

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009050485

DECISION

The due process hearing in this matter was held on November 2 and 3, 2009, in Van Nuys, California, before Clifford H. Woosley, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Student's Mother appeared on behalf of the Student. Mother's sister accompanied Mother to assist and consult with Mother but did not directly participate in the hearing.

Patrick J Balucan, Assistant General Counsel, Office of General Counsel, appeared on behalf of the Los Angeles Unified School District (District). Accompanying Mr. Balucan was attorney Mampre Pomakian, also from the Office of General Counsel, but he did not participate in the proceedings. Deborah Neal, Ph.D., attended each day as the District's representative.

On May 12, 2009, Mother filed the request for due process hearing. Continuances were granted for good cause on June 17, 2009, and September 14, 2009. At the close of hearing, the matter was continued to November 23, 2009, for the submission of closing briefs. On that day, briefs were filed, the record was closed, and the matter was submitted.

ISSUES¹

1. Whether District failed to provide a free and appropriate public education (FAPE) during the 2008-2009 school year and summer 2009 ESY, commencing with the November 2008 amendment IEP, by failing to offer and provide an additional adult assistant assigned to Student during the school day.
2. Whether District failed to offer a FAPE to Student at the April 2009 annual IEP for the 2009-2010 school year by failing to offer and provide an additional adult assistant assigned to Student during the school day.

FACTUAL FINDINGS

THE STUDENT

1. Student is a four-and-a-half year-old girl who has been enrolled in a preschool mixed class at District's Haskell Elementary School (Haskell) since September 2008. Student was eligible for special education because of mental retardation (MR) and visual impairment (VI). Student has Chromosome 18q minus deletion syndrome,² which causes developmental delay, small stature, hypotonia

¹ The ALJ has redrafted the issues as they appeared in the prehearing conference order, for clarity. (See ¶ 21 and fn. 5, below.) Also, IEP services included transportation which is not in dispute; therefore, the issues no longer include any reference to transportation.

² Chromosome 18q minus deletion syndrome is a rare chromosomal disorder in which there is deletion of part of the long arm (q) of chromosome 18. Rather than a terminal deletion, Student has an interstitial, which is even rarer.

(poor muscle tone), speech delay, strabismus (crossed eyes), hyperopia (farsightedness), and amblyopia ("lazy eye"). Student has cortical visual impairment (CVI), which is improving. Student must wear glasses (with recently added bifocals) full time and may require daily dilating drops or patching to improve the vision in the left eye.

2. North Los Angeles County Regional Center (NLACRC) provided services to Student in the areas of Speech and Language, Physical Therapy and Occupational Therapy. Student attended the CHIME (Community Honoring Inclusive Model Education) Institute Infant and Toddler Program (for children from birth through age 3 and their families) and received services from the District Infant/Preschool Support Services PIVIT³ Program. NLACRC referred Student to District for assessment as Student transitioned from its early start program.

THE INITIAL IEP (APRIL 14, 2008)

3. Two weeks before Student's third birthday, District held the initial IEP meeting on April 14, 2008. The IEP determined and recorded Student's present levels of performance (PLP) in Vision, Health, Speech and Language, Motor-PT (physical therapy), Gross Motor – Adapted Physical Education (APT), School Readiness, Motor – OT (occupational therapy), General Ability, Academic

³ The PIVIT (Parents & Infants who are Visually Impaired Together) program is a service provided through LAUSD Infant/Preschool Support Services. It is a comprehensive educational program that assists infants and toddlers with the low incidence disability of visual impairment. Services are provided free of cost, either in the family's natural home environment or at center based family support centers.

Performance, Social-Emotional Status, and Self-Help (including orientation and mobility).

4. In the PLP for vision, the IEP team found Student to have cortical visual impairment, esotropia with high hyperopia and amblyopia of the left eye. Visual acuity had a somewhat delayed fixation. The assessment data concluded that Student required accommodations to access visual targets and that Student's visual impairment adversely affected her educational performance. The IEP team recommended services from the Visually Impaired (VI) Program, to be provided in the classroom, in collaboration with Student's teacher, assistants and other relevant related service providers. The VI Teacher would develop teaching strategies and classroom accommodations in consultation with the classroom teacher and staff. The recommended accommodations included: Student is to sit close to the teacher in circle time, story time, or any group instruction; Student will be permitted to approach the viewing area for more accurate observation of details; and, Student is to be seated facing away from bright lights and glare.

5. The PLP for health noted that Student was 36 inches tall and weighed 22 pounds. Student wore prescription glasses at all times. The assessment team was unable to get a good evaluation of Student's hearing and referred Student to District's Audiological Resource Unit (ARU). Student was ambulatory with stable gait, but not yet able to run, only fast walk. The IEP team noted that Student "appears fragile and will fall easily when bumped." Student needed assistance with feeding, dressing and toileting.

6. Speech and Language PLP found Student to say most age appropriate sounds. Voice and fluency were within normal limits. Student enjoyed attention from others, but she could be fearful of strangers. Student relied on a limited number of concrete, single word utterance augmented by facial expression

and gestures. She dropped some ending and beginning consonants which should have resolved by age 3 years. Receptive delays would impact Student following teacher directed tasks. Expressive delays and phonological processes would impact Student clearly expressing needs, thought and ideas, and sustaining successful peer interactions. Suggested modifications and accommodations included: modeling sounds in songs, rhymes, and fingerplays; providing picture supports; and visual referents.

7. The Motor – PT PLP found Student to have functional trunk and lower extremity range of motion to access the school environment. Student possessed independent transitional skills, sitting skills with functional balance to participate in activities, standing skills with slight unsteadiness with some dynamic activities, but with overall balance to participate in school program. Despite a tendency to move slowly and decreased leg strength, Student appeared to have adequate endurance to participate in a preschool program. Student had decreased control walking down inclines, necessitating supervision for safety. Student had decreased leg strength with climbing activities, decreased balance when negotiating curbs and steps, requiring hand support on railing, and decreased climbing skills on jungle gym, requiring use of railing to access. Student's decreased strength and balance skills impacted climbing and ability to access the school environment. Additional equipment was not required for Student to access the school environment.

8. The Gross Motor – APE PLP concluded that Student's gross motor skills were delayed in all areas, including balance, locomotor, eye-hand, and eye-foot coordination skills. Student needed to continue participating in a variety of gross motor activities in both structured and play environments along with her peers. Student needed extra time and practice in order to build upon and strengthen the gross motor skills that she already had. Accommodations would be

extra time to respond to teacher directed tasks and visual and verbal cues.

9. In the School Readiness PLP, the team described Student as a petite and sweet little girl, who made progress in her overall development and who cooperated with and looked to adults for guidance. Student needed guidance to use her vision, with reminders to look and visually scan her immediate area during tabletop activities. Student showed weakness in her balance during walking, running (fast walk), and climbing stairs, requiring motivation and assistance. Though shy initially, Student would quickly gain comfort and confidence thereafter. The PLP School Readiness concluded that Student would benefit by attending a preschool class that would address her educational needs.

