF PROOF

2. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore,

Student has the burden of persuasion on all issues stated in his complaint, and District has the burden of persuasion on the issue stated in its complaint.

#### DEFINITION OF A FAPE

3. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

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



5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit. (*Ibid.*)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

7. Extended school year (ESY) services means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP. (34 C.F.R. § 300.106 (b).)<sup>2</sup>

8. Extended year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).)

9. Each public agency must ensure that ESY services are available as necessary to provide FAPE. (Ed. Code, § 56345, subd. (b)(3); 34 C.F.R. § 300.106

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<sup>2</sup> All citations to the Code of Federal Regulations are to the 2006 edition.

(a.) The IEP determines on an individual basis whether ESY services are necessary for the provision of FAPE. (34 C.F.R. § 300.106 (a)(2). )

10. ESY services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.)

11. An extended year program shall be provided for a minimum of 20 instructional days, including holidays. (Cal. Code Regs., tit. 5, § 3043, subd.(d).)

12. Under federal regulations, a public agency may not unilaterally limit the type, amount, or duration of ESY services. (34 C.F.R. § 300.106 (a)(3)(ii). )

#### ANALYSIS

13. Student has failed to establish that the five week gap in speech therapy services denied her a FAPE. Student's assessments showed generally that she required consistency and practice, and was disturbed by changes in her routine, but the IEP team had no information that would require speech and language services beyond the duration of ESY that was offered. At hearing, Mother presented no credible evidence of the likelihood of regression. Mother's opinion that Student required an educational component during the summer gap to enable Student to continue her education without regression, although shared by the private speech therapist, was unsupported by any underlying facts. The private speech therapist's declaration did not state any factual basis for the

opinion. Moreover, the opinion was unsupported by any testimony at hearing, and was outweighed by the countervailing opinions of Ms. Sena and Ms. Kugler, both of whom had observed and worked with Student extensively over several years. Ms. Sena's observation that she noticed no differences in Student's performance after winter or spring breaks when Student had been in good health was convincing, as was her opinion that she would not expect any regression during the summer gap. This opinion was corroborated by that of school psychologist Ms. Kugler, who opined that a five week break in the summer would have no impact, given Student's global delays and the fact that her communication levels were overall commensurate with her developmental levels. Finally, Ms. Kugler's views of Student's global delays and communication levels were corroborated by the Diagnostic Center assessment. In light of the above, Student's contention that the gap in services would cause regression and thus would deny Student a FAPE, was not persuasive.

14. Mother's other contentions at hearing were all outside the scope of her due process complaint, such that the ALJ could not consider them as a basis for awarding relief. (See 20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i)). Thus, Mother's contention that she was denied legally required training by virtue of being excluded from District speech therapy services; that District improperly abandoned appropriate speech goals; that the private speech therapist was superior in general to Ms. Sena; and that Student's eligibility category was improper, cannot be addressed in this decision because District was not given notice of them in the complaint. The sole contention at issue, as stated in Mother's complaint, was that Student was denied a FAPE by not being offered speech therapy services for the period of time between the conclusion of ESY and

the commencement of the regular academic school year in 2012. As discussed above, Student failed to meet her burden of proof on this contention.

15. Given the above, Student failed to establish that District denied Student a FAPE. (Factual Findings 1-62; Legal Conclusions 1-14.)

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the only issue that was heard and decided in this case.

## RIGHT TO APPEAL THIS DECISION

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

Dated: October 12, 2012

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JUNE R LEHRMAN

Administrative Law Judge

Office of Administrative Hearings