

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
PARENTS on behalf of STUDENT,
v.
GARVEY SCHOOL DISTRICT.

OAH CASE NO. 2007100989

DECISION

Administrative Law Judge Christine L. Harwell, Office of Administrative Hearings (OAH), State of California, heard this matter in Rosemead, California, on May 28, 2008 through May 30, 2008.

Matthew M. Pope, Advocate, represented Petitioner (Student). Student's mother, (Mother) attended each day of the hearing.

James Meeker, Attorney at Law, represented Respondent, Garvey School District (District). Bonifacio B. Garcia, Attorney at Law, attended as second chair to Mr. Meeker.¹ Barbara Razo, Program Specialist (PS Razo) attended the hearing on all days on behalf of the District. Jerlene Hales, District Director of Special Education (DD Hales), attended on May 28 and May 29, 2008, on behalf of the District.

On October 30, 2007, Student filed a Due Process Hearing request (Complaint). Student's Motion to Continue the Due Process Hearing was granted for good cause on December 7, 2007.

On May 30, 2008, testimony was completed and the parties rested. The parties were granted permission to file written closing briefs on June 20, 2008. Briefs were

¹ Mr. Garcia was present; however, he did not participate in examination of witnesses or argument.

submitted and the record was closed on June 20, 2008.

ISSUES

1. Whether the District was required to provide Student an occupational therapist that was certified to conduct the Sensory Integration Praxis Test (SIPT) to conduct District's occupational therapy (OT) assessment of Student.
2. Whether the District denied Student a free and appropriate public education (FAPE) by failing to have the required Occupational Therapist (OTR) persons at the Individual Education Program (IEP) team meetings June 15, 2007 and June 22, 2007.
3. Whether the District is required to reimburse the Student's parents for an independent occupational therapy evaluation (OT-IEE) conducted on April 18, 2008 by Julie Driscoll, MA OTR/L.

FACTUAL FINDINGS

1. Student is a three-year, eleven-month old female with Down syndrome, who at all relevant times resided in the District. Student exhibits deficiencies in speech and language, fine and gross motor skills, sensory processing and has a history of epilepsy. Since she was one month, twenty-six days old, Student received services through the Eastern Los Angeles Regional Center (Regional Center). On January 25, 2007, she reached her third birthday and qualified for special education in the District.
2. The Regional Center required that development evaluations be regularly prepared. Regional Center provided District with its reports regarding Student's condition and treatment that included an occupational therapy initial report by OTR Janet Dunlap of Development Dynamics, Inc., dated June 25, 2004; a development evaluation from OTR Janet Bowen of Best Babies, dated August 21, 2004; a home program for congenital muscular torticollis by OTR Janet Hyde of Center for Developing

Kids, undated; an occupational therapy assessment, also from Janet Hyde, dated October 28, 2004; an occupational therapy addendum report from OTR Diane B. Lipp dated June 20, 2005; and an OTR Progress report by OTR Adachi dated June 2, 2006. The Regional Center provided occupational therapy services through various contractors, in 2005 and 2006. Nancy L. Press, O.T.R. of Long Beach, California, assigned registered and licensed occupational therapist (OTR) Aya Gota-Adachi (OTR Adachi) to Student. OTR Adachi has performed interim early intervention on children ages zero to three years old in a pediatric setting since the year 2000. She has a bachelor's degree in occupational therapy from Loma Linda University. Her experience with sensory integration issues was obtained through a one-time workshop and at school to improve her skills. She is not SIPT certified, and she performed her analysis in clinical settings, not at schools.

3. OTR Adachi was invited but did not attend Student's IEP meeting on June 15, 2007 or June 22, 2007. OTR Adachi prepared a progress report in June 2006 and a discharge report dated May 30, 2007, including an undated addendum that recommended two hours per week of OT for Student. The two reports were also considered by the IEP team, it was not established that the IEP team had OT Adachi's addendum.

4. In June 2006, Adachi reported that at 24 months Student's developmental age was 10 months. Student's OT goals at Regional Center were to 1) develop motor skill for manipulation by stacking 2-3 cubes independently; 2) consistently demonstrate neat pincer grasp with pellets; 3) insert large pegs independently; 4) demonstrate improved jaw strength and stability by biting pieces of hard foods, such as rice crackers and thin pretzel sticks; 5) eat cut-up tablefoods of increased textures; 6) hold and drink from a regular straw cup independently with minimal liquid loss; 7) feed herself easy scooping foods such as yogurt and oatmeal independently with minimal spillage using a

spoon; and 8) assist with lower body dressing by lifting her feet for shoes and socks. OTR Adachi's June 2006 progress report did not mention sensory motor issues. OTR Adachi explained that, at that time, she identified five developmental areas and that she had missed the fact that Student's muscle tone limitations may have been due to sensory motor issues.

