

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HOLLISTER SCHOOL DISTRICT,

OAH CASE NO. 2012080366

DECISION

Administrative Law Judge (ALJ) Troy Taira, from the Office of Administrative Hearings (OAH), heard this matter in Hollister, California, on November 27-29, 2012.

Natashe Washington, Attorney at Law, appeared on behalf of Student. Ms. Washington was assisted by Hee J. Kim, Attorney at Law. Student's mother (Parent) was present during the morning sessions on November 27 and 28, 2012, and was present on November 29, 2012.

Daniel Osher, Attorney at Law, appeared on behalf of Hollister School District (District). Karen Lopes, Special Education Director, was present on behalf of District.

Student filed her due process hearing request (complaint) on August 14, 2012, naming District. OAH granted a continuance on September 25, 2012. At the close of the hearing on November 29, 2012, the matter was continued to December 17, 2012, at the

request of the parties for the submission of closing briefs. The parties submitted their closing briefs on December 17, 2012, and the matter submitted for decision.<sup>1</sup>

## ISSUES<sup>2</sup>

- a) Did the District deny Student a FAPE by failing to have a general education teacher at the IEP team meetings on September 16, 2011, and May 22 and July 19, 2012?
- b) Does the District's offer of placement at the May 22 and July 19, 2012 individualized education program (IEP) team meetings provide Student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?<sup>3</sup>
- c) Did the District deny Student a FAPE from August 2010 to July 2011 and from August 2012 to the present by failing to provide her adequate occupational therapy (OT) services?

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<sup>1</sup> To maintain a clear record, Student's brief has been marked as Student Exhibit S-48, and District's brief has been marked as District Exhibit D-44.

<sup>2</sup> The parties and ALJ reworded and clarified the issues at the beginning and at the end of the hearing. The ALJ has reordered and further reworded the issues in this decision for further clarity. No substantive changes were made.

<sup>3</sup> The parties and the ALJ clarified at the prehearing conference on November 14, 2012, that the specific issue addressed at the hearing is the issue of LRE.

## PROPOSED RESOLUTIONS

Student requests that District provide Student with a full inclusion placement with appropriate supplementary aids and services, including an independent inclusion specialist experienced in working with students with Down Syndrome; provide Student with a full-time one-to-one aide year round; and provide compensatory education in all areas of need by a non-public agency.

## PRELIMINARY MATTERS

At the start of the due process hearing, District stipulated that it did not provide a general education teacher at Student's IEP team meetings on May 22 and July 19, 2012. District further stipulated that the absence of a general education teacher significantly impeded Parent's right to participate the decision making process and denied Student a FAPE for the May 22 and July 19, 2012 IEP's.

## CONTENTIONS OF THE PARTIES

Student contends that District's offer of placement for kindergarten in the 2012-2013 school year in a moderate-to-severe special day class (SDC) failed to offer her a FAPE. Student alleges that she obtained satisfactory educational benefit during her preschool in a general education full inclusion program. Student states that with appropriate aides, supports, and services, she can obtain satisfactory educational benefit in a full-time general education setting. Student further contends that District provided OT as a consultation service, instead of direct therapy, and this was inadequate to address her needs. Finally, Student states that District did not have a general education teacher at the IEP team meetings on September 16, 2011, and May 22 and July 19, 2012, which denied Student a FAPE because Parents could not meaningfully participate in Student's educational decision-making process.

District contends that it offered Student a placement that balances the nonacademic benefits of mainstreaming with general education students with her need for intensive academic support. District asserts that Student's deficits are so severe that a general education curriculum would have extensive modifications, as well as requiring continual and extensive assistance from an aide, to such an extent that she cannot obtain meaningful educational benefit from placement in a full-time general education inclusion setting. District asserts that its moderate-to-severe SDC meets Student's needs so she can obtain meaningful educational benefit. District contends that it provided appropriate OT services and that its general education teachers, with two exceptions, attended Student's IEP team meetings, and Parents meaningfully participated in the education decision-making process.

## FACTUAL FINDINGS

### JURISDICTIONAL AND BACKGROUND

1. Student is a five-year-old girl who lives with Parents within the District's geographical boundaries. Student attended a District pre-kindergarten SDC at the Early Childhood Education Center (ECE) during the 2011-2012 school year.<sup>4</sup> For the 2012-2013 school year, Student attends District's moderate-to-severe SDC for kindergarten and first grade students. Student has Down Syndrome and is eligible for special education and related services under the category of intellectual disability (ID).