10. The General Ability PLP utilized direct assessment, previous reports, and observations in estimating that Student functioned within the Markedly Below Average range of cognitive development. Student had difficulty creating novel problem solving strategies and participating in a classroom conversation. The Student struggled learning and retaining information without appropriate contextual associations. Supports for Student included repetition of concepts in a context that motivates learning (e.g., part of a play theme, using toys or materials which are preferred) and breaking concepts into small increments.

11. The Social-Emotional Status PLP described Student as a happy and affectionate little girl whose activity level varied. She was shy around adults, preferred to be around children, and enjoyed playing with her dolls. Student had restricted engagement and preferred to play alone. Student possessed a variable personality, was reluctant to interact with unfamiliar adults, was resistant to comply, and had limited functional engagement with toys. This would affect Student's ability to participate in a regular preschool program. Student would need assistance with feeding for nutrition and to assure meal completion. Student was emerging in her

independence for dressing and self care. Student was not toilet conditioned. Student would require assistance with dressing and toileting to establish independence.

12. Finding Student eligible, the IEP team offered placement in a preschool mixed (PSM) special education class and provided for three related services, which it deemed necessary for Student to benefit from special education, in the areas of Visual Impairment, Language and Speech, and Physical Therapy. The IEP team created Goals and Objectives in the areas of: Articulation, Motor-PT, General Ability, School Readiness (2), Social Emotional, and Fine Motor. The IEP recommended placement in a smaller, structured language-based special education program where Student's goals could best be met. The IEP provided for extended school year (ESY)⁴ because of Student's continuing impact of disability, pattern of regression, and difficulty retaining knowledge after vacations and school breaks.

13. Student's Mother visited District's proposed placement options, observed the classes, took note of the sizes, evaluated Student's potential peers, examined the physical layouts, and talked with teachers and staff. Mother chose the PSM class at Haskell Elementary School (Haskell), with special education teacher Jennifer Stroger-Cornea (Mrs. Stroger). Mother thought the physical layout the most conducive for her child, determined the speech therapist was on site, and found the special education teacher Mrs. Stroger to be especially understanding of Student's situation. Mother informed the IEP team of her choice and the IEP was finalized. Mother signed the IEP on May 5, 2008.

⁴ Extended school year services are defined as services "provided to a child with a disability ... [b]eyond the normal school year of the public agency ...[i]n accordance with the child's IEP ..." (34 C.F.R. § 300.106(b)(1)(i) & (ii).)

14. The initial IEP offer of FAPE for the remainder of the 2007-08 school year and for the 2008-09 school year was:

- A. Placement in the preschool mix class at Haskell.
- B. Designated Instructional Services:
 - i. Visual Impairment Teacher (partially sighted itinerant), who would provide collaborative services 2 times a month for a total of 30 minutes per month, initially, until Student was acclimated. Service changed to 1 time per month in September.
 - ii. Speech therapy once weekly for 30 minutes to be provided by a speech therapist in collaboration with the special education teacher. Service delivery would include consultation, collaboration and direct services.
 - iii. Physical Therapy services to assist Student to benefit from her specially designed instruction, to be provided once weekly for 30 minutes.
- C. Extended School Year due to risk of regression.
- D. Home to school transportation.

2008-2009 SCHOOL YEAR

15. In May of 2008, Mother and the preschool mixed class teacher, Mrs. Stroger, agreed to delay Student's enrollment until the fall of 2008 because of Mother's concerns about Student's frailty and toilet needs. Over the summer 2008, Student gained greater independence in toileting and personal care, but Student's balance and motor control remained about the same. Student began attending the Haskell PSM class at the beginning of the 2008-09 school year.

16. Mother testified at the hearing. Mother is a registered nurse, receiving her nursing degree 5 years ago from Pierce College. She has worked the past eight (8) years at Providence-Tarzana Medical Center. Mother displayed a keen

knowledge of Students' rare genetic disorder. Though sometimes emotional, Mother is realistic about Student's needs and limitations. Her primary concern regarding her child in the District's classes is safety. Mother's testimony was not contradicted by other witnesses or documentation. Mother was not represented by counsel and sometimes struggled in asking questions or presenting evidence. However, Mother was credible, exhibited poise throughout the proceedings, courteously treated witnesses and opposing counsel, and respectfully participated in the hearing. Her testimony is given great weight by the ALJ.

17. Mother stated her concern about sufficient adult assistance for Student. She discussed Student's need for dependable adult assistance to access the curriculum and for safety, with Mrs. Stroger. Mother regularly checked with Mrs. Stroger about adult assistance, Student's ability to participate in class, and Student's safety in class and on campus. Mother unswervingly and consistently stated Student required adult assistance which could not be removed.

18. Student's special education teacher Mrs. Stroger testified at the hearing. Mrs. Stroger had worked for the District as a special education teacher for 13 years, assigned to Haskell Elementary. Her duties include: teaching children the curriculum; following, creating and conducting IEPs; holding parent meetings; and doing home visits. Her class is a preschool mixed, which is composed of children with various moderate disabilities. Mrs. Stroger received a Bachelor of Arts in child development in 1996 and a Masters of Arts in early childhood special education in 2001, both from California State University, Northridge. Mrs. Stroger holds an early childhood special education teaching credential and previously possessed a children's center permit, which was for a general education preschool teacher.

19. Mrs. Stroger possessed a keen recall of her interactions with Mother and Student since first meeting Mother in April 2008 when Mother was visiting

possible placement options related to the initial IEP. Other than Student's Mother, Mrs. Stroger was the witness with the most and broadest range of personal interaction with Student. As Student's special education teacher, Mrs. Stroger had reason to be aware of Student's IEP services, the delivery of such services, Student's needs and everyday challenges, the classroom environment, and the resources available in her PSM special education class at Haskell. Accordingly, her testimony was carefully considered by the ALJ.

20. Mrs. Stroger was aware in April 2008 that Mother's greatest concern was safety because Student was very fragile, very small (weighing in the "early 20s"), visually impaired (especially depth perception), and hampered by poor muscle tone. In the Fall of 2008, Student's PSM class lasted for two hours, 20 minutes in the morning, four days a week. One baseline adult assistant was assigned to Student's class. Also, there was an additional adult assistant who was available for the morning class. This additional adult assistant (Mrs. Jackie Wilson) was assigned to a special education student in Mrs. Stroger's afternoon class. However, Mrs. Wilson was not assigned to a student in the PSM morning class. Mrs. Stroger stated that she supports Mother's request for an additional adult assistant to be assigned to Student and, further, would seek such assistance even if Mother did not.

