

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of :

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

Respondent.

Case No. N 2005080927

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In the Matter of:

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

Case No. N 2006030578

DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on April 19, 20, and 21, 2006, in Los Angeles, California.

Student was represented by Mark Y. Thacker, Esq., and Areva D. Martin, Esq., of the law firm of Martin & Martin LLP. Student's Mother was also present at the hearing.

Los Angeles Unified School District (District) was represented by Donald A. Erwin, Assistant General Counsel. Also present for the District were Harriet Watson, due process specialist, and Lee Weiss, due process specialist.

## PROCEDURAL HISTORY

On June 6, 2005, Student filed a request for due process with the Special Education Hearing Office (SEHO).<sup>1</sup> On June 9, 2005, at the request of the parties, SEHO took the matter off calendar. The matter was continued on several occasions. On March 3, 2006, OAH issued an order setting the hearing in Student's case for April 19-21, 2006.

On March 15, 2006, the District filed with OAH a request for due process and a motion to consolidate the District's case with Student's case. Student did not oppose the motion to consolidate. On March 27, 2006, OAH issued an order granting the District's motion to consolidate and setting the two matters for hearing on April 19-21, 2006.

At the conclusion of the hearing on April 21, 2006, the matter was continued and the record held open for the parties to file written closing briefs by May 5, 2006. Student's brief was timely received and marked for identification as Exhibit P-12. The District's brief was timely received and marked for identification as Exhibit 6. The record was closed on May 5, 2006.

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<sup>1</sup> McGeorge School of Law's SEHO had responsibility for these matters until OAH took over on July 1, 2005.

## ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) for the 2005-2006 school year by recommending to discontinue Student's occupational therapy (OT) services?<sup>2</sup>
2. Is the District required to reimburse Student's parents for the independent OT assessment they obtained?<sup>3</sup>

## CONTENTIONS OF THE PARTIES

The issues in this case arise solely from the District's recommendation in the November 3, 2005, IEP to discontinue Student's OT services (60 minutes per month). There is no dispute regarding the other services offered in the November 3, 2005, IEP for adaptive physical education (275 minutes/week), language and speech (60 minutes/month), least restrictive environment counseling (10 minutes/month), and physical therapy (PT) (60 minutes/month).

In this case, Student seeks to retain his 60 minutes per month of OT services provided by the District. Student contends that continued OT services are required to

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<sup>2</sup> Student's request for due process filed on June 6, 2005 alleged occupational therapy and physical therapy as the areas in dispute. However, at the due process hearing, occupational therapy was the only remaining disputed area.

<sup>3</sup> The sole issue stated in the District's request for due process filed on March 15, 2006 is "Whether the District should be compelled to complete an Independent Educational Evaluation ("IEE") requested by [Student's] parent after the District has previously conducted an [sic] Occupational and Physical Therapy Assessments on November 2, 2005 & November 3, 2005, respectively." However, subsequent to the filing of the District's due process request but before the start of the due process hearing, Student's parents obtained an independent OT assessment.

address three areas of concern raised by Mother, namely, Student's ability to be more independent in donning and doffing his jacket or coat, opening condiment packets at lunch time, and toileting. In addition, Student's parents seek reimbursement from the District for the independent OT assessment they obtained because they disagreed with the District's assessment that recommended discontinuing Student's OT services.

The District filed its own request for due process hearing. The District contends the OT assessment by the District's occupational therapist was appropriate, and Student's parents are not entitled to reimbursement for their independent OT assessment.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is a 14-year-old eighth grader at John Burroughs Middle School. He has a medical diagnosis of cerebral palsy and spastic diplegia.<sup>4</sup> Student is presently eligible for special education and related services in the categories of orthopedic impairment (OI) and speech or language impairment (SLI). Student attends an OI special day class, and receives related services including adaptive physical education, language and speech, school-based OT, and school-based PT. Student has two additional adult