5. OTR Adachi's May 30, 2007 occupational therapy discharge summary was prepared to provide to District because Student would soon be ineligible for Regional Center services. In that report, OTR Adachi reported that Student had not met goals 1, 2, 5 or 6, but that she had partially met goals 3 and 4. For the first time, OTR Adachi described Student's sensory motor issues which she had only recently been observing. She explained that Student had sensory seeking behaviors, poor motor planning, poor balance and poor "righting"/equilibrium responses, as well as decreased attention span. Her report described her observations of Student's sensory seeking behaviors to include that she: 1) needs to touch and feel the grass, sand, dry beans/rice, Play Dough, and water, as well as various foods; 2) often tries to place most of these materials in her mouth; and 3) craves intense movements, and particularly enjoys being spinned, tossed in the air, placed in an upside down position, loves to swing and go down the slide (often with her head first). Student demonstrated poor motor planning and body awareness that may possibly be due to inefficient proprioceptive and tactile processing. She noted that Student continued to have significant difficulty imitating body movements when imitating nursery tricks or making simple signs for communicating. She also has difficulty positioning her body, such as when assisting in dressing/undressing, and getting in and out of a chair. OTR Adachi described Student's righting/equilibrium responses as very much delayed, possibly due to inefficient vestibular processing. She noted that Student continued to fall easily when walking and changing positions on the uneven terrain of a grassy field at the park. She showed short

attention span with toys. However, Adachi notes that following 30-40 minutes of playing at the park, with at least 10-15 minutes of swinging, as well as touching and pulling the grass, exploring dried leaves, and running and tumbling down the hill, Student seemed to present with increased attention span with fine-motor activities, as well as increased vocalization and socialization, at least for the remaining therapy session.

6. OTR Adachi did not use a formal assessment through standardized testing to come up with a recommendation and report for OT services in the May 2007 discharge summary. Instead, she took Student to the park for a couple of weeks before Student transferred to District. She observed that Student seemed to improve her balance after using swings. She used a current schedule to measure Student's strength and coordination levels. OTR Adachi did not recommend a specific interval, place or amount of time for Student's OT; however, an undated addendum recommended that Student "receive one hour of OT two times per week, once in the school and once at clinic setting (2 hrs per week)." OTR Adachi testified that her addendum was requested by Mother on an unknown date before the June 15, 2007 IEP meeting and that she learned that the addendum was provided to District by Mother. She testified that while she regularly attended IEP meetings for students entering school from the Regional Center, it was not her practice to make a specific recommendation of the amount of time for OT services. Her deviation from that practice was made at Mother's request. Her supervisor, Nancy Press approved the addendum. OTR Adachi recommended further sensory motor treatment as part of Student's OT schedule, but her testimony did not establish that SIPT certified occupational therapy was necessary for Student because she did not demonstrate sufficient education or experience in sensory processing, nor was she certified in that area.

7. For two years, the Regional Center also provided Student with physical therapy from licensed physical therapist Peggy Wu (PT Wu). On June 15, 2007, PT Wu

reported to the IEP team that Student sat well with good balance, that she did well with verbal and tactile cueing, and that her standing ability was good. She advised that Student was beginning to use stairs with minimal assistance but needed more help going down stairs. PT Wu observed Student's gait and her motor control were improving, but her reaction time was low. She advised that Student recently obtained DAFO's (leg braces) to assist her walking. Student was able to walk 5 to 8 minutes on a treadmill; that Student was able to climb up and slide down a slide but needed to be closely watched because Student demonstrates no fear; that Student was beginning to use a tricycle; and that Student enjoys bouncing movements. In her report provided to the June 15, 2007 IEP team, PT Wu advised that Student's age-equivalent gross motor skills at age three were between 15-18 months, emerging to 20 months.

8. An initial IEP team meeting was held on June 15, 2007 and completed on June 22, 2007. The June 15, 2007 IEP meeting was attended by Mother; District Program Specialist and Supervisor for Special Education at Bitely Elementary School, Barbara Razo (PS Razo); and District psychologist, Nancy Kugler (D Psyche Kugler) who had performed a preliminary assessment on Student's history based on her interview with Mother prior to the IEP meeting. Also present were general education teacher Julienne Chu (GE Chu); Special Education teacher Annette Johnson (SE teacher Johnson); speech and language pathologist Julie Sena (SLP Sena), school nurse Micki Rios (Rios); physical therapist Peggy Wu; and pediatric speech and language therapist Amy Johnson (SL therapist Johnson), provided through the Regional Center. Representing the occupational therapy issues to be discussed at the IEP meeting was Certified Occupational Therapist Assistant, Chelsea Spaulding (COTA Spaulding) rather than District's Occupational Therapist, Laura Cerrone (OTR Cerrone) as indicated in the District's notice. COTA Spaulding, who was supervised by OTR Cerrone, had discussed Student's needs with the OTR Cerrone, and

presented the draft goals and objectives that OTR Cerrone had developed in preparation for the IEP meeting.

9. COTA Spaulding presented OT goals that had been drafted by OTR Cerrone. Cerrone recommended services to be two 30 minute sessions per week in the OT room. The goals listed were: 1) palmer grasp on a crayon; 2) drinking a thick liquid from an open cup; and 3) scooping and eating food. These three goals were referenced by OTR Adachi in her May 30, 2007 occupational therapy discharge report. Another goal drafted by OTR Adachi was that Student build a brick tower of cubes and other similar goals regarding scooping and eating food were addressed in the IEP drafts for the special education teacher to address.

10. Mother advised the IEP team that Student bites too hard on utensils and needed to be watched while eating. She also reported that Student apparently does not feel the pain or itch from mosquito bites and that she fills her mouth too full of food to be safe. Mother also advised that Student has a history of biting other people. At the June 15, 2007 IEP meeting, Mother requested that District arrange for a "SIPT certified occupational therapist" to assess Student, but not that the actual Sensory Integration Praxis" test be administered to Student. Her request was based on the recommendation of SL therapist Johnson. Regional Center staff, Charmayne Ross, had also mentioned that Student appeared to be hypo-sensitive. After receiving SL therapist Johnson's recommendation, Mother requested that OTR Adachi adopt some sensory-type treatments in her treatment of Student and because OTR Adachi had reported positive results and significant improvement that included Student babbling more and taking more interest in tasks.