TYPES OF ADULT ASSISTANCE

21. Mrs. Stroger's testimony highlighted the confusion amongst the witnesses about the terms used to describe adult assistance in the special education classrooms. Since adult assistant assignment is at the heart of the dispute, the following terms are defined for purposes of this decision: ⁵

⁵ The witnesses' use of these terms was inconsistent and sometimes contradictory. Mrs. Stroger stated that the terms used to identify adult assistance

- Baseline AA – an adult assistant (AA) assigned to a special education class, typically determined by baseline ratios of adults to students. The baseline AA supports the SE teacher and is available to assist all the children. The baseline AA cannot be taken from the classroom to serve elsewhere and needs to be replaced with a substitute when absent.
- Additional Adult Assistant (AAA) – an adult assistant who is in a special education class in addition to the baseline AA. This AAA supports the SE teacher and is available to assist all the children. Unlike the baseline AA, the AAA can be taken from the classroom at anytime to be used elsewhere and, if absent, need not be replaced with a substitute.
- Additional Adult Assistant assigned to a student – an AAA who is assigned to a specific special education student. Though the AAA supports the SE teacher and is available to assist other children, this type of AAA's primary responsibility is a particular student, whose needs are the AAA's priority. The AAA, who is assigned to a student, cannot be taken from the classroom to serve elsewhere and should be replaced with a substitute when absent. A student's IEP will indicate if there is an AAA assigned to the student.
- One-on-One (1-on-1) – an additional adult assistant (often called an "aide") who is assigned to one student, whose needs are the adult assistant's sole concern. A 1-on-1 supports the SE teacher's efforts regarding the assigned student. The 1-on-1 is not available to assist

were confusing and that the District's use of the terms often changed. Therefore, the ALJ pointedly asked the witnesses their respective definitions to ensure clarity and consistency in the testimony.

with other children in the classroom. The 1-on-1 cannot be taken from the student to serve elsewhere and needs to be replaced with a substitute when absent. A student's IEP will indicate a 1-on-1 assignment.

22. Mrs. Stroger was concerned about Student's need for adult assistance support from the very beginning. Student bumped into objects, was unsteady, was not verbal, was MR and VI low incidence, was unable to follow directions, had poor muscle strength, would wander, and could not express wants and needs. Considering the number of students in the morning PSM class and in light of Student's needs and eligibility, Mrs. Stroger believed Student was a very good candidate for an additional adult assistant assigned to Student.

23. Mrs. Stroger hoped to be able to meet Student's needs with the AAA in the morning and told Mother that she would direct the AAA to work more closely with Student. Student needed help and guidance with her work, her curriculum, sitting and attending and, most significantly, her safety because Student kept falling in the school yard (a greater risk of injury because Student always wore glasses).

24. However, the morning AAA could be pulled out or be absent, leaving Student without the attention Mrs. Stroger considered necessary for accessing the curriculum. The AAA was pulled or absent on at least two occasions. Mrs. Stroger became apprehensive about meeting Student's needs in the classroom, especially as to safety. Mrs. Stroger talked to the Haskell administration and was told by her assistant principal an IEP amendment meeting should be convened for the purposes of getting additional assistance for Student.

OCTOBER 2008 FUNCTIONAL BEHAVIOR ASSESSMENT

25. The Haskell assistant principal also told Mrs. Stroger that a Functional Behavior Assessment (FBA) needed to be completed before holding the

amendment IEP for purposes of assigning an AAA to Student.⁶ Mother signed a Special Education Assessment Plan on September 18, 2008. Mrs. Stroger thereafter conducted interviews, observations, and document reviews. She completed the FBA, dated October 24, 2008.

26. The October 2008 FBA reviewed Student's medical history, diagnosis and symptoms. The FBA described classroom targeted behaviors. Though Student tried extremely hard in class to assimilate to the program and peers, she had a number of difficulties. Student was unable to follow basic rules and routines. Student's vision and physical abilities created safety concerns. Student's targeted behaviors included: gets upset easily (cries or has breakdowns); tends to wander aimlessly (cannot stay focused); becomes very upset when the routine is changed; requires direct adult support and assistance; has difficulty engaging with peers/adults; becomes very impulsive at times; unable to navigate her classroom environment at times; and has unsteady balance and is unable to keep up with peers physically.

27. As the current teacher, Mrs. Stroger stated that Student's current program placement was appropriate but only if there was enough support. Student required a lot of individual adult support and assistance and there was not enough adult support in place to meet her needs. Mother reported that Student had a number of incidents the previous months which resulted in emergency room visit

⁶ Witnesses Stroger and Mother sometimes used the term "1-on-1" in referring to the additional adult support to be provided by the November 2008 amendment IEP. However, their description of the duties associated with this additional support established that they were referring to an "AAA assigned to a student." (See ¶ 21 and fn. 5, above.)

and orthopedic examination. A recent ankle sprain took 4 weeks to resolve, preventing Student from performing her regular activities. Mother provided this history in further explaining why Mother was very concerned for Student's safety and access to the same experiences as her peers. Mother also reported that she expressed her concern over an AAA at the April 2008 IEP but was told there would be "enough support."

28. The October 2008 FBA indicated that all of Student's related service providers, both assistants in the PSM class, and school support staff believed that Student required more support and supervision to meet her safety and social needs.

29. The FBA included an analysis of antecedents, behaviors, and consequences (ABCs). Four behaviors and consequences were presented. Student would participate in off task behavior to avoid the class activity, seeking preferred or self-chosen activities and attention. Student did much better when an adult was present. Suggested positive replacement behavior included an adult providing physical prompts and redirection to the tasks at hand. Also, Student should be allowed to complete tasks in parts and to take more time for tasks. The FBA recommendations were: an adult assistant to support Student in keeping her safe; having an adult walk next to her when walking around the school campus; acknowledge appropriate behavior; provide warnings and transitions; provide breaks; use different work areas for continued visual support; provide opportunity for movement; and encourage Student with positive reinforcement.

NOVEMBER 2009 AMENDMENT IEP

30. The amendment IEP took place on November 10, 2008. Attending the IEP were Mother, Mrs. Stroger (SE teacher), Deirdre McDermott (General Education teacher), and Haskell Elementary School Assistant Principal Rene Chavez

(Administrator/Educational Instruction Specialist).

31. The sole purpose of the November 2008 amendment IEP was to consider providing AAA support to the Student. The IEP has a PLP for Behavior. Student required a lot of re-direction and physical prompting. Student heavily relied on adult support and facilitation in order for tasks to be completed. Student tended to wander and leave an area/activity. When brought back to the activity, Student had tantrums and would completely "shut-down." Accommodations were proposed, consistent with those listed in the FBA. The IEP PLP for Behavior recommended that Student have additional adult support to address her inappropriate behaviors.

32. The November 2008 amendment IEP also provided a PLP for Safety, which states that Student had a great need for adult support and supervision. Student had fallen on numerous occasions since the start of school. Her gait was extremely unsafe and unstable. Her visual impairment strongly impacted her ability to have complete access to her physical environment. Paired with her physical delays, Student was unable to safely navigate her physical environment, which impacted her preschool curriculum involving physical development. The IEP PLP for Safety recommended that Student have additional adult support to address her safety needs.