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<sup>4</sup> According to the testimony of Thomas J. Grogan, M.D., cerebral palsy is a static lesion involving the brain. It changes the tone of musculature such that many patients have difficulty coordinating movements because, in essence, the brain does not communicate directly or as well to the musculature. The problem is usually worse in the lower extremities than the upper extremities, as it is with Student. Dr. Grogan described spastic diplegia "as going under the basket of terms of cerebral palsy," and is essentially a "wiring problem" between Student's brain and his limbs. *See also* Cal. Code Regs., tit. 2, § 60300(j)(1) ("cerebral palsy" is defined in pertinent part as "a nonprogressive motor disorder with onset in early childhood resulting from a lesion in the brain").

assistants (AAAs) who are directly assigned to assist him throughout his school day. In addition, Student has various adaptive equipment to help him access his school curriculum including a motorized scooter, walker, stander<sup>5</sup>, laptop computer, and printer.

2. Student's special day class is taught by Teri McKneely-Chatman, a special education teacher. Ms. Chatman has been Student's teacher for two and one-half years. Ms. Chatman's special day class is for sixth, seventh, and eighth graders, and presently has 14 pupils and two adult assistants to assist her in the classroom. Ms. Chatman is Student's teacher for all subjects, except when Student is mainstreamed for history class. In his 2005 fall semester report card, Student received two grades of "B" and two grades of "C" in the four classes taught by Ms. Chatman, a "B" in adaptive physical education, and an "A" in history. Student uses a laptop computer to complete classroom assignments and homework. He types on the computer keyboard using his left index finger, and may use one finger on his right hand for typing capitalizations. Student can copy questions from a paper onto his computer. Student can set up his laptop, open programs, retrieve and save files, print documents, and shut down the computer. Student is described as an engaging young man who is well liked by his peers and interacts well with his classmates.

#### NOVEMBER 3, 2005, IEP

3. On November 3, 2005, the District convened an IEP meeting to conduct a three-year review of Student's individualized education program (IEP). The IEP team discussed all aspects of Student's IEP, including OT, PT, adaptive physical education, academics, and speech. Mother was present and participated in this meeting, which lasted approximately five hours. The District's representatives present at the meeting included

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<sup>5</sup> A stander is a piece of equipment that moves Student from a sitting position to a standing position and maintains him in an upright standing position.

Ms. Chatman, occupational therapist Gail Klein, physical therapist Vicky McCree, and senior occupational therapist Lindsay Astor.

#### OT ASSESSMENT BY GAIL KLEIN

4. Gail Klein, an occupational therapist for the District, conducted an OT assessment of Student on October 20 and 21, 2005. Ms. Klein prepared a written assessment report dated November 2, 2005. The purpose of the assessment was to determine whether Student continued to require school-based OT to access his classroom curriculum. Ms. Klein presented the results of her assessment at the November 3, 2005, IEP meeting.

5. Ms. Klein is licensed as an occupational therapist in the State of California. She received her master's degree in health science/OT in 1995. In addition, Ms. Klein has an advanced certification for intervention and treatment of swallowing, and is certified in neurodevelopmental treatment (NDT). Ms. Klein has been a school occupational therapist for the District since July 2000, and has worked with special education students with a wide range of disabilities, including cerebral palsy, orthopedic impairment, and autism. Ms. Klein has participated in numerous IEPs and is experienced in writing goals and objectives and conducting OT assessments. Prior to her employment with the District, Ms. Klein worked as an occupational therapist at Cedars-Sinai Medical Center for approximately five years.

6. Ms. Klein first met Student on September 16, 2005. Prior to her assessment of Student, Ms. Klein worked with Student in three separate sessions on September 16 and 30, 2005 and in October 2005.

7. Ms. Klein used the "ecological model" to conduct her assessment of Student, which incorporates a pupil's ability with the school environment and curriculum. Pupils are assessed in their natural setting (i.e., their classroom) to see how they function in class. For Student's assessment, Ms. Klein directly observed Student in his school setting

(i.e., his classroom, the cafeteria, and school campus) as well as in a one-to-one clinical setting. Prior to the assessment, she spoke with Mother, Ms. Chatman, Student's AAAs (David Garza and John Olivas), and Angela Rosenstock, Student's previous occupational therapist. Mother told Ms. Klein about her concern regarding Student's ability to independently open condiment packets at lunch time. Ms. Klein also reviewed Student's school records, including prior IEPs and OT records.