11. SL therapist Johnson, who attended the June 15, 2007 IEP meeting as a guest of Mother, was licensed by the California Speech-Language Pathology and Audiology Board, and possessed a master's degree in speech and language. She

specialized in pediatric speech and language pathology. SL therapist Johnson used an interdisciplinary approach to understand the larger picture of a child's neuro-motor issues from a muscular standpoint. SL therapist Johnson is the executive director and owner of Cornerstone Speech and Language that provides assessment, consultation and play-based speech and language intervention to infants, toddlers and preschoolers with oral-motor, neuro-motor, developmental and communication/feeding impairments.

12. SL therapist Johnson provided speech and language therapy to Student. During therapy, SL therapist Johnson noted that when Student was put on a bucket swing as a sensory processing exercise, it impacted her sensory motor abilities in an indirect positive manner. She advised OTR Adachi of her findings and learned that OTR Adachi had experimented and found that swinging improved Student's babbling and her motor ability. Based on her observation and information provided by Adachi, SL therapist Johnson recommended that Mother have Student assessed by an OTR with SIPT certification in order to fully explore the sensory integration issues. SL therapist Johnson admitted that the SIPT test itself was inappropriate for Student due to her age, but that a SIPT trained OTR would have more understanding of sensory integration issues. The SIPT course for assessment looks at twelve different types of issues. There was also a treatment portion. She thought the SIPT methods would be an "easy measuring stick" to see how different sensory systems interact to allow a child to move through his/her environment. Otherwise children who may have sensory motor issues may simply be regarded as cognitively deficient. Johnson admitted that she did not know any more specifics or where SIPT training was offered. SL therapist Johnson was not persuasive on the issue of the necessity that District's assessment be conducted by a SIPT certified OTR. Her recommendation to Mother was not based on sufficient familiarity with the subject matter, she did not administer such testing, nor was she, herself, trained or certified.

13. PS Razo explained that the Regional Center reports, particularly those of OTR Adachi, which had been prepared only two weeks before the June 15 meeting, were sufficiently complete to be relied upon for the initial IEP meeting to assess Student for enrollment in the summer 2007 session and the following year. PS Razo did not recall reviewing OT Adachi's addendum. The IEP team determined that it had enough information to continue providing occupational therapy service to Student similar to that she had been receiving at Regional Center, however, neither OT Adachi's interim report nor her discharge report advised how many hours per week Student had been receiving services.

14. After considering the reports and comments, District ultimately offered Student placement in a group Special Day Class (SDC) setting at District's Bitely Elementary School with services that included, among other things, individual occupational therapy for two 30 minute sessions per week. The meeting was continued to June 22, 2008, so that Mother could consider the District's offer. On June 20, 2007, Mother wrote to D Psyche Kugler requesting that District arrange for and pay for a formal assessment of Student by a "SIP-certified Occupational Therapist as soon as possible." On June 21, 2007, Mother wrote to DD Hales advising that she agreed to part of District's offer, but the District's OT had to be "SIP certified." Mother asserted that it was District's obligation to conduct such an assessment "regardless of the State's requirements."

15. The June 22, 2007 IEP meeting was attended by DD Hales, PS Razo, D Psyche Kugler, Mother and her friend Sally Lira (Lira). After discussion, Mother accepted the offer of services by District except for the level of OT services, she requested the services be increased by 60 minutes in a clinic setting and to be provided by a SIPT certified occupational therapist. PS Razo had investigated SIPT assessments and reported to the group that the test is usually used with high functioning autism or

aspergers related disabilities on children from the ages of four to eighteen and that a child must be verbal to take the test. Based on that information, District did not agree to Mother's request for a SIPT assessment because such an assessment was inappropriate. The IEP team advised Mother that after a District OTR assessed Student, the OTR would be able to address any needed sensory concerns. Further meeting of the IEP team was scheduled for November 1, 2007.

16. In August 2007, Michael Ramirez, MA/OTR/L (OTR Ramirez), replaced Laura Cerrone as OTR for District. Ramirez was assigned to provide Student's OT services twice a week for 30 minutes in a clinic setting as set forth in Student's IEP. OTR Ramirez obtained a master's degree in occupational therapy from the University of Southern California (USC) in 2003. In 2004 he was certified, licensed and registered as an OT by the State of California Board of Occupational Therapy and the National Board of Occupational Therapy with a specialty in pediatrics. OTR Ramirez's experience included serving as a licensed/registered occupational therapist for Rosemary Johnson and Associates in Monrovia, California from September 2003 through August 2004, for Glendale Adventist Medical Center in Eagle Rock, California from September 2004 through October 2005, and for Alhambra Unified School District in Alhambra, California from November 2006 through June 2007. His experience included providing occupational therapy to children in individual and group settings, using sensory integration theory, neuro-development treatment, muscle strengthening programs and participating in IEP team meetings. While SIPT training is not required for practice in his field, within the last year, OTR Ramirez completed the fourth portion of the SIPT four-part program, treatment methods. The other three courses are: administration; scoring; and introduction to the test. He explained SIPT testing is used on children aged four to nine years old that have potential sensory integration or processing problems. The SIPT test is a standardized test but not useful for Student because Student is outside of the

age protocol. Because there are no other formal standardized test that address sensory integration, observation is the only method to use to evaluate a three year old.