33. The IEP narrative notes that Student was a wanderer and had a very unsteady gait, which posed safety concerns. The IEP then states on page 12:

"[Student's] current class has 11 students w/her 12 (2 over norm) and 1 baseline assistant with the support of an AA whose current student is in the PM class, making it very easy to have that AA support [for Student] in the AM class. With this support, [Student]

will be able to maintain more appropriate behaviors as well as gain complete access to her preschool curriculum. All other aspects of this IEP will remain in affect until her annual review of April 14, 2009."

34. Assistant Principal Chavez testified to the District's interpretation of the above language in the IEP amendment. Mr. Chavez has worked for the District a total of 11 years. The first 5 years, Mr. Chavez was a teacher in multiple subjects at Hazeltine Elementary School. For the last 6 years, he has been an assistant principal. Mr. Chavez did not work in education prior to coming to the District. He is now assistant principal at Lorne Elementary School and Cohasset Elementary School, where he oversees the special education program. For the school year 2008-09, Mr. Chavez was the assistant principal at Haskell Elementary School, where his duties also included overseeing the special education program. Presently, Mr. Chavez has no responsibilities related to Haskell. Mr. Chavez has a Bachelor of Arts degree in political science from University of California, Los Angeles, in 1996. In 2003, he received a Masters of Arts from UCLA in education. He holds a multiple subject teaching credential and an administrative credential. Mr. Chavez possesses the required qualifications, licenses, and experience as an administrator of special education programs to knowledgeably read, understand, and determine the placements, services, goals and objectives, as recorded in a written IEP.

35. Mr. Chavez did not have an independent recollection of the November 2008 amendment IEP. After reading certain portions of the IEP, Mr. Chavez stated that his independent recollection was not refreshed. Therefore, when testifying as to the November 2008 IEP, he relied upon the IEP language, his training, and his experience of attending, writing, and administering IEPs as an assistance principal at Haskell and for the District.

36. The IEP team determined that Student's IEP was to be amended to assign an AAA for Student in the morning class, specifically Mrs. Wilson, who was assigned to another student in Mrs. Stroger's afternoon class. The intention was to have Mrs. Wilson assigned to Student in the morning like she was assigned to a student in the afternoon.

37. Mr. Chavez confirmed the IEP similarly assigned Mrs. Wilson as an AAA to Student in the morning. This meant that Mrs. Wilson could assist other students but her primary responsibility was to meet Student's needs. Mr. Chavez's intention was that, as an AAA assigned to Student, Mrs. Wilson would not be pulled away from Student for other purposes. He further stated he never did. He did not know if someone else did, but Mrs. Wilson should never have been pulled from Student's class.

38. Mother and Mrs. Stroger both similarly testified at the hearing. Mrs. Stroger had specifically asked for an AAA to be assigned Student because, otherwise, the AAA could be pulled to serve elsewhere, leaving Student inadequately supported and jeopardizing Student's safety and ability to access the curriculum. Both Mother and Mrs. Stroger believed the November 2008 amendment IEP provided an AAA assigned Student.

39. The November 2008 amendment IEP added two goals: one for Behavioral Support and another for Safety. Both goals list the special education teach and the AAA as the responsible personnel. A Behavior Support Plan (BSP) was appended to the amendment IEP, consistent with the added goals.

STUDENT TWICE SEPARATED FROM CLASS AFTER NOVEMBER 2008 AMENDMENT IEP

40. Following the November 10, 2008 amendment IEP, Mrs. Stroger was away from school for approximately one month, the last 3 weeks of November and

the 1st week of December, 2008. While gone, she believed that Mrs. Wilson, the AAA assigned to Student, had regularly been in Student's morning PSM class. Upon returning to school, Mrs. Stroger noted that Mrs. Wilson started to be pulled from her morning PSM class, leaving Student without the additional adult assistance, which was assigned to Student by the November 2008 amendment IEP.

41. On the last day before the winter break (a Wednesday), the elementary school was having a holiday program. Mrs. Wilson was pulled to assist a teacher from another classroom. Mrs. Stroger's baseline AA was absent. The administration provided a substitute baseline AA, but Mrs. Stroger was left with 13 children and one aide, who did not know the program.

42. Upon return from the winter break, Mrs. Wilson started to be pulled from Mrs. Stroger's class on a regular basis. Mrs. Wilson was being pulled 1 to 2 times per week from the Monday through Thursday class, sometimes for the full morning class, sometimes for an hour. The PSM morning class is 2 hours, 20 minutes, so Mrs. Stroger's ability to provide Student's IEP services was substantively disrupted even when Mrs. Wilson was pulled for an hour.

43. Student was twice lost at school in early 2009, when the AAA assigned to Student was gone. The first incidence occurred right after the Martin Luther King holiday (Monday, January 19). Mrs. Wilson had been pulled from Student's class. After outside playtime, Student wandered out of the kindergarten gated area into the upper grade yard. A kindergarten aide found Student in the corridor near the second grade classrooms and brought her back. Mrs. Stroger and the baseline AAA were unaware that Student was missing. The second time, closer to the April 2009 annual IEP, Mrs. Wilson was absent and no substitute was provided. Mrs. Stroger discovered that Student was missing and notified the front office to elicit help in searching. Some time passed before Student was found,

outside, next to a trash bin, where she fell. Student did not express her needs or call out for help. Student's tendency to wander was a primary reason why Mrs. Stroger sought an assigned additional adult assistant, especially since Student's PSM classroom was next to a parking lot which led to a street.

APRIL 2009 ANNUAL IEP

44. Student's first annual IEP took place on April 2, 2009. Attending the IEP were Mother, Mrs. Stroger (SE teacher), Deirdre McDermott (General Education teacher), Ixchelle Monk (Visual Impairment), Teresa Van Vranken, DPT (Physical Therapy), a USC physical therapy student (observing only), and Haskell Elementary School Assistant Principal Chavez (Administrator/Educational Instruction Specialist).

45. Teresa Van Vranken has worked for the District as a school physical therapist for 12 years. Ms. Van Vranken is assigned to 62 schools, including Haskell. She sees children directly and assists them in increasing their functional mobility skills and play skills. Her duties include educating and assisting parents and teachers.

46. Ms. Van Vranken received a 1994 Bachelor of Arts degree from Sonoma State University in kinesiology, which included one and a half years of prerequisites for her 3-year doctoral program. In 1998 she earned a Ph.D. from the University of Southern California in physical therapy. Her doctoral research included the effectiveness of school physical therapy upon children with chromosome deficits. Ms. Van Vranken is familiar with Student's Chromosome 18q minus deletion syndrome although her research did not specifically include this chromosome deficit. She possesses a physical therapy license. As a physical therapist, she possesses all the required qualifications and licenses to administer assessments, provide direct services and consultation, and develop IEP goals and objectives.

47. Ms. Van Vranken provides mostly direct physical therapy services to Student. She observes Student in the classroom, checking on functional gains and takes Student outside to work on various issues. Student's most significant issues are decreased strength and decreased balance.

48. Ms. Van Vranken reviewed Student's physical therapy goals and concluded that Student had made progress in her compensatory skills but little if any progress in her strength. In the Motor/Physical Therapy Present Levels of Performance, Ms. Van Vranken reviewed Student's strengths and areas of needs.