8. During the assessment, Ms. Klein observed Student in his actual classroom and school setting. Ms. Klein found that Student's skills in the following OT areas were at functional levels: (1) upper extremity strength and range of motion (for reaching for and picking up school items from his desk and in the cafeteria); (2) postural stability (for maintaining an upright posture at his desk and on a cafeteria bench); (3) visual perceptual skills (for scanning his computer key board when typing and correctly copying from a paper onto his computer); (4) fine motor skills (for finger isolation when typing and grasping a crayon or marker, and picking up small items); (5) visual motor skills (for using a highlighter marker, typing, and cutting on a line with adaptive scissors); (6) sensory processing (for handling transitions and maintaining his attention in class); and (7) motor planning (for driving his scooter around campus). Ms. Klein concluded that Student's functional level of skills allowed him to access his educational curriculum and environment.

9. Student has received OT services since 1997 when he started kindergarten. He currently receives OT services of 60 minutes per month from Ms. Klein pursuant to his last agreed upon IEP. Ms. Klein worked with Student on the two OT goals from that IEP. One of the OT goals is that Student will plan, organize, and retrieve class work from his laptop and folders. Ms. Klein found that Student has fully met this goal. The other OT goal is that Student will, with assistive technology, independently output a paragraph with correct punctuation and take notes from the board to the pace of his peers. Ms. Klein found that Student has partially met this goal. He can independently output a paragraph with correct punctuation, but he takes notes from the board at two-thirds the speed of his

peers. However, the note taking aspect of this goal was addressed by the teacher allowing Student extra time to complete his work. With that accommodation, Ms. Klein found that Student is able to complete the work within the class period without fatigue. Student takes notes at a slower pace than his peers because he is typing on a computer whereas the other students are writing by hand.

10. Based on her OT assessment of Student, Ms. Klein concluded that Student no longer needs school-based OT services and recommended that Student's OT services of 60 minutes per month should be discontinued.

11. Generally, under the District's guidelines, a pupil will no longer receive OT services when it is determined the pupil possesses the underlying component of OT skills (e.g., fine motor skills, visual motor skills, perceptual skills, sensory processing skills, and motor planning skills) that would enable them to perform certain tasks. A pupil may be dismissed from OT services if the pupil's school-based OT needs do not require the skilled expertise of an occupational therapist to support the pupil or those needs can be met through modifications, accommodations, or another IEP team member. The District's guidelines for termination of OT services are the same as the California Department of Education's guidelines.

#### MOTHER'S CONCERNS

12. At the November 3rd IEP meeting, Mother expressed concern that her son has new needs that should be addressed with OT services. The new OT needs identified by Mother relate to opening condiment packets, donning and doffing a jacket, and zipping and unzipping pants for toileting. Mother requested that the IEP include OT goals to address these needs to further develop Student's independence and prepare him for the future.

13. The IEP team discussed and considered Mother's concern about Student's ability to don and doff his jacket independently. The IEP team discussed making a specific



goal for donning and doffing a jacket. Gail Klein, the District's occupational therapist, suggested she could teach Student's teacher specific techniques for making it easier for Student to don and doff his jacket.<sup>6</sup> Mother expressed her belief that an occupational therapist, and not Student's teacher, should work with Student on this goal. However, Ms. Klein opined that, in this case, a goal to don and doff a jacket does not require an occupational therapist and could be implemented by Student's teacher and his AAAs under the teacher's supervision. Mother helps Student with donning and doffing his jacket when he is at home. As a school occupational therapist, Ms. Klein has seen special education teachers implement "related service" goals and objectives. Ms. Klein's opinion is that Student has the functional underlying skills to work on this goal, and he just needs someone to help practice and review the techniques with him, which his special education teacher is able to do.