17. The IEP team did not re-convene on November 1, 2007, but on December 6, 2007, District served parents with a request for consent to an OT assessment by OTR Ramirez. On December 19, 2007, Mother wrote to PS Razo requesting that District immediately provide her with a copy of OTR Ramirez' curriculum vitae (CV). On December 20, 2007, PS Razo wrote to Mother in response denying her request for the CV. She did advise he was certified as a non-public agency (NPA) provider to work in public school; that he was certified with the National Board for Certification of Occupational Therapy, Inc., and was licensed by the State of California Board of Occupational Therapy. Mother did not consent to assessment by OTR Ramirez. On February 26, 2008, Mother wrote to District's legal counsel advising that she had arranged for an OT assessment of Student in May 2008, and that Mother would seek an order for reimbursement of the costs from District.

18. On March 18, 2008, District prepared another request for parent's consent to an OT assessment by District. District Counsel, James Meeker (Meeker) sent the District's assessment plan for OT evaluation to Mother on March 19, 2008. He explained that Mother was not entitled to have the District pay for an independent educational evaluation (IEE) until after the District had an opportunity to conduct its own assessment. The letter also enclosed the Educational Evaluation Policy of the West San Gabriel Valley Special Education Local Plan Area (SELPA), which explained the guidelines for obtaining an IEE. The policy also provided that motor assessments could be performed by either by a licensed physical therapist, a registered occupational therapist or an adaptive physical education specialist with a master's degree.

19. On April 1, 2008, Mother responded to Meeker by letter. She was not refusing to permit an OT assessment, but, reasserted that District was required to

conduct such assessment with someone who is certified in Sensory Integration Processing (SIP). Mother clarified that she was not seeking that District actually administer a Sensory Integration Praxis Test (SIPT) test. She returned and signed the District's consent form for an OT assessment, however, Mother wrote in the following conditions: "that the assessor be qualified and formally trained to perform testing & treatment of toddlers in Sensory Processing Disorders, meaning someone who is SIP-certified. These include, but are not limited to: Susan Spitzer, OTL/L, CDK, and any other mutually agreed upon assessor; and specifically excludes OT Michael Ramirez, no disrespect intended."

20. On April 3, 2008, Meeker responded to Mother acknowledging receipt of the partial consent to the District's assessment plan. Meeker advised that the conditions Mother added were unacceptable. Meeker explained that District intended to assess sensory integration issues as part of its OT assessment.

21. On April 17, 2008, Mother informed the District that SIPT certified OT Julie Driscoll (Driscoll) would meet with SE teacher Johnson on April 18, 2008. Mother requested that Driscoll be allowed to observe OTR Ramirez's session with Student on that day at 10:00 a.m.

22. Driscoll is certified and licensed as an occupational therapist in California. She had twenty years of occupational therapy experience in public and private schools, outpatient hospitals and private clinics. Driscoll is a SIPT certified occupational therapist having attended the four-part course in the summer of 1997 at the University of Southern California (USC) and was certified to administer the Sensory Integration Praxis Test (SIPT). She also had certification from Pediatric Therapy Network and Sensory Integration International, and USC curriculum. She possessed Pediatric Leadership Certification through the University Affiliated Program at the Los Angeles Children's Hospital, USC. Presently she works for the Global Health Organization. Previously she

worked with the Lanterman Regional Center, Pasadena Unified School District, and in private practice as well as numerous other schools and treatment facilities. She developed programs for several public school districts; the supervision of student clinical training programs, an early intervention program for the University of New Mexico; and a social skills program for Center for Developing Kids. Driscoll presented with qualified and relevant experience in the field of pediatric occupational therapy and sensory integration as it applies to pediatric occupational therapy.

23. Driscoll explained that the Sensory Integration Praxis²Test course was developed two to three years ago. It was developed by Jean Ayers as a standardized method for evaluating a child's ability through twelve sub-tests, to do certain things with their body, such as spinning to determine nystagamus, to note the position of the body and to watch carefully to see if by these movements, the child tests within the standard deviation. Two years ago there was no certification in the field. She opined that SIPT is a standardized test that is valid, reliable, approved, and quantitative but the approval for use is through USC. She did not know whether the State of California recognized the certification and was unfamiliar with the Business and Professions Code provisions for certification. Driscoll explained that the SIPT test is for children aged four to eight years, eleven months old who have motor skills disabilities. The specific protocol of the test prohibits administration of the test outside the specific age range. Nevertheless, while the test batteries cannot be modified for a three year old, the test theory can be adapted. She explained that the clinical theory behind the test is to make an evaluation of a child's ability to take in and process sensory information and how the child responds, whereupon adaptations to the environment (sensory diet) can be made

² Praxis is defined as the ability to plan and execute tasks requiring motor skills. It is also called motor planning.

so that it is more conducive to learning. For an age-appropriate child there are twelve sub-tests that are used to reach a conclusion of their needs.

24. On April 18, 2008, Driscoll's assessment and visitation of the classroom and OT clinic occurred as planned. She interviewed the following: Student's teacher, an aide, OT Ramirez, the speech and language therapist, and someone on the playground who told her what Student enjoys on the playground. Driscoll had reviewed the Regional Center reports that the IEP team used for the June 2007 meetings that she considered valid, informative and written by competent professionals. She observed that two of the Regional Center's OT reports from the Center for Developing Kids, Inc., particularly the one by Ann Hyde dated October 28, 2004, addressed the pediatric sensory processing areas well; the IEP team had information regarding those issues. On May 3, 2008, Driscoll prepared her assessment report which was provided to District on or about May 21, 2008. Driscoll did not use the SIPT to test Student but did use clinical observation from the SIPT theory. She tested Student with Mother in her office for three hours and observed her for three hours at school. Driscoll gave Student tactile tools and provided textured experiences such as "feely toys," which she described as something with jelly, brushes that poke, a surgical brush, and putty substances.

25. Driscoll concluded that Student has a neuro-muscular disability with low muscle tone, poor postural stability, poor shoulder and hip stability, muscle weakness, and fine and gross motor delays. She also has motor planning problems. She found Student's bilateral integration and muscle tone were compromised making her weak and that the vestibular system is compromised making it difficult to balance and use stairs. Driscoll explained that Student's sensory needs impact her education because Student becomes focused on a need or want for some feeling, such as biting on a rubber mat. When engaged in that activity, Student is unable to conceptualize other things in her environment, such as a child who may run by, or getting out of the way of

a slide. She also observed that Student becomes over-stimulated by noises and activity. She does not like to be touched with a light touch and, visually, there may be too much activity for her to sit in a group because she becomes over-aroused. Driscoll explained that increased arousal decreases the ability to be involved so Student needs proprioceptive intervention, sensory diet accommodation which includes a specific kind of chair, a weighted vest, heavy work, deep touch pressure, contained seating arrangements and sitting close to the teacher. She should respond well to sitting on a peanut ball so she does not have to move. Student's problem manipulating objects that are non-resistant also revealed Student also has attention issues and sensory processing issues. Driscoll arrived at her opinion reading reports, observing Student's functions and activities and watching her in the classroom. She stated that Student requires an adult to orient her to tasks, such as with "motoring through" which is a term used to describe having an adult physically direct the child to perform a task or go in a direction. She also found that Student seeks sensory hand tools to help orient her to the world and to help her process greater information. Student's has motor planning issues interfere with her interaction with peers, and, she does not relate to objects or other humans.

26. Driscoll opined that Student could improve by sensory integration therapy and static motor activities such as holding on with her hands and knees in a quadruped position, sitting on a ball to challenge her postural responses and placing her in things to protect her. She explained that when Student becomes over-aroused she has no adaptive behavior so a therapist or teacher must use the "just right challenge" to present tasks at a level she can perform. Determining the right challenge requires improvisation that comes with experience. She stated "[Student] is a hard kid to treat because of the behavior." Driscoll observed she needs someone with her all the time. Driscoll recommended that the IEP goals could be improved because they did not address the self-help needs of Student. In her May 3, 2008 report, she stated that

Student would benefit from receiving occupational therapy in the classroom setting as well as in the sensory motor setting which should be a separate room, adequately equipped to provide sensory integration treatment. The administration of a sensory integration model of treatment should be provided for Student by an occupational therapist experienced in the theoretical and clinical practice of sensory integration treatment. She recommended that individual OT be provided in the classroom setting for biweekly 30-minute sessions, and, one, individual 60-minute session per week provided in a separate sensory motor setting as follows:

- In the classroom setting, OT treatment should address fine motor OT goals and motoring of a sensory diet program.
- In the sessions provided in the OT room, treatment emphasis should address Student's sensory integration needs.
- Classroom based OT should include teacher collaboration and training of specific accommodations and methods that would prove beneficial for Student to use daily in class.
- That OTR should set up and monitor a 'sensory diet' program as an additional method to help Student regulate her levels of arousal and improve her attention throughout her school day.
- That the OTR assists her teacher to incorporate multi-sensory experiences into her educational program.

27. Driscoll acknowledged that OTR Ramirez's assessment was appropriate and that he did provide a description of Student's behavior relating to sensory processing. She stated that OTR Ramirez was a certified OTR, he was qualified to administer an OT assessment and he is registered and licensed, and, as such, he has the degree of professional expertise to do the different tests that an OTR must do in public schools, including evaluation.

28. Whether a Certified Occupational Therapist Assistant (COTA) may appear at an IEP meeting, Driscoll advised that professional standards guide COTA's. A COTA is able to follow a treatment plan, gather equipment and score assessments. COTA's may not interpret assessments, create goals and objectives and cannot carry them out unless they are supervised. A COTA may report at an IEP team meeting but usually an OTR is sitting by their side. A COTA may substantiate observations but cannot establish frequency and duration of treatment.

29. On April 22, 2008, District prepared another request for parent's signature to consent to District's OT assessment plan. Mother signed the plan that day. On May 8, 2008, OTR Ramirez conducted District's OT assessment of Student. The evaluation document OTR Ramirez prepared was thorough in its analysis of Student's sensory needs.³ It described Student's neuromuscular conditions, fine and gross motor skills, self-care needs and her organization of behavior and attention difficulties. OTR Ramirez attempted to administer the Peabody Developmental Motor Scales – 2nd edition, for fine motor skill, but was unsuccessful because Student was unable to understand the task or follow directions to complete the assessment; therefore, OTR Ramirez assessed Student's motor skills by observation. OTR Ramirez did not attempt to interview Mother. OTR Ramirez considered that his review was complete by observing Student in the school setting and providing her OT services since August 2007. His report summarized and recommended daily practical adaptations and techniques for use in Student's classroom to address her needs at school which included:

³ OTR Ramirez's report defined the various sensory processing areas: gustatory is taste, olfactory is smell, tactile is touch, auditory is hearing, visual is sight and proprioceptive is awareness of body and force.