49. Student's strengths include: independently move through the classroom, acquire toys by herself, get in and out of various chairs, go to her cubby herself, step over toys, walk to washroom (with assistance of aide in bathroom), functionally move in the classroom by herself. The Student's primary area of need is the lack of strength, which the physical therapist had not been able to remediate. Despite physical therapy and the classroom program since September 2008, Student's strength did not improve. Student increased her skills in other areas to compensate for her lack of strength, which enabled her to do more. However, Student exhibited the same behaviors as those when Ms. Van Vranken started to work with Student in September 2008. For example, Student continued to reach for the hand rail when going on stairs, putting one hand on the rail and using the other hand to push up on her knee. If Student had any increase in strength, she would have no longer exhibited this conduct.

50. The physical therapy services included stair climbing, tricycle riding, climbing through and over objects, and working on the elementary school play structure ladder. This regimen should have increased Student's muscle strength. The absence of increasing strength is a consequence of her syndrome. Though the physical therapy continues, Ms. Van Vranken does not expect Student's strength to

significantly improve, if at all, given the physical therapy history. Student's strength appears to have plateaued and will probably not increase.

51. Ms. Van Vranken recommended physical therapy services continue for Student. She developed goals for Student at the April 2009 annual IEP. The general goal was for Student to increase her ability to access the educational environment. The two objectives used in measuring the goal were Student pedaling a tricycle a set number of times over different surfaces, and ascending at least three 6-inch stairs independently (without verbal cues) using one rail 80% of the time. At the April 2009 annual IEP, Ms. Van Vranken did not support the request of Mother and Mrs. Stroger for a 1-on-1⁷ aide. Ms. Van Vranken did not feel that Student was a flight risk. From a physical therapy perspective, 1-on-1 aides are used for a person who is unable to transition physically, is unable to sit, or is in need of a wheelchair. Student transitions between positions and transitions between activities. Ms. Van Vranken stated that Student does not need a 1-on-1 aide because Student can access areas of her curriculum. Ms. Van Vranken was concerned that a 1-on-1 aide would cause Student to become dependent and delay Student's independence. When Ms. Van Vranken was in Student's classroom, she saw sufficient adult support to meet Student's physical therapy needs. There was an adult there to help. Student was physically able to do what the teacher asked. Student was able to accomplish many tasks during her physical therapy and these tasks are more physically taxing than what Student does in the classroom. Ms. Van Vranken's opinion was that Student does not require a 1-on-1 aide from a physical therapy perspective. Appropriate support and services relevant to physical therapy

⁷ When using "1-to-1 aide," the witness's testimony confirmed she was using the term as defined above (see ¶ 21 and fn. 5, above).

needs could be met by the teacher and adult staff.

52. Ms. Van Vranken provided physical therapy for Student once a week for 30 minutes. The session was usually outside. Student did okay in the classroom when properly staffed. Ms. Van Vranken acknowledged that she did not know if Student's class was consistently properly staffed.

53. The physical therapist's testimony regarding Student's physical needs and strengths provided valuable additional understanding of Student's condition and needs. However, Ms. Van Vranken's statements regarding a 1-on-1 aide were sometimes beyond the witness's experience, or knowledge. For example, nothing in the April 2009 annual IEP indicates that the Mother asked for a 1-on-1 aide. The IEP document indicates that Mother wanted a guarantee that an additional adult assistant would be there for her daughter, when needed. (This could have been a consequence of the parties ascribing different meanings to the term "1-on-1.") Ms. Van Vranken stated that Student was not a flight risk, despite the documented incident of Student wandering away from the classroom and being found in the kindergarten campus. Witness's statement that she does not have any physical therapy safety concerns for Student, who can learn to compensate and only needs to be exposed to different situations and dual tasking, appeared inconsistent with the incident just a few weeks before the IEP when Student fell by a trash can and was lost, requiring a lengthy search to find because Student could not cry for help or extricate herself. Witness's statement that she was not concerned that Student's small size being a factor in considering a 1-on-1 aide was inconsistent with Student's primary area of need, lack of strength, which witness states is not likely to increase. Ms. Van Vranken's testimony exhibited deep care for Student and a sincere desire for Student to grow increasingly independent despite her physical challenges. The administrative law judge considers the physical therapist's

testimony regarding a 1-on-1 aide or adult assistance to be from a physical therapy perspective and does not give substantial weight to the testimony as it relates to the Student's general need for additional adult assistance to access her curriculum and assure her safety in the PSM class.

54. Ixchelle Munck also attended the April 2009 annual IEP. She has worked for the District as a teacher of the visually impaired since 1999. Over the past two years, she has been an itinerant teacher, assigned to 10 to 13 schools, including Haskell Elementary. In 1998, Ms. Munck received a Bachelor of Arts degree in child development from Mount St. Mary's College and in 2004 she received a Masters of Arts from California State – Los Angeles, in visual impairment. She has a level 2 special education instruction credential in visual impairment. As a visual impairment teacher, she possesses all the required qualifications and licenses to administer assessments, provide direct services and consultation, and develop IEP goals and objectives.

55. Ms. Munck works with Student 30 minutes a month, in a collaborative model. She works with Student's teacher in designing accommodations for Student. Visual impairment accommodations for Student include: sitting close to the teacher during group lessons and activities, sitting facing away from glare and lights; and allowing Student to seek permission and approach a viewing area for more accurate observation of detail.

56. At the April 2009 annual IEP. Ms. Munck evaluated Student's present levels of performance, noting strengths and abilities as well as needs and challenges. Student's major visual challenge was fine motor skills related to hand/eye coordination. Student did not meet the previous years IEP goal of tolerating textures and utilizing class manipulatives with a consistent three-point and pincer grasp while engaged in simple art or craft activity. Student needed

assistance with grasping. Ms. Munck recommended that Student continue to receive services from the visually impaired program.

57. Student does not require a 1-1 aide⁸ to achieve the visual impairment related goals. Student's visual needs were met with her accommodations. Based on visual needs, the accommodations enabled Student to access her education. When Student required some extra support regarding visual impairment, adult assistance was sufficient. A 1-1 aide risked Student developing dependence rather than gaining independence relative to her visual impairment. The accommodations necessary for Student's visual impairment required adult assistance, not a 1-1 aide. Ms. Munck carefully circumscribed her opinion regarding aide support to issues solely related to Student's visual needs. Ms. Munck was aware of Student's other deficits and challenges, but did not offer an opinion regarding adult support other than as to Student's visual impairment.

58. The April 2009 IEP documented that Student failed to meet 9 of her 10 goals, including the Behavioral Support and Safety goals added by the November 2008 amendment IEP. (Student met her goal in School Readiness.) The PLP for Behavior found that "Not much has changed since meeting in November." Student still required a lot of adult assistance, recommending additional adult support. The Safety PLP similarly found that not much had changed since the November 2008 amendment IEP, other than Student eloping at least twice in the last school year. The Safety PLP stated that Student was still in great need of adult support and supervision. She had fallen on numerous occasions since the start of school. Student's gait was extremely unsafe and unstable. The Safety PLP

⁸ When using "1-to-1 aide," the witness's testimony confirmed she was using the term as defined above (see ¶ 21 and fn. 5, above).

recommended additional adult support to better facilitate her safety needs.