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<sup>4</sup> During the summer of 2011, the ECE operations were transferred from District to San Benito County Office of Education (COE). Student participated in both Early Start and Head Start during the 2011-2012 school year. COE and Head Start staffs collaborate to serve students with IEP's through a memorandum of understanding and work with District staff.

2. Student attended the ECE and participated in both Early Start and Head Start programs during the 2011-2012 school year. Through the ECE, COE operates the Early Start program, a special education preschool program. COE also operates the Head Start program, a comprehensive preschool and social services program for low-income families. Early Start and Head Start are co-located at the ECE.<sup>5</sup>

3. District's 2012-2013 school year began August 20, 2012. Student did not attend school until September 4, 2012. She missed approximately two weeks of school and returned to her placement in a moderate-to-severe SDC due to stay put because Parent did not consent to District's July 19, 2012 placement offer and was uncertain where Student would attend school because of her pending request for a due process hearing. Therefore, Student is not receiving any general education inclusion at this time. Student currently attends a kindergarten through first grade moderate-to-severe SDC. Student's SDC has seven students with four adults including the teacher.<sup>6</sup>

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<sup>5</sup> The 2011-2012 school year is not at issue. However, a description of Student's educational program helps to understand the background for the September 16, 2011 IEP team meeting. It also provides Student's functioning during this school year provides information of Student's deficits, abilities, and levels of need that were considered by the IEP team when developing Student's placement for the 2012-2013 school year.

<sup>6</sup> Ms. Martha Selsor is Student's current teacher. Ms. Selsor has bachelor's and master's degrees in special education, with a severely handicapped credential. She has been a District SDC teacher 24 years, for both mild-to-moderate and moderate-to-severe SDC's. Ms. Selsor has taught 200 special education students, of which approximately 50 to 75 with Down Syndrome. Ms. Selsor testified to Student's current performance, needs, and abilities, and opined that Student will not receive an academic

4. District scheduled and held an IEP team meeting on September 25, 2012. Parent received notice of the meeting and Ms. Selsor personally invited her to attend. Parent declined to attend because of her pending request for a due process hearing in this matter. Parent did not request or otherwise attempt to reschedule the meeting. The IEP team meeting held on September 25, 2012, included a general education teacher. Parent did not attend the meeting.<sup>7</sup>

#### ATTENDANCE OF A REGULAR EDUCATION TEACHER

5. Parents of a child with a disability must have an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A school district is required to conduct an IEP team meeting that is meaningful. A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP team meeting, expresses agreement or disagreement regarding the IEP team's conclusions, and school district considers any request to revise the IEP. Procedural violations result in a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.

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benefit in general education kindergarten class, but would receive a non-academic benefit. Ms. Selsor was a credible witness with considerable knowledge about Student.

<sup>7</sup> District contends that the attendance of a general education teacher at the September 25, 2012 IEP team meeting cured the procedural defect that began with the May 22 and July 19, 2012 IEP's. The September 25, 2012 IEP is not an issue in Student's complaint and this Decision does not address the appropriateness of that IEP.

6. An IEP team must include a regular education teacher of the child if the child is, or may be, participating in the regular education environment. The attendance of required IEP team members is excused if the parent and the school district consent in writing, and the IEP team member provides input in writing to the IEP team prior to the meeting.

7. District stipulated that it did not provide a general education teacher at Student's IEP team meetings on May 22, and July 19, 2012. District further stipulated that the absence of a general education teacher significantly impeded Parent's right to participate the decision making process and denied Student a FAPE for the May 22 and July 19, 2012 IEPs. Therefore, District failed to offer Student a FAPE for the May 22 and July 19, 2012 IEP's for the 2012-2013 school year, and further analysis is unnecessary. The remaining issue addressing the lack of attendance of a general education teacher is for the September 16, 2011, IEP team meeting.

#### September 16, 2011 IEP Team Meeting

8. Student began the 2011-2012 school year in an Early Start preschool class taught by Ms. Vicki Wanken.<sup>8</sup> Ms. Wanken taught Student for a total of 19 days, in August and September 2011. Ms. Wanken's class was in the morning with a total of seven students and two part time aides. Student subsequently transferred to an afternoon Early Start class that was a smaller class size to address the staff's concerns

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<sup>8</sup> Ms. Wanken began her duties as ECE preschool teacher in the fall 2011. Before coming to ECE, she taught at a Montessori school for two years. Ms. Wanken has a bachelor's degree in child development and a master's degree in education. She has teaching credentials in Illinois and California in early intervention, early childhood, elementary special education and general education.

over Student's behaviors and to make it easier to coordinate Student's attendance at the Head Start program, which was also in the afternoon.