- When seated, Student's feet should be flat on the floor to provide a stable base of support by using an appropriately sized chair and table.
- Support her back with a wedge or other firm support to assist with maintaining an upright posture and prevent slouching in her chair.
- Allow her to sit on a move-n-sit cushion or therapy ball (or peanut) when working with tabletop tasks.
- Provide hand-over-hand assistance⁴ when engaged with fine motor activities such as coloring, writing, cutting with scissors, or gluing activities.
- Physically assist Student with hand movements and gestures during circle time or sing along activities to improve hand coordination.
- Allow Student to open items on her own during snack time, such as zip lock bags, snack bags, milk or juice cartons to promote hand and finger dexterity.
- Using pictures when it's time to transition from one activity to the next or some other sort of communication device.
- Attempt to eliminate distractions when working individually with her in class.
- To improve strength and endurance, have Student carry books or equipment from one side of the room to the other.
- Encourage Student to initiate opening and closing doors or holding doors open for others.
- Consistently encourage Student to use both hands when engaged in a bilateral hand task.

⁴ Hand-over-hand assistance is utilized by an aide by placing the aide's hand over Student's hand to guide the student's hand movements while she is working on a manual project such as scribbling or eating with a utensil.

30. OTR Ramirez had been treating Student twice a week for 30 minutes each session in the OT room and a few times in the classroom since August 2007. He regularly collaborated with SE Johnson a few times a week and recently has been working with Student in the classroom. He described Student as mentally retarded with bifacial features of Down syndrome with low endurance. He explained that it is difficult to engage Student in novel activities. For instance, Student has been successful at beading which involves stringing small or medium sized beads onto a string. Depending upon certain conditions, such as the color of the bead and the kind of string, Student can usually successfully lace a bead, or perform other activities such as engage in clothespin activities by taking pins from a basket, and/or work on three finger grasps and pincer grip exercises. He has been doing sensory based activities, incorporating swinging⁵ to increase her posture and to increase her core strength. Some other techniques he used were to have Student sit on a peanut ball, hand-over-hand time, weight bearing on her stomach, and lying prone with a game in front of her. He used positional therapy that included using a phone book on her chair with a box to support her feet because it was important to provide a stable base support to develop Student's central and distal core strength abilities. He found that Student had difficulties in sensory processing, fine motor skill and organizational behavior/attention. She becomes over-stimulated by noise, but he did not find that Student was over-stimulated by singing. In cases of over-stimulation, OTR Ramirez, or an aide, would get her out of her chair and go to quieter areas. Based on the results of his examination, he recommended that Student receive occupational therapy services twice a week, 30-minute sessions, one session in the classroom the other in clinical setting. OTR Ramirez presented as a qualified and capable professional occupational therapist who understood and had

⁵ District's OT clinic has a swing that Student uses during the OT sessions.

given due attention to Student's sensory integration processing needs.

31. Student's special education teacher Annette Johnson (SE teacher Johnson), has had Student in a special education class (SDC) since June 2007. Her observations of Student were that she is a sweet, lovable, happy, affectionate girl that enjoys school. Student had weaknesses in her ability to comprehend and balance problems walking and climbing on playground equipment, but her conditions have improved. She also improved her eating practices. Before, Student would put too much food in her mouth and she ate with her hands, now Student does not overstuff her mouth and uses a spork. SE Johnson observed that Student may not feel pain. She has some familiarity with sensory integration, in that regard she provided a regular period for Student to experience touching substances such as pudding or rice. She has observed Student using play equipment such as the slide and swings. Recently, Student developed the ability to use the rail when ascending a slide, but there is always an aide present when Student plays on the playground. She has learned to scribble using paper, pencils and crayons using a hand-over-hand assistant or with one person behind her to guide. Student likes circle time with the class. She can touch her facial parts; look in a mirror and do things with a group but she needs prompting. Student has the motor ability to stack blocks but SE teacher Johnson uses her judgment, based on Student's performance, to determine when to give Student additional assistance. The District OTR had provided her with a "peanut" to sit on and has adjusted her sitting arrangement to improve Student's posture. SE Johnson explained that Student requires physical and verbal prompting and that aides in the class "motor her through," tasks and events.

32. SE Johnson confirmed that she met with OTR Ramirez regarding Student about once or twice a week. OTR Ramirez explained to SE Johnson what Student does not like and some things that he does to treat her. He also discussed how Student holds a spoon and that he gives her little treats when working with her. Within the last three

to four weeks OTR Ramirez has begun treating Student in the classroom. SE Johnson did meet Student's expert, Driscoll, when Driscoll conducted her assessment. She was aware that Driscoll suggested that Student be given a special chair to help her posture. Similarly, OTR Ramirez gave SE Johnson a phone book to put in back of Student's chair for support and under Student's feet so her feet would not dangle in order to help her posture. Even though Driscoll recommended that Student use a peanut chair or a bean bag chair or certain types of toys, SE Johnson was aware that OTR Ramirez already used those types of treatments. In response to Driscoll's point about Student being motored-through, (i.e., physically guided to move to a point), SE Johnson explained that the aides do provide motoring assistance to Student. In regard to having a sensory diet, SE Johnson explained that Driscoll's suggestions concerning playing with textures like pudding or rice are already used. It is SE Johnson's practice to use pudding as part of Student's sensory diet rather than shaving cream because some students will try to eat the textured substances they are playing with.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*.)
2. Under the IDEA and state law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) 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).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child

in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Occupational therapy is a DIS. (Ed. Code, § 56363, subd. (b)(1)(6). Cal. Code Regs., tit. 5, §3001, subd. (e).)

3. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. (*Gregory K.*) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

ISSUE 1 – WHETHER DISTRICT WAS REQUIRED TO PROVIDE STUDENT WITH A SIPT CERTIFIED OTR ASSESSMENT

4. Student asserts that District failed to provide a SIPT certified practitioner for its OT assessment of Student.⁶

5. Districts must perform assessments that are conducted by individuals who are both “knowledgeable of the student’s disability” and competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56220, subd. (g), 56322.) There is no legal authority to mandate has an OT assessment be performed by someone with advanced certification for SIPT test or for sensory integration. In California, the requirements for occupational therapy is set forth at California Code of Regulations, title 34, section 3051.6, subd. (b)(3) which states: (b) Qualifications of therapists:...(3) An occupational therapist shall be currently registered with the American Occupational Therapy Association. (Cal. Code Regs., tit. 34, § 3051.6, subd. (b)(3).) Licensing is mandated by the Occupational Therapy Practice Act which is codified at section Business and Professions Code, Division 2, Healing Arts, Chapter 5.6, Occupational Therapy (Bus. & Prof. Code, § 2570, et seq.). In order to be licensed, occupational therapists must file a written application with the Department of Consumer Affairs, California Board of Occupational Therapy (hereinafter “Board”). (Bus. & Prof. Code, § 2570.6, subd. (b).) Occupational Therapists may obtain and become specialized in certain post-certification advanced practices. At present the areas of post-certification

⁶ Originally the parties issue statement included the issue of whether District’s OT services from June 2007 to the date of the filing of Student’s complaint, was appropriate. No evidence was presented regarding the adequacy of Student’s OT at hearing and neither party addressed the issue in closing briefs.

advanced practices for OT's are rehabilitation of the hand, wrist and forearm and for swallowing, including instrumental evaluation, endoscopic evaluation, and videofluoroscopic swallowing study. (Cal. Code Regs., tit. 16, § 4150.)

6. Student obtained an assessment and produced Driscoll as an expert in the field of sensory integration. While Driscoll testified that Ramirez was qualified to conduct the District's OT assessment, and that his report did address sensory processing issues related to Student, she reasoned her analysis was superior based on her application of the SIPT theory. However, in her discussion of who should administer a sensory integration model of treatment, she stated that it should be by an occupational therapist experienced in the theoretical and clinical practice of sensory integration treatment. She did not say that a SIPT certified OT was required. OTR Ramirez had some SIPT training and his report addressed each of the sensory processing areas. OTR Adachi had only passing knowledge of sensory processing. She was not trained or certified as a SIPT specialist either, however, she, too was considered to have made accurate observations regarding Student's sensory motor disabilities in her prior clinical treatment. Driscoll did not administer the SIPT test to Student because Student was outside the age range protocol for the test to be valid as to Student. However, she applied the theory as a structure and arrived at her opinion after reading reports, observing Student's functions and activities using a variety of ways of gathering information. She deemed Student to be a "hard kid to treat" requiring a merge of theory with clinical practice. The result was that Driscoll recommended a "sensory diet" to address Student's praxis issues. However, most of the interventions that Driscoll recommended, such as sitting on a peanut ball, stringing beads and using clothespins in a basket, having posture support, use of multi-sensory tactile experiences or regulating Student's levels of arousal to improve her attention throughout the day, were already implemented in one way or another by District. OTR Ramirez demonstrated that he was

licensed, certified and had both training and relevant specific experience as a pediatric occupational therapist who had utilized sensory processing. He did attend a relevant part of the SIPT course at USC, even though it was not required for his certification. While Driscoll presented as a competent OTR, the evidence Driscoll provided is insufficient to establish that a SIPT certified OT was necessary or superior to District's OT assessment of Student. Therefore, Student failed to establish that District's failure to use a SIPT certified OT for its assessment denied Student a FAPE. (Factual Findings 1- 5, 10-14, 16, 22 - 27, 29-32; Legal Conclusions 1, 2, 3, 5.)

2 - WAS COTA SPAULDING'S ATTENDANCE IN LIEU OF OTR CERRONE A PROCEDURAL VIOLATION?

7. Student contends that she was denied a FAPE on June 15, 2007, the date of the initial IEP within the District, and June 22, 2007, at the follow-up IEP meeting, by the District's failure to have a licensed occupational therapist present at the meeting to discuss Student's occupational therapy goals and objectives.

8. The required members of an IEP team in California are (1) one or both of pupil's parents, a representative by a parent, or both in accordance with IDEA (20 U.S.C. § 1400 et seq.); (2) not less than one regular education teacher; (3) not less than one special education teacher of the pupil; (4) a representative of the local education agency (LEA); (5) an individual who can interpret instructional implications of assessment results. Other non-required members who *may* attend would be: (6) individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate, and, if appropriate, (7) the Student with exceptional needs. (Ed. Code, § 56341, subd. (b).) Attendance by a registered occupational therapist is not required under the California statute, or the IDEA. (34 C.F.R. §§ 300.321 (a)(1)- (6) (2006), Ed. Code, § 56563, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (n)(1).)