59. The April 2009 annual IEP summarized that Student, though she had made nice gains, still required a lot of supervision and assistance when working in group situations. Student tended to wander and not stay focused to the task at hand. The April 2009 annual IEP states that an FBA was conducted to assess Student's need for additional support. The April 2009 annual IEP offer was that Student would remain in the PSM morning program at Haskell for the then current year and for 2009-10, with a review in December 2009 to see if Student should move to the afternoon PSM after winter break. All DIS services were to continue. Annual Goals were set in: Motor (PT), Fine Motor, Speech (articulation), Safety, Behavioral Support, and Language Development.

60. Mrs. Stroger and Mother both expressed concerns about how the AAA assigned to Student (Mrs. Wilson) was being pulled from Student 1 to 2 times a week. Mrs. Stroger asserted that the November 2008 amendment IEP provided an AAA assigned to Student. Contrary to the November 2008 amendment IEP, Mr. Chavez told Mrs. Stroger that Student did not have an AAA assigned to her because there was not sufficient AAAs. Mrs. Stroger could not understand in light of the fact that Mrs. Wilson was a six-hour AAA and assigned to only one student in the afternoon. The November 2008 amendment IEP recognized this and determined Mrs. Wilson should be assigned to Student in the morning, consistent with the October 2008 FBA findings and recommendations. The April 2009 annual IEP incorrectly stated that Student's AAA needs were being met with existing staff.

61. The April 2009 annual IEP offer was: Placement in the morning PSM Special Day Program at Haskell. Services continued to be: Blind/Partially Sighted Itinerant, 1 to 5 times per month, for a total of 30 minutes per month; Language and Speech, 1 to 5 times per month, for a total of 120 minutes per month; and

Physical Therapy, once a week, for 30 minutes a week. The IEP team recommended the LAS service be delivered at least 2 out of 4 sessions per month in a 1:1 session.

EVENTS SUBSEQUENT TO FILING

62. Both the District and Mother requested that the ALJ consider documents and events, which occurred after the May 12, 2009 filing of the due process. This evidence was admitted solely for the purpose of addressing and fashioning a remedy, if needed.

63. On May 14, 2009, Mother signed a Special Education Assessment Plan to have Student assessed for occupational therapy services. District occupational therapist Saera Hwang conducted the assessment. Ms Hwang testified at the hearing.

64. Saera Hwang had worked as a District occupational therapist for over five years. Prior to that, she had approximately six years of experience as an occupational therapist in a school district and a private clinic. Her District duties included therapy sessions, assessments and IEP meetings. She earned a Bachelor of Arts from University of California, San Diego, in 1995, and a Masters of Arts in occupational therapy from University of Southern California in 1999. The District assigned Ms. Hwang to 4 school sites, including Haskell. As an occupational therapist, she possesses all the required qualifications and licenses to administer assessments, provide direct services and consultation, and develop IEP goals and objectives.

65. Ms. Hwang conducted the assessment and produced the occupational therapy report, dated June 9, 2009. Student's primary needs had to do with fine motor skills (ability to grasp) and vision motor skills to trace and cut, which were most apparent during table top activities. Ms. Hwang concluded that Student required occupational therapy services to assist her to benefit from Student's

specially designed instruction. Haskell noticed an amendment IEP for June 11, 2009, specifying DIS OT as the only issue for consideration. Since the only issue was the addition of OT services, Mother gave the team permission to proceed without her. Not wanting to unnecessarily take off work, Mother did not attend believing the only issue would be OT services.

66. The June 11, 2009 amendment IEP recorded the following attendees: Saera Hwang (OT), Jill Kleinberg (GE teacher), Jennifer Stroger-Cornea (SE teacher), and assistant principal Rene Chavez (Administrator). Ms. Hwang prepared the PLP for OT, summarizing her OT assessment findings and recommendations. Ms. Hwang also developed the OT Goal that Student would demonstrate improved fine motor, motor planning, and proprioceptive (nerve ending) awareness. The Goal included two incremental objectives. The amendment IEP provided Student with OT therapy, one time per week, for 30 minutes a session.⁹ Ms. Hwang has provided the weekly service to Student since September 2009.

67. Student requires adult assistance to achieve her OT goals. Student is working on grasp and needs cues and guidance. Ms. Hwang provided Student with eight OT sessions. Six times, Ms. Hwang observed two additional adults in classroom to assist the teacher; on two occasions, she observed one adult assistant. She collaborates with the SE teacher and the adult assistants so they may provide OT related assistance for Student. Ms. Hwang's opinion is that Student does not

⁹ The amendment IEP also addressed Speech, BID (behavior intervention development), and Adult Assistance, which Mother contends was procedurally improper. However, the June 2009 amendment IEP is not part of this due process proceeding.

now require a 1-on-1 aide¹⁰ to achieve her OT goals. At the June 2009 amendment IEP, Ms. Hwang did not participate in, nor make any recommendation regarding, a 1-on-1 aide or additional adult assistant assigned to Student.¹¹

68. Student's special education teacher, Mrs. Stroger, contended that Student continues to require an AAA assigned to Student. Though VI, OT and PT are improving, and Student has made great gains, Student still needs dependable adult assistance to access her special education. Mrs. Stroger cannot get more than five unassisted attentive minutes from Student. Her behavior has become increasingly difficult to direct and monitor. Student cries, yells, and is oppositional. Mrs. Stroger believes Student's behavior regressed because she could not attend summer school. Student presently requires an adult for guidance. Student's class now has 14 students and sometimes has an AAA, in addition to Mrs. Stroger and the baseline AA. However, the AAA is often pulled from the class to serve other students in other classes. Student is 4 ½ years old and will be transitioning into kindergarten next year. Student needs the additional adult assistance to overcome inappropriate behavior in order to access her curriculum now.

69. Both Mrs. Stroger and Mother testified about ESY in the summer of 2009. Because of budgetary considerations, Mrs. Stroger's ESY class moved from

¹⁰ When using "1-to-1 aide," the witness's testimony confirmed she was using the term as defined above (see ¶ 21 and fn. 5, above).

¹¹ Though her signature is on the attendance sheet, the witness did not attend the entire June 2009 amendment IEP. Ms. Hwang shared her recommendations, asked to leave early and left, with the assistant principal's permission.