14. Based on the discussion at the November 3rd meeting, the IEP team wrote a vocational goal for donning and doffing a jacket or coat. Ms. Chatman, Student's teacher, was designated the "responsible personnel" for this goal. In her experience working as a special education teacher, Ms. Chatman has previously shown pupils how to take their jackets on and off. Mother expressed concern that Ms. Chatman might not have

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<sup>6</sup> Hemi-paresis is an example of a technique that could be used for helping Student improve his ability to independently don and doff his jacket. Hemi-paresis is not an OT technique and does not require the expertise of an occupational therapist. Hemi-paresis is used in hospitals for patients such as stroke victims, individuals with cerebral palsy or other neurological disorders that render one side of the patient's body weaker than the other. Patients are taught to put an item of clothing on their body's weaker side first, and then use their stronger side to bring it around. Typically, patients are shown the technique on their day of discharge from the hospital and given written and pictorial descriptive handouts on how to do the technique, which they can refer to after they arrive home.

time to gather the information and resources regarding techniques to use in working with Student on this goal. To address this concern, the IEP team offered a total of 90 minutes of OT consultative services for the District's occupational therapist to train and consult with Ms. Chatman and Student's AAAs and provide them with handouts on techniques they could use with Student for donning and doffing his jacket.

15. At the November 3rd IEP meeting, Mother again raised the concern about Student's ability to independently open condiment packets at lunchtime, which she had previously discussed with Ms. Klein prior to her OT assessment in October 2005. Ms. Klein addressed this concern in her OT assessment and found that Student could open condiment packets, by himself, with the use of adaptive scissors. However, without adaptive equipment, Ms. Klein found that Student could not open condiment packets consistently. Student responded well to the adaptive scissors and liked using them. Ms. Klein recommended adaptive scissors as "additional equipment" for Student to help him with "cutting more independently during class projects and for opening some packets during lunch time." The IEP team recommended adaptive scissors as an adaptive strategy to address this second area of concern.

16. At the November 3rd IEP meeting, the IEP team discussed and considered Mother's third concern about Student's ability to zip his pants independently for toileting. In her OT assessment, Ms. Klein found that Student "requires assistance from his AAAs when toileting." Mother raised the issue of zipping pants at the IEP meeting because she wants her son to be able to use the restroom on his own. The IEP team concluded that "dynamic standing balance" was the underlying component inhibiting Student's ability to be as independent as possible when using the restroom. Dynamic standing balance is an area addressed in PT.

17. Vicki McCree, the District's physical therapist, conducted a PT assessment of Student on October 24, 2005. She prepared a written assessment report dated November 3, 2005 and participated in the November 3, 2005, IEP meeting. In her PT assessment, Ms.

McCree found that Student requires moderate assistance to transition from a sitting position to a standing position and for balance. When Student gets up from a toilet, he requires assistance in transferring because he does not do that movement smoothly and does not have the dynamic stability to do it by himself without holding onto something. Ms. McCree's opinion is that dynamic stability is an area of concern for Student. Dynamic stability refers to how Student gets around after he gets out of his chair. Student uses a walker or a scooter because he cannot stand independently, by himself. Because Student's dynamic standing is impaired, he needs assistance when transferring from a toilet seat or chair.

18. Based on the discussion at the November 3rd meeting, the IEP team recommended that Student's toileting issue should be addressed as a PT goal. The District's physical therapist, Ms. McCree, wrote a PT goal to address the underlying component of dynamic standing balance for toileting. Mother expressed concern that since the physical therapist is a woman (Ms. McCree), there may be privacy issues if she is to work with Student, a male, regarding toileting issues. Ms. McCree testified she could address Student's dynamic standing ability, and the sit-to-stand mechanism and transfers used in toileting, without having to be in the restroom with him and without having Student take off his clothes.

19. Student's AAAs assist him in the restroom, including zipping and unzipping his pants. According to David Garza, one of the AAAs, Student is able to zip and unzip his jacket and, in Student's most recent attempt, Student was able to fully unzip his pants but could only zip his pants half-way up. According to Mr. Garza's testimony, Student and his AAAs are usually standing up to zip his pants, and the difficulty is for Student to weightbear and zip his pants at the same time. According to Ms. Klein's testimony, she observed Student zip and unzip his sweatshirt on his own, and Mr. Garza told her that Student can zip and unzip his pants on his own.

## STATUS OF NOVEMBER 3, 2005, IEP

20. Mother did not sign the IEP at the November 3, 2005, meeting, but took it home to consider it. Eventually, Mother signed the IEP on or about November 23, 2005. The IEP indicates Mother "agrees with all areas all [sic] IEP except OT and High School Placement."<sup>7</sup> The IEP also includes the following comments from Mother: "I want my son to be along with his peers in relation to opening up condiments and not feeling bad because he can't. [¶] Toileting is an OT function and OT doesn't want to make it a goal." The November 3, 2005, IEP has not been implemented by the District because of this due process proceeding.

## OT ASSESSMENT BY AKEMI DAVIES

21. By letter dated February 21, 2006, Mother requested the District provide an independent OT assessment "at the District's expense." On March 15, 2006, the District filed its request for due process.

22. Akemi Davies is an occupational therapist employed by Holding Hands, a pediatric clinic for OT and other therapies. At the request of Student's counsel, Ms. Davies conducted an OT assessment of Student on April 13, 2006. The purpose of Ms. Davies' assessment was to evaluate Student's general OT needs. Student's parents paid \$350.00 for the OT assessment by Ms. Davies.

23. Ms. Davies received her bachelor's degree in OT in 2004 and her master's degree in OT in 2005. She has worked for Holding Hands for one and one-half years, and this is her first job as an occupational therapist.

24. For Student's assessment, Ms. Davies conducted a one hour clinical session with Student, during which time she observed Student, spoke with Mother who was

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<sup>7</sup> Mother's disagreement with the high school placement proposed in the November 3, 2005, IEP is not an issue presented for resolution in this case.

present for the session, and administered a standardized test, the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI). In addition, Ms. Davies reviewed Student's records, including the report of Ms. Klein's OT assessment, a pediatrician's report, and an IEP. Ms. Davies did not speak with Mother prior to the assessment except to set up the appointment. Ms. Davies did not observe Student in his educational setting nor did she speak with anyone from Student's school.

25. The VMI is a standardized test for design copying skills. Ms. Davies's opinion is that the VMI was "highly appropriate" for Student because it gives "the most information regarding Student's visual motor abilities, when looking at his fine motor skills." According to Ms. Davies's testimony, the VMI looks at how well a student can use both their eyes and dominant hand to work together "for writing purposes." The VMI took five to ten minutes out of the one hour clinical session to administer to Student. Ms. Davies found Student's scores on the VMI indicated his fine motor coordination and visual perceptual skills are significantly delayed. The District's occupational therapist, Ms. Klein, did not administer any standardized tests during her October 2005 assessment of Student. Ms. Klein's opinion is the VMI was not an appropriate test for Student because it does not address function. The VMI is a precursor for handwriting, and Student was functionally using his laptop computer for generating his writing output.

26. Ms. Davies reviewed the OT assessment report by Ms. Klein. Based on her one hour clinical observation of Student, Ms. Davies's opinion is that Student's skills were not as strong as indicated in Ms. Klein's report in the areas of fine motor skills, range of motion, and postural stability. Ms. Davies also testified she was concerned as to whether Student's speed of typing would allow him to keep up in class. However, Ms. Davies agrees that Student's laptop computer, as an adaptive tool, is an efficient method of written communication for him.

27. Ms. Davies found Student had "great difficulty" with fine motor skills, especially in the areas of trying to unbutton something or writing. Student was able to

type with one finger, but the spasticity in his hands did not allow full function of his fingers for fine movements. Student used Ms. Davies's laptop computer during the assessment, and was able to copy sentences from a distance and from a paper next to him onto the computer with "99 percent accuracy." Student was able to open pen caps and use adaptive squeeze scissors to cut across a four inch line. Ms. Davies did not observe Student donning and doffing his jacket, opening condiment packets, and zipping his pants for toileting. Based on her assessment of Student, Ms. Davies recommended one hour of clinical OT per week, for six months, at "a clinic that specializes in teaching clients how to use adaptive equipment for activities of daily living, such as opening and closing clothing fasteners and lunch packets/containers."

28. The findings of Ms. Davies's assessment were not as persuasive as those of Ms. Klein's assessment. Ms. Davies assessed Student during a one hour, clinical session and had not met Student prior to the assessment. Ms. Davies did not observe Student in his school setting nor speak with anyone at Student's school. On the other hand, Ms. Klein's assessment involved two days of direct observation of Student in his school setting, and she had also worked with Student on three occasions prior to the assessment. Prior to the assessment, Ms. Klein spoke with Mother, Ms. Chatman, and others at Student's school. Ms. Klein's assessment involved Student using the actual computer he uses at school whereas Ms. Davies assessed Student using a computer she provided but which was similar to the laptop computer Student uses in school.

29. Thomas J. Grogan, M.D., is an orthopedic surgeon with 20 years experience. He is not a certified occupational therapist nor has he worked as a school occupational therapist. He has not spoken to Student's school occupational therapists. Nor has he participated in any of Student's IEPs or written any goals in a school setting. Dr. Grogan does not know Student's current IEP goals nor has he observed Student in his educational setting.

30. Dr. Grogan has had Student under his care for the last eight to ten years, and sees Student every six months. Dr. Grogan last saw Student in October 2005. Dr. Grogan opined that Student's main issue with his lower extremities is ambulation. He is always going to be in a wheelchair and is going to have difficulty ambulating. In Dr. Grogan's opinion, Student's biggest issue regarding his upper extremities is coordination of his limbs and motions. Dr. Grogan has prescribed OT services to Student in the past which were provided outside of the school setting.

## LEGAL CONCLUSIONS

1. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code § 56000.) A FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge, that meet the State's educational standards, and that are provided in conformity with the child's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code § 56031.) "Related services" is defined, in pertinent part, as developmental, corrective, and other supportive services, including physical and occupational therapy, as may be required to assist a child with a disability to benefit from special education." (20 U.S.C. § 1401(29).)

2. In *Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court determined that a child's IEP must be reasonably calculated to provide the child with some educational benefit to satisfy the IDEA, but that the school district is not required to provide the child with the best education available or instruction and services that maximize the child's abilities. (*Id.* at 198-200.) The Court held that a school district is required to provide only a "basic floor of opportunity" consisting of access to specialized instruction and related services that are

individually designed to provide educational benefit to the child. (*Id.* at 201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

3. The analysis of whether a school district has provided a FAPE to a student is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Rowley, supra*, 458 U.S. at 206-207.)

4. The U.S. Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (Nov. 14, 2005, No. 04-698)\_\_\_\_U.S.\_\_\_\_, [126 S. Ct. 528, 2005 U.S. Lexis 8554].)

5. Special education and related services must be tailored to meet the unique needs of the child with a disability by means of an IEP. (*Polk v. Centra Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3rd Cir. 1988).) The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (20 U.S.C. § 1401(14) and § 1414(d)(1)(A); Ed. Code §§ 56032, 56345; *Honig v. Doe*, 484 U.S. 305, 311 (1988).)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Christopher S. v. Stanislaus County Off. of Education*, 384 F.3d 1205, 1212 (9th Cir. 2004).) "An IEP is a snapshot, not a retrospective." (*Adams, supra*, 195 F.3d at 1149, citing *Fuhrmann v. East Hanover Bd. of Education*, 993 F.2d 1031, 1041 (9th Cir. 1993).) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the



alternative preferred by the parents. (*Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).)

ISSUE NO. 1: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2005-2006 SCHOOL YEAR BY RECOMMENDING TO DISCONTINUE STUDENT'S OT SERVICES?

7. Under the IDEA, OT is a "related service." (20 U.S.C. § 1401(26)(A); Ed. Code § 56363.) As such, the District is required to provide Student with OT "as may be required to assist [Student] to benefit from special education." (*Id.*)

8. Based on factual findings 2 and 7-10, Student demonstrates functional OT skills to allow him to access and participate in his educational curriculum and environment. Student's grades for the 2005 fall semester indicate he is able to access and benefit from his special education program.

9. Based on factual findings 13-14, Mother's concern regarding donning and doffing of jackets was appropriately addressed in the November 3, 2005, IEP through a vocational PT goal under the direction of Ms. Chatman. Student has the functional underlying skills for this goal and, thus, does not require OT services to address this goal. Techniques to improve Student's ability to don and doff his jacket, such as hemi-paresis, do not require OT expertise and can be implemented by Student's teacher. Mother's testimony that she helps Student with donning and doffing his jacket at home further suggests that OT expertise is not required for this task. In Ms. Klein's experience as a school occupational therapist, she has seen special education teachers implement "related service" goals and objectives.

10. Based on factual finding 15, Mother's concern regarding opening condiment packets was appropriately addressed in the November 3, 2005, IEP through the inclusion of adaptive scissors as an adaptive strategy. The testimony of Ms. Klein and Mr. Garza established that Student can open condiment packets by himself when he uses adaptive scissors, and that Student likes using the adaptive scissors. The OT recommendation of Ms. Davies supports the use of adaptive scissors for this purpose. As

noted in factual finding 27, Ms. Davies recommends OT services for Student at a clinic that specializes in teaching clients how to use adaptive equipment (such as adaptive scissors) for daily living activities such as opening and closing lunch packets/containers. Mother contends if the other students are not using adaptive scissors to open their condiment packets, then Student should likewise be taught to open condiment packets without adaptive scissors. However, the IDEA does not require a school district to provide an education that maximizes a child's potential. (*Rowley, supra*, 458 U.S. at 197, 200; *Gregory K., supra*, 811 F.2d at 1314.)

11. Based on factual findings 16-19, the November 3, 2005, IEP appropriately addresses Mother's concern about toileting. Mother's primary concern is that she wants Student to be able to use the restroom on his own. The testimony of Ms. Klein, Ms. McCree and Mr. Garza established that, at this time, the overriding component inhibiting Student's ability to be as independent as possible in the restroom is his dynamic standing balance, which is an issue addressed in PT. For toileting, Student zips and unzips his pants while he and his AAAs are standing. Ms. McCree can work with Student on his PT issues regarding toileting without having to go into the bathroom with him and while Student is fully clothed.

12. Student contends the District must provide OT services to prepare him for "further education, employment and independent living." Student is mistaken because he relies on a statute (20 U.S.C. § 1400(d)) which states the purpose of IDEA. However, another statute (20 U.S.C. § 1401(26)) specifically defines the scope of "related services" such as OT. The District is only required to provide school-based OT "as may be required to assist [Student] to benefit from special education." (*Id.*) School-based OT is a supportive service to the special education program to assist a student to access the school environment and the school curriculum. The District has complied with its obligations under IDEA.

13. Accordingly, the District did not deny Student a FAPE for the 2005-2006 school year by recommending to discontinue his OT services.

**ISSUE NO. 2: IS THE DISTRICT REQUIRED TO REIMBURSE STUDENT'S PARENTS FOR THE INDEPENDENT OT ASSESSMENT THEY OBTAINED?**

14. Assessments must be conducted in accordance with assessment procedures specified in the federal IDEA and State special education law. (Ed. Code § 56381(e).) For example, tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible; and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.532, subd. (a), (c); Ed. Code § 56320, subd. (a), (b).) The assessors must use a variety of assessment tools and strategies to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum, that may assist in determining whether the child is a child with a disability and what the content of the child's IEP should be. (34 C.F.R. § 300.532(b).)

15. Moreover, assessment must be in all areas of suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.532, subd. (f), (g); Ed. Code § 56320 subd. (e), (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. Additionally, assessments must be conducted by individuals who are knowledgeable of the student's disability, and any

psychological assessment must be performed by a credentialed school psychologist. (Ed. Code §§ 56320(g) and 56324.)

16. When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an independent educational evaluation (IEE) from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code §§ 56329, subd. (b), (c), and 56506(c); 34 C.F.R. § 300.502.) If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either initiate a due process hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2).)

17. The District's OT assessment consisted of an evaluation by occupational therapist Gail Klein. Ms. Klein is an experienced school occupational therapist, and she is knowledgeable of Student's disability, having worked with Student in three 30 minute sessions prior the assessment. Ms. Klein conducted the assessment by observing Student in his educational setting and a one-on-one clinical setting, reviewing his records, and interviewing Mother and Ms. Chatman. Based upon her observations of Student, Ms. Klein was able to assess how Student functioned in all areas of need related to OT, and determined that Student could access his educational curriculum and environment.

18. Ms. Davies disputed Ms. Klein's findings regarding Student's fine motor skills, range of motion, and postural stability. As discussed in factual finding 28, the testimony of Ms. Davies is unpersuasive when compared to the testimony of Ms. Klein.

19. There was conflicting testimony on the appropriateness of administering the VMI to Student. Ms. Klein did not use the VMI in her assessment and Ms. Davies did. Ms. Klein's testimony on the appropriateness of the VMI was more persuasive than Ms. Davies testimony. Ms. Klein is more experienced as an occupational therapist than Ms. Davies. Ms. Davies testified the VMI assesses skills for "writing purposes." Since the VMI is

a precursor for handwriting, and Student was functionally using his laptop computer for generating his writing output, the VMI is not an appropriate assessment tool for Student.

20. Student contends that Ms. Klein's assessment is not reliable because, prior to the assessment, she saw Student on no more than three occasions, and did not speak with Student's "orthopedic doctors, private therapists or [Mother] about the occupational goals." This contention is not persuasive. As discussed in factual findings 7, 24, and 28, Student's own independent OT assessor, Ms. Davies spent less time and had less information than Ms. Klein in conducting her OT assessment of Student on April 13, 2006.

21. Ms. Klein's use of observation, interviews, and records review met the legal requirements to assess in all areas of need related to OT and was performed in accordance with applicable Education Code provisions recited above. Accordingly, the District's November 2, 2005 OT assessment was appropriate.

22. Because the District's OT assessment was appropriate, there is no legal basis for an award of reimbursement to Student's parents for the independent OT assessment by Ms. Davies.

#### DETERMINATION OF WITNESS CREDIBILITY

23. The District's primary witnesses for OT and PT, Ms. Klein and Ms. McCree, were knowledgeable regarding both educational requirements and Student's school-based OT and PT needs. Those witnesses offered credible testimony. In light of all the circumstances, when all relevant evidence was weighed and evaluated, those district witnesses were more credible due to their knowledge of relevant educational matters.

24. Student's primary witnesses, Ms. Davies and Dr. Grogan, were not as persuasive as the District's witnesses because of their minimal knowledge and/or experience regarding school-based OT and PT. Consequently, their testimony could not be given as much weight.

25. Mother's testimony was heartfelt. She wants the District to address her three areas of concern so that her son can be as independent and as much like the other students as possible. However, her preferences for addressing the three areas of concern do not necessarily correspond to the District's obligations under special education law. The District's obligation is not to maximize Student's potential, but only to provide a "basic floor of opportunity."

## ORDER

1. Based on legal conclusions 7-13, the District did not deny Student a FAPE for the 2005-2006 school year by recommending to discontinue Student's OT services. The Student's due process complaint is denied.
2. Based on legal conclusions 14-22, the District is not required to reimburse Student's parents for the independent OT assessment they obtained. The District's due process complaint is sustained.

## PREVAILING PARTY

3. 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. The District prevailed on all issues heard and decided.

## 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 days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

DATED: June 9, 2006

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ERLINDA G. SHRENGER

Administrative Law Judge

Special Education Division

Office of Administrative Hearings