9. Student was excitable, accidentally hitting others. She lacked the manual dexterity and control to use scissors to cut a straight line. Student also needed the assistance of an adult play partner to assist minimizing or controlling her movements on the playground so that she did not throw sand or otherwise injure other students.<sup>9</sup> Student could mimic peers and work with teaching aids, such as Play-Doh, for up to 15 minutes.

10. Starting in August 23, 2011, Student attended Ms. Margaret Pavese's afternoon Head Start class.<sup>10</sup> Student attended the afternoon session from 3:00 p.m. to 4:30 p.m. There were 17 students in the class, 16 were general education students. Student was the only student with special needs. Their ages ranged from three to five years old. Ms. Pavese had one TA.

11. Student needed significant redirection due to her short attention span. Ms. Pavese tried to include Student in small group activity with three or four students.

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<sup>9</sup> The term "play partner" does not refer to a designated aide or teaching assistant (TA). There is no specific training and any responsible adult can assist on the playground as a play partner.

<sup>10</sup> Ms. Pavese has a total of 15 years of experience at Head Start, as an aide for five years and a teacher for 10 years. Ms. Pavese has a bachelor's degree in early childhood development. She teaches students with ages two years and nine months to five-and-a-half years old. Ms. Pavese has a credential in early childhood education and certified to teach general education preschool. Ms. Pavese has no experience working with children with Down Syndrome in the classroom environment.



Student continued to show a short attention span. Student also showed a lack of self-control or self-regulation. Student would squeeze and push other students, mimicking at preschool the rough play she had with her brothers at home. Her classmates did not like the rough play and Ms. Pavese felt this was a safety concern. Student showed limited interaction with her classmates. She could say "hi" to others and actively joined in class activities, but tended to engage in parallel play without responding or interacting to the other students.

12. Student's vocabulary was limited to simple words, such as "yes," "no," or "please." Student used one-word sentences. Student needed help buttoning and unbuttoning clothing. Student could hold a pencil. She also required assisted bathroom visits and liked to play in the toilet.

13. Student required, but did not have, an individual aide in the Head Start class, although Mother came occasionally to act as an aide. Ms. Pavese visited Student's home as part of the Head Start program and saw Parent when she picked up Student from class. Ms. Pavese also reviewed and developed Student's goals with Parent in the areas of cooperative play, friendship, and keeping hands to herself.

14. Student did benefit from attending Ms. Pavese's Head Start class. The other children accepted her and tried to include her in their activities. Student was happy and smiled, and enjoyed doing finger plays.<sup>11</sup>

15. On or about September 16 or 17, 2011, Ms. Wanken and Ms. Pavese, met with other Head Start and COE staff to discuss their concerns over Student's progress and behavior. This was not an IEP team meeting. The Early Start teachers thought Student might be better served if attending a smaller class to address her impulsiveness,

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<sup>11</sup> "Finger play" is an activity where the teacher and students sing a song or tell a story with associated finger or hand gestures to illustrate what the characters are doing

lack of self-control and regulation, and distractibility. Student required lots of redirection. Student was excitable (would hit accidentally), and had unwelcomed contact with younger children (would wipe their noses, etc.).

16. The group considered moving Student to the afternoon Early Start class taught by Ms. Maria Filis from 12:30 p.m. to 3:00 p.m. Subsequently, Ms. Filis volunteered to assist Student transition to Head Start from 3:00 p.m. to 3:30 p.m. Ms. Filis would assist Student as an aide for three weeks to facilitate Student's inclusion at Head Start, then fade out and increase her Head Start time.

17. On September 16, 2011, the IEP team met to discuss Student's progress and placement in Head Start and Early Start. The team meeting notes show that Lorna Gilbert (COE special education director), Ms. Filis (special education teacher), Margarita Carrillo-Gaitan (Head Start supervisor),<sup>12</sup> the speech and language therapist, and Parent attended the meeting. Credible testimony from Ms. Carrillo-Gaitan and Ms. Pavese established that Ms. Pavese attended the IEP team meeting as a general education teacher. Ms. Carrillo-Gaitan excused Ms. Pavese to return to her class before the team signed the meeting notes so the notes do not reflect her signature. Ms. Wanken does not recall if she attended the IEP team meeting and she also did not sign the IEP, but credible testimony from Ms. Pavese established that Ms. Wanken was also present during the meeting.

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<sup>12</sup> Ms. Carrillo-Gaitan is the Head Start supervisor of preschool sites with 16 years total experience. Ms. Carrillo-Gaitan has a bachelor's degree in child development and master's degree in early childhood intervention. She is credentialed in child development, teaches preschool kids, and supervises classrooms and staff. Ms. Carrillo-Gaitan taught at Hollister migrant preschool as a teacher's assistant. She teaches prekindergarten when covering for staff absences a few times a year.

18. Ms. Pavese reported that she and her aide were doing lots of redirection and supervision and that Ms. Pavese felt as though she functioned as Student's individual aide. Ms. Pavese communicated her observations of Student's parallel play and use of simple one-word communications. Ms. Pavese opined that Student would do better coming to Head Start during their free choice period so Student could choose which activity to do since she had difficulty with more structured activities like story time.

19. The IEP team discussed placing Student in a smaller class, with more supervision, such as Ms. Filis's class. There was no discussion specifically about an individual aide or behavior plan, but Ms. Filis volunteered to act as a temporary aide to assist Student's inclusion with the general education Head Start program.

20. The team placed Student in Ms. Filis's afternoon Early Start class from 12:30 p.m. to 3:00 p.m. and in the Head Start program from 3:00 p.m. to 3:30 p.m. (accompanied by Ms. Filis). Student's participation in Head Start was reduced to 30 minutes, from one-and-a-half hours, with the intent that Ms. Filis's assistance would fade as Student's time in Head Start increased. Student attended class from Tuesday through Friday. Parent participated in the IEP team meeting and agreed with the placement.

21. With regard to the September 16, 2011 IEP team meeting, the evidence discussed above established that Ms. Pavese attended the meeting as a general education teacher and provided sufficient input to the IEP team so that Parent meaningfully participated in the decision making process. Accordingly, District did not commit a procedural violation of the IDEA and Parent was not denied the right to meaningfully participate in the development of Student's educational program.

May 22 and July 19, 2012 IEP Team Meetings

22. The May 22, 2012 IEP team meeting was held to discuss Student's

transition to kindergarten and placement in extended school year (ESY). ESY ran from June 6, 2012 to July 3, 2012. The July 19, 2012 IEP team meeting was held to discuss Student's placement for the 2012 -2013 school year.

23. In Issue a), Student contends that the District denied Student a FAPE by failing to have a general education teacher at the IEP team meetings on May 22 and July 19, 2012. In light of District's stipulation and the factual finding that District denied Student a FAPE because District did not provide a general education teacher at Student's IEP team meetings on May 22, and July 19, 2012, and that the absence of a general education teacher significantly impeded Parent's right to participate the decision making process, this Decision need not reach the issue of whether the District's offers were substantively appropriate.

#### DETERMINATION OF LRE

24. Student contends that District's offer of placement at the May 22 and July 19, 2012 IEP team meetings failed to provide Student a FAPE in the LRE. Because the prior factual findings establish that the May 22 and July 19, 2012 IEP's denied Student a FAPE, this Decision need not reach the issue of whether the District's offers from these IEP's were substantively appropriate. Therefore, further analysis of these IEP's and the LRE is unnecessary.

#### OT SERVICES

25. Student's motor skills are delayed due to Down Syndrome. Her gross motor skills are close to grade level and she has good strength to be able to walk on a balance beam, for example. Student has deficits in her fine motor skills in areas such as cutting with scissors, pencil grasp, and tracing.

OT services from August 2010 through July 2011

26. The IEP team met on May 17, 2010, and offered Student group OT consultation for 30 minutes per week. Parent participated in the IEP team meeting, but did not consent to the OT services. The IEP team met again on September 27, 2010, to discuss Parent's request for individual OT in addition to the group OT consultation. Parent agreed to group OT consultation for 30 minutes per week. This is the level of OT service provided to Student to date. District contends that based on Student's needs and her progress, its offer of OT service met Student's needs to make meaningful educational progress. Student contends that District offered group OT in addition to consultation. Credible testimony and the evidence established that the level of OT service offered and provided to Student has been on a consultation model.

27. Karen Yinger, District occupational therapist, attended the May 17, 2010 IEP team meeting and recommended the OT as part of the in class consultation.<sup>13</sup> Ms.

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<sup>13</sup> Ms. Yinger is an occupational therapist for District. She has a bachelor's degree in occupational therapy and a master's degree in special education/learning handicapped. Ms. Yinger retired from teaching special education and is working as an occupational therapist in schools as an independent contractor. Ms. Yinger taught special education for 23 years from preschool to high school level and holds a current credential to teach special education. Ms. Yinger met Student in 2009 and conducted an OT assessment in May 2010 when Student was three years old. Ms. Yinger has been an occupational therapist since 1976, but did not do OT when she was teaching special education for 23 years. Ms. Yinger has worked with at least 50 OT students and worked with Student since 2009. Ms. Yinger was Student's primary OT for 2011-2012. Ms. Yinger is an experienced occupational therapist, familiar with Student's needs and public school programs, and was a credible witness.

Yinger did not recommend pullout direct occupational therapy, but recommended consulting in a small group setting as part of the class activity for 30 minutes a week. Consultation means that OT is done as a demonstration (or modeling) with the teacher, aides, and students, so teacher and aides can incorporate into the school activities or provide later. Student's consultation started at 30 minutes, but Ms. Yinger can do more if needed, but not less. Student does not need less OT. If the teacher needs to talk to Ms. Yinger, she still provides services for 30 minutes.

28. Ms. Kishimura, occupational therapist at Children's Therapy Center, opined that Student should receive three 50-minute individual OT sessions per week.<sup>14</sup> Ms. Kishimura's testimony was also credible. Ms. Kishimura provided Student direct individual OT twice a week for 50 minutes each from January to March 2012. However, District's more credible evidence established that Student did not need direct OT services since the preschool program incorporated development of fine motor skills. Developing fine motor skills are incorporated into the preschool program and it is undesirable for Student to miss more class time with pull out direct OT. The consultation OT was provided in small groups of three to four students, using the TA's to assist working with students. Student does not need direct OT to progress and Student did much better with her peers when the OT was a class activity and the OT was more effective when the teacher and aides were present. Examples of activities where consultation OT is done in a class setting include rolling on the blanket, walking a balance beam, cutting, drawing, and painting.

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<sup>14</sup> Ms. Kishimura has a bachelor's degree in psychology and a master's degree in occupational therapy. Ms. Kishimura has been a clinical pediatric occupational therapist at the CTC since 2011.

29. The evidence established that District's educationally focused OT enables Student to access her education. In other words, District's OT specifically addresses helping students access their education. Outside of school, OT applies in a broader purpose. Clinical or medical-based OT is much broader, with more goals. Student attempted to demonstrate that the clinical or medical-based OT model shows her true OT needs to access her education. However, the clinical model may not be the most appropriate for a school environment. Educationally focused OT is tailored for a student to access her education. Educational OT focuses on what Student is doing in natural setting to accomplish tasks in school. Clinical or medical-based OT addresses symptoms and done with direct, individual OT to address muscle strength and tone in relation to the specific medical symptoms. School-based education OT is more collaborative, using strategies and roles for teachers and aides, done in a more natural setting such as a classroom, with practical classroom applications.

30. Student did not establish that she did not make meaningful progress nor failed to meet her OT goals with consultation delivery model. Student could hold scissors correctly, cutting forward when she could not do this before. Student made significant progress holding markers because of her stubby fingers. The evidence showed that Student is making progress with her OT services. Therefore, Student did not prove that the District's OT offer denied her a FAPE.

#### OT Services from August 2012 to the Present

31. This period is covered by the May 22, 2012 and July 19, 2012 IEP's that denied Student a FAPE. Because the prior factual findings establish that these IEP's denied Student a FAPE, this Decision need not reach the issue of whether the District's offers for OT services during this period were substantively appropriate. Therefore, further analysis of OT during this period is unnecessary.

## REMEDIES

32. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing based on the individual student's needs.

33. Student requests that District provide Student with a full inclusion placement with appropriate supplementary aids and services and compensatory education, including individual intensive instruction in core academic areas. District contends that the period of FAPE denial caused by the lack of a general education teacher is from the time Student reported to school on September 4, 2012 until the IEP team meeting on September 25, 2012, or 16 school days. District contends that the attendance of a general education teacher at the September 25, 2012 IEP team meeting cured the procedural defect that began with the May 22 and July 19, 2012 IEP's.

34. However, the evidence shows that the FAPE denial from the May 22, 2012 IEP also includes District's offer of ESY from June 6, 2012 to July 3, 2012, or 20 school days. The FAPE denial from the July 19, 2012 IEP team meeting ran from the time school started on August 20, 2012 until the IEP team meeting on September 25, 2012, which cured the procedural defect. The period for the FAPE denial from August 20, 2012 to September 25, 2012 is approximately five weeks, or 26 school days. Therefore, the total period covered by the denial of FAPE from the May 22 and July 19, 2012 IEP's is 46 school days.



## Full-Time Inclusion in General Education

35. Credible testimony from Maria Filis,<sup>15</sup> Karen Lopes,<sup>16</sup> Ms. Selsor, and Kristine Damn<sup>17</sup> established that Student does not belong in a full-time inclusion

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<sup>15</sup> Maria Filis is a COE special education teacher at the ECE Early Start program. Ms. Filis has a bachelor's degree in biology and a master's degree in teaching. Ms. Filis holds a California teaching credential for children from birth to five years old with developmental delays. From 2006 through 2010, Ms. Filis taught a kindergarten through second grade autism class in the New York City public school system. She also taught early intervention from 2009 to 2010. From 2010 through 2011, Ms. Filis taught a moderate-to-severe SDC for kindergarten through second grade students at Soledad Unified School District. Ms. Filis came to COE in 2011 and worked in the preschool home environment program for special education at the ECE. Ms. Filis was a credible witness and her testimony has considerable weight.

<sup>16</sup> Karen Lopes is in her third year as District's special education director. Ms. Lopes also spent one year as the special education coordinator. Ms. Lopes has a bachelor's degree in liberal arts and a master's degree in special education. Ms. Lopes currently has a multiple subject teaching credential, a special education credential, a resource specialist program (RSP) certificate, and an early childhood education certificate. Ms. Lopes taught six years kindergarten in San Jose, was an RSP teacher for kindergarten through second grade, and taught five years at District's general education kindergarten. Ms. Lopes spent seven years developing inclusion models for grades four through eight. Ms. Lopes oversees eight school sites, with 560 IEP students. Ms. Lopes was a credible witness.

<sup>17</sup> Ms. Damn is a District general education kindergarten teacher.

general education class, but would derive social benefit from spending a portion of her school day in a general education class. Student requires the support of a SDC. Her academic needs require significant repetition of instructions and considerable adaptation of text. Student's language deficits include delayed articulation, making her hard to understand. Her IQ is 62, in the intellectually disabled range, and her cognitive abilities are significantly delayed. Student has difficulty grasping concepts that three to five-year-old children can, and fails to recognize physical boundaries. District knew Student had attended a private general education preschool summer session, but determined full-time placement in general education was not appropriate for Student.<sup>18</sup>

36. District would not be able to modify a general education kindergarten curriculum to the level where Student could obtain a benefit. District could not alter the curriculum, for example, from three or four word sentences to two or three word sentences so she can keep pace. Student cannot follow the pace of a regular kindergarten general education class as the pace is too fast. Kindergarten students have already started to read and perform basic addition and subtraction. They know sight words. By contrast, Student is unable to recognize all the letters in her name, and can only do simple shapes and numbers.

37. A full-time general education kindergarten class with a modified curriculum changes to such an extent that Student would no longer be a part of the class. She would, in essence, be isolated from her classmate with an alternate curriculum

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<sup>18</sup> Student attended Little Baylor preschool during its 2012 summer session. The preschool class had 12 general education students. The Little Baylor director was not Student's teacher and had little experience with public school curriculum. The director lacked knowledge of Student and relevant public school programs and her testimony weighed accordingly.

so there would be no benefit having her in a full-time general education class with the modifications. Even with an aide, full-time general education inclusion would still have no benefit for Student if she required a separate class within the class. Student's progress also does not depend on an individual aide. Student needs require a visual and auditory environment that is quiet, decreasing visual and auditory stimuli. If in a general education class, 100 percent of the day, Student and her aide would have to work separately from the rest of the class to access her education and this is not meaningful inclusion. Student requires specialized instruction, and an aide alone cannot control the learning environment to suit her needs, especially since District's general kindergarten class has 30 students with one teacher.

38. The evidence showed that Student would receive a social or nonacademic benefit from inclusion with general education students. During Student's time at the ECE, she did receive a social benefit from inclusion with general education Head Start students. Student seemed happy and the other students accepted her and tried to include her in their activities. Student is very social in class and on the playground with general education students. Student would be able to model general education student behavior and language used by typical peers. District's evidence estimated that compensatory education for missing a general education teacher at the IEP team meeting would be met with one hour per day of social skills or extracurricular activity. Therefore, District will provide Student with 46 hours (one hour for each impacted school day) of social skills or extracurricular activities as compensatory education for missing a general education teacher at the IEP team meetings.

#### OT Services from August 2012 to the Present

39. The period from August 2012 to the present falls within the scope of the July 19, 2012 IEP which denied Student a FAPE. However, the evidence shows that District's OT during this period addressed Student's fine motor needs and Student is not

entitled to a remedy in the areas of OT. From August 2012 to the present, District continued to offer and provide Student with group OT consultation for 30 minutes per week. Student's current occupational therapist is Ms. Alma Nunez.<sup>19</sup> Ms. Nunez credibly established that Student continues to receive OT on a consultation model where she answers staff questions, makes recommendations, give tips, and modify tasks. Ms. Nunez identified Student's deficits in fine motor skills and sensory self-regulation.

40. Student met her scissoring goal for fine motor skills, but the OT continues to keep challenging her. Before she could not snip, attempt single shapes. She is at the pre-writing stage as she can trace vertically and horizontally. While she can trace her name, she cannot do a circle. Her strengthening exercises work on pinching, grasping. Before she could only pincher grasp a writing instrument, now she can do a three-finger grasp and her coloring has improved. Student can hold a pencil and is working on tracing her name. Student has scattered skills in the 28 through 58 month age range, averaging one year behind her peers. Student can access and navigate the playground, alternate steps on the balance beam without assistance, and jump and play.

41. Student has made progress in cutting, grasping, coloring, fine motor tracing control; sitting in a chair, tabletop tasks. She can do tabletop tasks, use

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<sup>19</sup> Ms. Nunez has been a District occupational therapist since August 2012 with seven and a half years working as an occupational therapist, six years with Morgan Hill Unified School District and as a clinical occupational therapist at Children's Therapy Center. Ms. Nunez has bachelor's degree in occupational therapy and is licensed by the national and California boards. She is licensed to provide OT in public schools and has seen approximately 500 students. Ms. Nunez has five students with Down Syndrome, one in kindergarten in addition to Student. Ms. Nunez was assigned to Student in September 2012 and was a credible witness.

playground equipment, climb stairs, and sit. The evidence established that the strategies used by the staff in consultation with the OT addressed Student's fine motor needs and Student is not entitled to a remedy in the areas of OT.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. 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 for the issues raised in this case.

### ELEMENTS OF A FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); 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(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require local education agencies to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 949-954.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination of whether a district has complied

with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.)

Second, there must be a determination of whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. The Ninth Circuit has endorsed the "snapshot" rule, explaining that ". . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031 (*Fuhrman*), 1041).)

5. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student's parent preferred another program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2006010204.)

#### CONSEQUENCES OF PROCEDURAL VIOLATIONS

6. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. 176, 205-206.) However, a procedural error does not automatically require a finding of a FAPE denial. A procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation

of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479 (*Target Range*), 1484.)

#### REQUIRED MEMBERS OF AN IEP TEAM

7. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subs. (b)(1), (5-6).)

8. The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil, and supplementary aids and services and program modifications or supports. (20 U.S.C. § 1414(d)(2)(C).)

9. The attendance of required IEP team members is excused if the parent and the school district consent in writing, and the IEP team member submit input in writing to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C).)

#### PARENTS' RIGHT TO PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS

10. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a

student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

11. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1484.); *Fuhrman supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrman, supra*, at p. 1036.)

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO HAVE A GENERAL EDUCATION TEACHER AT THE IEP TEAM MEETINGS ON SEPTEMBER 16, 2011, AND MAY 22 AND JULY 19, 2012?