Haskell to Lassen Elementary (Lassen). Lassen was a crowded campus, with about 400 students. Both Mother and Mrs. Stroger were concerned about the adult assistance to Student, especially for safety. Mrs. Stroger had approximately 16 students in her class, in addition to Student, and one baseline AA. One adult assistant for the class was inadequate. Mrs. Stroger communicated to the principal that the class required more adult assistance. Despite follow up messages, and contact from Mother, the administration never addressed the adult assistance in Mrs. Stroger's ESY class. The bathroom for the Lassen ESY was about 200 feet from the classroom. Whenever the lone AAA took a child to the bathroom, Mrs. Stroger was left alone with 16 children. Busses dropped students off on two different sides of the Lassen campus, contributing to the difficulty in managing the students. Mrs. Stroger saw that the change in environment was very difficult for Student and the teacher was concerned about managing Student with inadequate adult assistance. Mrs. Stroger concluded the ESY at Lassen was an unsafe and unsuitable environment for Student. Mother withdrew Student from the 2009 ESY after 3 days. The progress report of July 31, 2009, stated that Student could not be evaluated for ESY 2009 because there was no additional adult support provided and Student attended but one week. Consequently, Student did not receive her IEP LAS services for Summer 2009.

LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, the Student has the burden of proof.

2. Student generally maintains that the District failed to provide FAPE by not offering and not providing an AAA assigned to Student in the November 2008

amendment IEP and the April 2009 annual IEP.

3. Under the Individuals with Disability Education Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Related services" ¹² are developmental, corrective and support services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) "Related services" include transportation, developmental, corrective and supportive services as may be required to assist the pupil in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subds. (a).) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.ED.2d 690] (Rowley), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require

¹² In California, "related services" are called "designated instruction and services" (DIS).

school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (Id. at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (Id. at p. 201; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034, 1037-1038 & fn. 10 (Mercer Island).)

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (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.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) 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 placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (Ibid.)

6. The standard also requires that a school district's program comport with the IEP. (Cal. Code Regs. tit. 5, § 3001(o)(4).) The IDEA defines a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program." (20 U.S.C. § 1401(9)). The statute allows a party to challenge an IEP because of procedural flaws in the IEP's formulation as well as "on substantive grounds based on a determination of whether the child received a free appropriate public education." (Id., § 1415(f)(3)(E)(i). This language indicates that a failure to implement

an IEP may deny a child a free appropriate public education and thereby give rise to a claim under the statute. (Van Duyn vs. Baker School District 5J (9th Cir. 2007) 502 F.3d 811, 821.)

7. To determine whether a pupil was denied a FAPE, an IEP must be examined in terms of what was objectively reasonable at the time it was developed, not in hindsight. (Adams, *supra*, at p. 1149; Roland M. v. Concord Sch. Comm. (1st Cir. 1990) 910 F.2d 983, 992 (Roland).) Minor implementation failures are not actionable given that "special education and related services" need only be provided "in conformity with" the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education. (Van Duyn, *supra*, 502 F.3d 811, 821.) A "material" failure to implement, though, is actionable. A failure is material "when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child's IEP." (*Id.* at p. 822.) The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. (*Ibid.*)

8. 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. (Honig v. Doe (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).)

9. The IEP also must include a statement of the program modifications

or supports for school personnel that will be provided to the pupil to allow the pupil to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).) Where a pupil's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1, subd. (b)(1).)

10. Under special education law, a pupil must be reassessed at least every three years. (20 U.S.C. § 1414(a)(2)(B)(i)-(ii), 34 C.F.R. § 300.303(b) (2006).) As part of a reassessment, the IEP team is required to review: existing assessment data, information provided by the parents, and observations; identify, with input from the parents, what additional data, if any, is needed to determine continued eligibility; present levels of performance and educational needs; and determine whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the annual goals and participate in the general curriculum. (34 C.F.R. § 300.305; Ed. Code § 56381.)

ISSUE 1: THE NOVEMBER 2008 AMENDMENT IEP DID NOT PROVIDE FAPE

11. Adult assistance is a related service which the District may utilize to meet its obligations to provide a FAPE. (Ed. Code, § 56363.) Yet, the District's own teachers and staff were baffled by the meaning of the various terms used by the District in describing adult assistance. The testimony and evidence at hearing demonstrated substantive confusion regarding the terms used to describe adult assistance at Haskell. The District has the burden of clearly and unambiguously describing available related services. The use of ambiguous and unclear related service terms is contrary to this obligation. This uncertainty affected the ability of

the parties to clearly delineate evidentiary purpose and issue argument. Therefore, the ALJ looked beyond the terms and sought the purpose for the various adult assistance models presented in the pleadings, the prehearing conference order, the testimony and the documentary evidence.¹³ At all times relevant herein, Student's Mother and SE teacher sought additional adult assistance for Student which could not be pulled from Student's classroom, making the adult assistant unavailable to Student. This is defined as an "AAA assigned to student." Neither Student's Mother or SE teacher requested an adult aide to be solely assigned to Student. This is defined as a "1-on-1" aide.

12. Student has failed to carry the burden of proof in establishing that the District failed to offer an AAA assigned to Student, in the November 2008 amendment IEP, because the District actually did offer an AAA assigned to Student. The only purpose of the November 2008 amendment IEP was to provide for the AAA assigned to Student. The IEP document reads that an AAA assigned to student was offered. In response to the Student's teacher's concern regarding adult assistance for Student, the Haskell assistant principal Mr. Chavez instructed the teacher to prepare an FBA and to schedule an amendment IEP to arrange for an AAA assigned to Student. The October 2008 FBA, completed in preparation for the amendment IEP, recommended an AAA assigned to Student. When reviewing the November 2008 amendment IEP, Mr. Chavez unambiguously testified that the IEP provided for an AAA to be assigned to Student. Mr. Chavez also confirmed that this AAA assigned to Student could not be pulled from Student's classroom, though the AAA assigned to Student could assist the SE teacher with other students in the

¹³ Please see paragraph 21 and footnote 5, hereinabove, regarding the adult assistance terms used in this decision.

classroom. The November 2008 amendment IEP assigned an AAA to Student for the very purpose of assuring that Student would have adult support that could not be removed from Student's classroom to serve elsewhere. Therefore, the November 2008 amendment IEP made a FAPE offer. (Factual Findings 37; Legal Conclusions 5.)

13. Student has, however, met the burden of proof in establishing that the District failed to provide the related service of AAA assigned to Student, as reflected in the November 2008 amendment IEP, and that such failure was material. The AAA who was assigned Student was regularly pulled from Student's PSM class. When the AAA who was assigned Student was absent, no substitute was provided. On two occasions, when the AAA assigned to Student was not present, Student was separated from the class. The first incident was when Student wandered away from class on the preschool playground and into the upper grade campus area, where she was found by a kindergarten aide. Student's SE teacher and the baseline AA did not even know Student was missing. The second incident was when student had wandered and fell near trash bins, could not extricate herself and could not call for help. The office was informed of Student's absence and a search was undertaken with additional personnel. Student was eventually found, but only after a significant passage of time. The AAA assigned to Student was a related service to assure that such incidents did not occur and that Student could otherwise access her curriculum. The District's failure to implement the AAA assigned to Student is more than a minor discrepancy from the IEP. Student has met the burden of proving that District failed to implement the AAA assigned to Student by the November 2008 amendment IEP, that such failure was material, and that District denied Student a FAPE as a result of such material failure. (Factual Findings 40-43; Legal Conclusions 6-7.)