9. Under California law, Occupational Therapists and Occupational Therapist Assistants are defined at California Business and Professions Code section 2570.2, subdivisions (g) and (h). The definitions explain that only an Occupational Therapist (OTR) may be responsible for an occupational therapy assessment of a client, and the development of an occupational therapy plan for treatment. (Bus. & Prof. Code, § 2570.2, subd. (g).) An Occupational Therapy Assistant (COTA) is one who is qualified to assist in the practice of occupational therapy and who works under the appropriate supervision of a licensed OTR. (Bus. & Prof. Code, § 2570.2, subd. (h).) A COTA may not act on behalf of a supervising occupational therapist in any matter related to occupational therapy treatment that requires decision making. (Cal. Code. Regs., tit. 16, § 4184, subd. (c)(3).)

10. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f)(2); Ed. Code, § 56505, subd. (j), see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 and *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions of the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, *Fuhrman v. East Hanover Bd. of Educ. supra*, 993 F.2d 1031, 1036 [parent who has an opportunity

to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

11. Here, District demonstrated that in June 2007, the IEP team analyzed Student's needs based on the records and recommendations of Regional Center, and the goals and objectives developed by District's OTR Cerrone. Mother did not voice objection to COTA Spaulding at the meeting. Mother's emphasis was that a SIPT certified occupational therapist was needed to assess Student. After discussion of the recommendations of OTR Adachi's May 30, 2007 Regional Center discharge report, the IEP team adopted three goals her report recommended (1) palmer grasp on a crayon; (2) drinking a thick liquid from an open cup, and (3) scooping and eating food. Each of these became goals for District's OTR to implement. At the meeting Mother expressed her concerns that Student apparently does not feel pain or itch from mosquito bites and that Student fills her mouth too full. These behaviors and others referenced by OTR Adachi such as using building blocks and inserting round pegs, were addressed as part of the 13 pages of goals and objectives for the Special Education teacher to accomplish. Mother testified that, except for her demand that a SIPT certified OT perform District's assessment, she accepted IEP plan, including the goals and objectives related to these subjects and signed the IEP document. Driscoll considered the OT reports provided to the IEP team to be valid and informative, written by competent professionals. (Factual Findings 2-15.)

12. In conclusion, there was no procedural violation by the District's failure to have a certified/licensed/registered occupational therapist attend the IEP meeting because to establish such a violation as impacting FAPE, Student must demonstrate that the procedural irregularity impeded Mother's opportunity to participate in the IEP process, or caused a deprivation of educational benefits. Attendance of an OTR was not required by statute. The evidence established that Mother meaningfully participated and

District adopted or accepted many of the recommendations made by her and by SL Therapist Johnson and at the meeting relied on the reports of Regional Center. There is no evidence that attendance of COTA Spaulding, who presented the proposed goals and objectives of OTR Cerrone, made a difference in the recommendations considered by the IEP team in June 2007. The goals and objectives would not have been modified in any way because there was sufficient information to adopt comprehensive OT goals. Therefore, there was no a procedural violation. Mother was informed, attended and she expressly agreed to all the goals of the plan. Her disagreement went only to the IEP team's rejection of her request for a SIPT certified OTR. In light of the above, Student has not met her burden of demonstrating that the District failed to provide FAPE by having an OT assistant rather than an actual OT present at the IEP meetings. (Factual Findings 2- 16; Legal Conclusions 1-6, 8-11.)

ISSUE 3 – IS DRISCOLL'S OT-IEE COMPENSABLE

13. Student contends that Student should be reimbursed for the costs of Driscolls' report as an independent educational evaluation (IEE).

14. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain and IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining and IEE].)

"Independent educational evaluation means and evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i) (2006).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) and (b)(2) (2006).)

15. Mother agreed to the goals and objectives of the IEP team in June 2007, however, from December 2007 through April 2008 she refused to allow District to assess Student unless District did so with a SIPT certified OTR. District advised Mother in December 2007, February 2008, and March 2008 that OTR Ramirez was licensed, certified and qualified by his experience to perform Student's OT assessment. In April 2008 District advised that its assessment must go forward in order for Mother to be entitled to an IEE. An IEE is authorized only after a district has performed an assessment with which the parent disagrees. Nevertheless, having been advised of the consequences, Mother arranged for Driscoll to assess Student before consenting to have OTR Ramirez conduct an assessment.

16. In light of the above, Student did not meet her burden of demonstrating that Driscoll's assessment should be provided at public expense. Because Mother did not allow District to perform an assessment until after Driscoll's assessment, Student is not entitled to payment for the cost of Driscoll's report. (Factual Findings 15 -24, 26, and 28; Legal Conclusions 14 and 15.)

ORDER

All relief sought by Student is DENIED.

PREVAILING PARTY

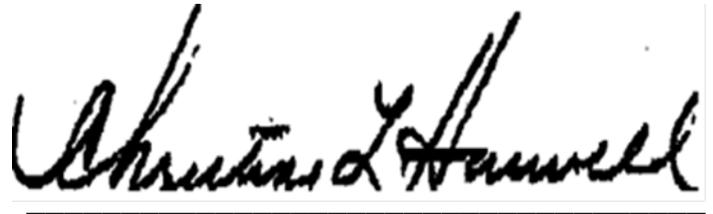
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District was the prevailing party on all issues presented.

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: July 14, 2008

A handwritten signature in black ink, reading "Christine L. Harwell". The signature is written in a cursive style with a horizontal line underneath it.

CHRISTINE L. HARWELL

Administrative Law Judge

Office of Administrative Hearings