12. In accordance with Factual Findings 8 through 21 and Legal Conclusions 7 through 11, the evidence established that a general education teacher attended and provided sufficient input at the September 16, 2011 IEP team meeting. Accordingly, Student was not denied a FAPE with regard to the September 16, 2011 IEP team meeting. With regard to the May 22 and July 19, 2012 IEP team meeting, Factual Finding 7 and Legal Conclusions 1 through 11 establish that District committed a procedural violation that denied Student a FAPE by significantly impeding upon Parents' opportunity to participate in the decision making process when it failed to include a general education teacher at the May 22 and July 19, 2012 IEP team meetings. The lack of a general education teacher on the IEP team meant that the team did not adequately



consider a general education placement, which meant the team was unable fully to consider placing Student in a general education setting with services and supports.

DOES THE DISTRICT'S OFFER OF PLACEMENT AT THE MAY 22 AND JULY 19, 2012 IEP TEAM MEETINGS PROVIDE STUDENT A FAPE IN THE LRE?

13. Pursuant to Factual Findings 7, 22, 23, and 24, and Legal Conclusions 2 through 6, District denied Parent participation in the decision making process by failing to have a general education teacher attend the IEP's. As previously discussed, District's offer of placement following the May 22 and July 19, 2012 IEP team meetings failed to provide Student a FAPE and the issue of LRE is not addressed.

DID THE DISTRICT DENY STUDENT A FAPE FROM AUGUST 2010 TO JULY 2011 AND FROM AUGUST 2012 TO THE PRESENT BY FAILING TO PROVIDE HER ADEQUATE OT SERVICES?

OT from August 2010 to July 2011

14. In accordance with Factual Findings 25 through 30, District's May 27, 2010 IEP offered Student group OT consultation for 30 minutes a week. Parent agreed to the group OT consultation for 30 minutes per week. The evidence established that the level of OT offered and provided to Student has been on a consultation model and not a direct service. In accordance with Legal Conclusions 2 through 5, District's OT consultation was sufficient for Student to access her education and make meaningful progress. Student failed to establish why the offered and provided OT did not meet her needs and denied her a FAPE.

OT from August 2012 to the Present

15. Pursuant to Factual Finding 31 and Legal Conclusion 13, the OT during this period is included in District offer of placement and services following the May 22 and July 19, 2012 IEP team meetings that denied Student a FAPE.

## RELIEF

16. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).

17. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*) (citing *Puyallup, supra*, 31 F.3d at p. 1496).) An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) The award may consist of additionally training for special education staff. (See *Park, supra*, 464 F.3d at p. 1034.)

18. District did not provide a general education teacher at Student's IEP team meetings on May 22 and July 19, 2012. The absence of a general education teacher significantly impeded Parent's right to participate the decision making process and denied Student a FAPE for the May 22 and July 19, 2012 IEPs. Therefore, District failed to offer Student a FAPE in the May 22 and July 19, 2012 IEP's.

19. As indicated in Factual Findings 33 and 34, the period for the FAPE denial includes ESY from June 6 to July 3, 2012, or 20 school days. The period for the FAPE denial also runs from the time school began on August 20, 2012, until the next IEP team

meeting on September 25, 2012, a period of approximately five weeks, or 26 school days. The total number of days impacted by the FAPE denial is 46 school days.

20. Student failed to attend school until September 4, 2012. However, Parent was reasonably uncertain where Student's placement would be and kept Student out of school for this period. Factual Findings 38 through 38 and Legal Conclusion 19 show that it is appropriate that the relief for District's failure to provide a FAPE address Student's general education inclusion opportunities. Accordingly, 46 hours (one hour for each impacted school day) of social skills, or extracurricular activities, would be appropriate compensatory education.

## ORDER

1. District shall provide Student with 46 hours of social skills training or extracurricular activities, whichever Student prefers. District shall provide Parents with a list of at least three individuals or agencies that have adequate experience and training providing such services, one of which may be a district employee, and Parents may choose from the list. Student may use the 46 hours during the 2012-2013 school year or the 2013-2014 school year.

2. All other requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issue a) with respect to the September 16, 2011 IEP team meeting. Student prevailed on Issue a) as to the May 22 and July 19, 2012 IEP team meetings. Neither party prevailed on Issue b) as this Decision need not address whether the District's offers were substantively appropriate. District prevailed on Issue c) with respect to OT from August 2010 to July 2011. Student prevailed on Issue c) with respect to OT

from August 2012 to the present.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 16, 2013

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*/s/*

TROY K. TAIRA

Administrative Law Judge

Office of Administrative Hearings