ISSUE 2: THE APRIL 2009 ANNUAL IEP DID NOT PROVIDE FAPE

14. The April 2, 2009 annual IEP did not offer an AAA assigned to Student. Though acknowledging the Student's need for AAA support, the April 2009 annual IEP stated that Student's need can be met by existing staff. This annual IEP ignored that the November 2008 amendment IEP had already provided an AAA assigned to Student and that the circumstances and needs which prompted such related service not only continued but were more acute.

15. The April 2009 annual IEP misstates the related services which Student was receiving pursuant to her IEPs, by stating Student's AAA needs were being met by existing staff (Factual Finding 61). The annual IEP ignores, as confirmed by Mr. Chavez' testimony and the IEP documents, that the November 2008 amendment IEP provided an AAA assigned to Student. The parties and witnesses could not explain the discrepancy. Though the April 2009 annual IEP acknowledges Student requires "... an AA in order to meet her safety and behavioral needs which impact her learning and curriculum," the District found that Student's AA needs could be addressed using existing resources at the school site. This determination is contrary to the November 2008 amendment IEP, even though the April 2009 annual IEP found: (a) the PLPs for Behavior and Safety had not changed since the prior November amendment; (b) the FBA affirmed the need for the adult assistance; (c) the Student failed to meet 9 out of her 10 goals; (d) the Student's SE teacher Mrs. Stroger continued to insist on an AAA assigned to Student to assure safety and access to curriculum; (e) Mother and Mrs. Stroger emphasized the need of adult assistance for Student which was always there and could not be pulled; and (f) the circumstances which caused the November 2008 amendment IEP to provide an AAA assigned to Student had become more acute, as indicated by the Student repeatedly falling and twice becoming separated from the

PSM class. Accordingly, Student has met the burden of proving that the April 2009 annual IEP failed to provide a FAPE by not providing an AAA assigned to Student. (Factual Findings 59-62; Legal Conclusions 4,5 & 8.)

THE REMEDY

16. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing “shall grant such relief as the court deems appropriate.” (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) The United States Supreme Court has held this authority “confers broad discretion on the court” to grant relief that is appropriate in light of the purpose of the IDEA. (School Committee of the Town of Burlington, Massachusetts v. Department of Education (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (Forest Grove School District v. T.A. (2009) 557 U.S. ____ [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168] The fashioning of equitable relief in IDEA cases requires a “fact specific” analysis. (Parents of Student W. v. Puyallup School District No. (9th Cir. 1994) 31 F.3d. 1489, 1497.)

17. The District pointedly requested consideration of a June 2009 amendment IEP, which added OT services, for purposes of assisting the ALJ in fashioning a remedy. The District also elicited testimony from the VI, PT, and OT service providers about Student’s present condition, classroom environment, and

need for a “1-on-1” aide.¹⁴ Each of the service providers stated that Student does not require a 1-on-1 aide to achieve their respective related service’s goals. Their general opinion is that a 1-on-1 aide may very well encourage Student to become increasingly dependent on such aide and fail to develop independence sufficient to improve in the related services. The service providers also carefully limited their respective opinion to a 1-on-1 aide for purposes of achieving the goals for each of their services.

18. Each service provider stated that adult assistance is necessary for Student to develop and stay on track for each of their respective disciplines – VI, PT, and OT. The VI, PT, and OT service providers also stated that they were in Student’s classroom on a limited basis, when they were there to provide services. They often provided the services outside the classroom. Therefore, the service providers could not provide meaningful testimony regarding Student’s needs for an adult assistant throughout the school day and week.

19. Student’s special education teacher pointedly disagreed with any service provider who believed that Student’s adult assistance needs were being met without having an AAA assigned to Student. Mrs. Stroger was in a much better position to evaluate Student’s classroom environment and the availability of adult assistance for Student. Mrs. Stroger agreed that Student did not and does not require a 1-on-1 aide. She had never asked for such an aide. However, Mrs. Stroger believed that Student continued to require an AAA assigned to Student, assuring that the AAA cannot be pulled from Student’s classroom. Student may have

¹⁴ This testimony and documentation concern events and conditions which are dated after this due process filing. Such evidence was not considered for purposes of determining the legal issues herein.

improved regarding her gate and ability to move about, but her behavior requires consistent and reliable adult assistance in order for Student to access and benefit from her special education.

20. Student has been denied the related service of an AAA assigned to Student since the November 2008 amendment IEP. Though Student may, at times, have had additional adult support available to her in her classroom, Student has not had the assurance of having the adult assistant available in her classroom at all times, as contemplated by the November 2009 amendment IEP.

21. Student will be transitioning into kindergarten in 2010-11. Student's April 2009 annual IEP indicates the next annual IEP is April 2, 2010, and the triennial is scheduled for June 30, 2010. It also provides Student with ESY 2010.

22. Accordingly, Student is entitled to receive an AAA assigned to Student, pursuant to this decision, until the conclusion of ESY 2010. The April 2010 annual IEP team will consider Student's adult assistance needs and determine if Student requires an AAA assigned to Student in the 2010-11 school year placement. Should Mother disagree with the 2010 annual IEP, and file for due process before the conclusion of ESY 2010, the AAA assigned to Student shall be considered part of the Student's stay put services.

23. Also, Student was unable to attend and benefit from ESY 2009 because District did not provide the AAA assigned to Student. Student not only lost benefit of participating in her class, but she also was unable to receive the LAS services to which she was entitled. (Factual Finding 70.)

24. Accordingly, Student is entitled to 120 minutes, or one month, of LAS services. In the April 2009 annual IEP, Mother was given the option of how Student would receive compensatory LAS services: either by a nonpublic agency (NPA) or through the District's LAS Summer Compensatory Program. Mother similarly has

the option of choosing how Student should receive the 120 minutes of compensatory LAS provided hereby.

ORDER

1. Student's claim for relief is granted.
2. Student is entitled to an AAA assigned to Student. An AAA is to be assigned to Student, through the conclusion of ESY 2010. For purposes of this Order, AAA assigned to Student means an AAA who is assigned to a specific special education student. Though the AAA supports the SE teacher and is available to assist other children, this type of AAA's primary responsibility is a particular student, whose needs are the AAA's priority. The AAA, who is assigned to a student, cannot be taken from the classroom to serve elsewhere and should be replaced with a substitute when absent.
3. Student is to receive 120 minutes of compensatory LAS services to compensate for services missed during the ESY 2009. The compensatory LAS minutes are to be used before the conclusion of ESY 2010. Mother will choose the manner of LAS delivery – an NPA or District's LAS Summer Compensatory Program.
4. The 2010 annual IEP team will consider Student's adult assistance needs and determine if Student requires an AAA assigned to Student in the 2010-11 placement.
5. Should Mother disagree with the 2010 annual IEP, and file for due process before the conclusion of ESY 2010, the AAA assigned to Student shall be considered part of the Student's stay put services.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided

in this due process matter. Student prevailed on both issues.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by it.
Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: December 28, 2009

_____/s/_____
CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings