

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2009040473

PARENT on behalf of STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT

OAH CASE NO. 2009100528

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Morgan Hill, California, on March 17-19, 2010. Telephonic oral argument was heard on March 26, 2010.

Attorney Christian Knox represented Student. Student's Mother attended all hearing days.

Attorney Tracy L. Tibbals represented Morgan Hill Unified School District (District). District Special Education Director Christopher Rizzuto (Rizzuto) attended all hearing days.

Student filed the due process hearing request in case number 2009040473 (First Case) on April 7, 2009, and continuances were granted for good cause. On October 8, 2009, Student filed the due process hearing request in case number 2009100528 (Second Case) and requested consolidation of the two cases. On October 22, 2009,

Student's request for consolidation was granted using the decision timelines in the Second Case. On November 23, 2009, a continuance was granted for good cause until January 26, 2010. At mediation on January 20, 2010, the parties requested, and were granted, a continuance of the due process hearing to March 16, 2010; however, the hearing began March 17, 2010. At the conclusion of evidence on March 19, 2010, the parties requested, and were granted, a continuance until March 26, 2010, to prepare closing arguments. The matter was submitted and the record closed upon receipt of closing arguments on March 26, 2010.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) from October 31, 2008, through October 8, 2009 (the filing date of the Second Case), by:

1

- (a) Failing to timely conduct assessments in assistive technology (AT), augmentative communication, speech and language, physical therapy (PT), occupational therapy (OT), and orientation and mobility (including vision);

¹ All issues arise under the Individuals with Disabilities Education Act (IDEA), title 20, United States Code, section 1400 et seq. and related state statutes. The ALJ has rephrased the issues for clarity. At hearing, Student withdrew the issue of whether she was denied a FAPE because the District failed to convene an IEP meeting to review the results of a privately obtained assessment. At hearing, the ALJ informed the parties that the issues and remedies were limited to those arising before the filing of the second request for due process hearing given the due process notice requirements. (See Ed. Code, § 56502, subd. (i) [absent agreement to the contrary, issues at due process hearing limited to those raised in the request].)

- (b) Failing to have an individualized education program (IEP) containing annual goals in all areas of unique need;
- (c) Failing to provide Student with related services for PT, AT, orientation and mobility, OT, and speech and language therapy; and
- (d) Failing to provide Student with appropriate AT and augmentative communication equipment?

2. Did the District deny Student a FAPE for the 2009-2010 school year prior to October 8, 2009 (the filing date of the Second Case), by:

- (e) Failing to make Student an offer of placement and services prior to the beginning of the school year; and
- (f) Failing to convene an annual IEP team meeting?

FACTUAL FINDINGS

1. Student is an 18-year-old young woman, who at all relevant times lived within the District and was eligible for special education. Student has glycogen storage disease, a condition that impacts her body's ability to create glucose from food. During sleep, Student required a pump to circulate glucose in her blood stream. At the age of three and a half, the pump failed while she was sleeping, resulting in a traumatic brain injury, cerebral palsy, and seizure disorder. Student's ability to move and communicate was severely impacted, such that she communicated with limited vocalizations and a gesture with her right hand. Student's nutrition was through a feeding tube. No evidence was presented establishing Student's cognitive ability through testing. However, Mother described Student as being opinionated about getting her needs met in the home, having an attitude and a sense of humor, and having an enjoyment of family life with her dog and brothers. Student was under a conservatorship and her Mother was authorized to make educational decisions for her.

2. At all relevant times, the only signed IEP containing an offer of services was dated January 22, 2002. This IEP provided for five hours a week of home instruction "designed to support the home educational program selected by parent." Extended school year (ESY) was offered. No goals or objectives were included, but the IEP referred to using goals and objectives from the "Evan Thomas Institute." No evidence was presented as to what these were. The IEP noted District "will continue to discuss AT as needed and appropriate" but no specific offer of services was made. Mother consented to the continuation of the home instruction on an IEP form dated March 17, 2008. The March 17, 2008 IEP form did not contain present levels of performance, a specific offer of placement and services, or goals. The March 17, 2008 IEP form included a District note stating District "did not respond to the request" by Mother for ESY.

3. Beginning in January of 2007, Student received District-provided home instruction for five hours per week from general education home teacher Valerie Chambliss (Chambliss). Chambliss had a bachelor's degree in French civilization, and master's degrees in French and information science. She held a single-subject general education teaching credential in library services. From 1984 through 2000, she taught French outside the District. Chambliss began working for the District as a librarian in 2000, but her job was eliminated within two years. Since then, she has worked as a substitute teacher or home-hospital instructor.

4. During instruction, Chambliss generally read novels or textbooks to Student, occasionally aided by a white board. For art history, Chambliss sometimes relied on showing Student internet images or pictures of artwork. The books were generally chosen by Mother, either from books used by Student's siblings in a similar grade, or that reflected activities within the family such as a sibling's trip or family trip abroad. Chambliss told Mother that books could be obtained from the District.

Chambliss did not determine whether the books being used were state approved curriculum and did not obtain curriculum or books from the District.

5. Between October 31, 2008, and the filing of the second due process hearing request, Mother purchased books (novels, current non-fiction, history, and geography) for use in instruction in the following amounts: \$30.00 on December 22, 2008; \$21.05 on May 20, 2009; \$14.83 on May 24, 2009; \$38.23 on June 12, 2009; \$9.59 on September 9, 2009; \$28.17 on September 22, 2009. The total claimed expense for books of \$141.87 excludes a charge for gift cards on June 12, 2009. Mother plausibly explained that she purchased books during the summer of 2009 because Chambliss was not teaching Student during that time. On September 4, 2009, Mother purchased index cards for Student's educational use totaling \$2.98. On August 27, 2009 Mother purchased a computer monitor at a cost of \$275.79 to assist Chambliss in showing internet images and for use in Student's privately funded neurofeedback activities.

6. Chambliss accepted Parents' representation that Student was capable of grade-level understanding. However, Chambliss could not independently verify Student's academic progress. Chambliss was not confident that Student could accurately indicate understanding, even with "yes/no" questions. Chambliss did monitor Student to see if she was alert and looking at what they were doing, but approximately 50 percent of the time Student did not appear responsive, even if given time and prompting. The other 50 percent of the time, Chambliss was not sure if Student was accurately responding to a choice. Chambliss has not prepared grades or progress reports for Student at any relevant time. Chambliss informally asked colleagues for advice on how to instruct Student.

7. For home instruction, Student was generally propped up in a chair but was unable to stay in a seated position without support. At no time did Chambliss use assistive technology such as a single button switch during teaching.

8. District Special Education Director Rizzuto started working for the District in July of 2008. During his first week on the job he became aware of Student. Rizzuto saw that Student did not have a current IEP and that a due process hearing request regarding her services was pending at the time. Rizzuto immediately contacted Mother and arranged to visit Student at home. Rizzuto expressed a desire to have the District serve Student and a desire to communicate directly with Student's parents. During the home visit, Rizzuto watched Chambliss reviewing history with Student. Rizzuto could not discern whether Student was responsive to the instruction.

9. During his visit, Rizzuto learned Chambliss was instructing Student on the assumption that the material was appropriate. Rizzuto discussed with Mother the need to develop a communication system, the possible use of AT and augmentative communication strategies, and the need for Student to work on functional skills. Rizzuto initiated an AT assessment for Student at a local children's hospital. Mother consented to the assessment. The resulting assessment report, generated from seeing Student in August and early September of 2008, recommended working with Student to have her reliably activate a switch to indicate choices in conjunction with "live voice scanning" (a technique of providing a scripted set of choices to a person with a disability that takes into account the individual's limitations and need for sufficient response time). The report also recommended that the family acquire a switch interface to allow a simple switch to activate software like start-to-finish books on a computer.

10. At the end of July of 2008, a close family member of Rizzuto's became ill, and he took extensive family leave. Rizzuto was not on the job for months at a time, particularly during the spring and summer of 2009. While out, his job duties were covered by other District and SELPA employees. Because Rizzuto did not feel he had established a productive relationship with Mother, he assigned Dr. Thomas Fried (Dr. Fried) to be the District contact with Mother regarding assessments. Dr. Fried was the

school psychologist at Student's local school and Rizzuto considered him to be a "gentle" person who had a better chance of establishing rapport with Mother.

11. On October 3, 2008, Student and the District entered a compromise and release agreement that released the District from any educational liability prior to October 31, 2008. In part, the agreement required the District to "arrange and fund" assessments in the following areas: AT (including related behavior), augmentative communication, speech and language (including an oral motor assessment), PT, OT, orientation and mobility, and a health records review. Student's parents agreed to make her available for assessment. The parties agreed to meet and confer prior to October 31, 2008, to select mutually agreeable assessors if they had not already done so. In addition, the agreement provided, "The District will notice and convene an IEP team meeting on or before October 31, 2008, to consider the assessments listed [above] and develop an IEP for [Student] including current placement and services and, to the extent appropriate, compensatory education."

12. An IEP team meeting was held on October 31, 2008. At the meeting, Mother believed that under the settlement agreement, the assessments should have been conducted and that a formal IEP could not be begun without assessment results. District special education director Rizzuto viewed the IEP team meeting differently, seeing it as an opportunity to start the necessary process of developing an IEP for Student while working to agree on an assessment plan. Mother refused to proceed with developing an IEP until the assessments were completed. At the meeting, home teacher Chambliss reported on Student's present levels of performance. Chambliss stated that she "assumed" grade-level understanding, but noted that Student's feedback to materials was limited to raising her head to look at what was shown to her and possibly gesturing "yes." Chambliss also noted that assessment of Student's ability to provide

feedback was required so that Student's level of comprehension and retention of materials could be determined.

13. An assessment plan was developed that included assessments in the following areas: social/adaptive; motor development; communication development; OT, orientation and mobility, PT, and health. The speech and language and OT assessments were to be done by the Center for Speech and Language and Occupational Therapy (CSLOT). Three possible assessors were listed for PT: Pediatric Therapy Services, Hope Services, and Patti Labouff. The orientation and mobility assessment was to be done by the Vista Center. The health assessment was to be done by the school nurse. No specific assessor was specified for AT. Mother signed and returned the assessment on November 3, 2008.

14. By December of 2008, home teacher Chambliss and Special Education Director Rizzuto had not heard anything from Dr. Fried about the progress of the assessment plan.

15. Mother heard from Dr. Fried at the end of January of 2009. Dr. Fried asked Mother something to the effect of "where are we with assessments?" According to Mother, who was not contradicted by other evidence at hearing, Dr. Fried suggested Mother take action to get the assessment process started.

16. In April of 2009, Special Education Director Rizzuto became aware that Dr. Fried was having trouble contacting Mother. To support an inference that the District was attempting to contact Mother regarding assessments during this time period and beyond, District presented evidence that phone calls were made to Student's home telephone by an extension used by Dr. Fried on the following dates: February 2 and 26, 2009; April 22, 23, 27, 30, 2009; May 5, 8, 20, 2009; and September 4, 2009. No evidence was presented that the telephone number where the calls originated was exclusively used by Dr. Fried or that Dr. Fried had actually made the calls.

17. Mother began contacting assessors herself until she learned in May of 2009 that the District had not executed contracts with some of the assessors indicated in the October 31, 2008 assessment plan. Mother's version of events was corroborated by emails to Dr. Fried showing that, in May of 2009, she was making telephone calls to try to arrange assessments.

18. In his May 11, 2009 email to Mother, Dr. Fried wrote, "Please let me know what is happening with PT assessment (Carol Block), Orientation and Mobility and Assistive Technology (Vista Center?)." After Mother replied that she had gotten dates for speech and OT assessments, Dr. Fried replied, "Any news on assessments for Assistive Technology, Orientation and Mobility, and Physical Therapy (Carol Block)?" It can be inferred that Dr. Fried, as a District employee with special education responsibilities, would be able to obtain information from District employees about the status of the District's own assessments. Even assuming Dr. Fried had tried to call Mother numerous times prior to the emails, Dr. Fried's emails to Mother demonstrated that as of May and June of 2009, the District had done nothing to further the assessment process and, in fact, expected Mother to implement the assessments.

19. Larissa Kasr (Kasr) was an occupational therapist for CSLOT. In 2007, Kasr obtained both bachelor's and master's degrees in occupational therapy, and became state licensed. Kasr performed assessments for California Children's Services (CCS) from November of 2007 through August of 2008, after which she was employed by CSLOT. Kasr assessed Student on June 12, 2009, after being given one week's notice of the assessment.

20. The OT assessment was done at CSLOT's clinic. Kasr interviewed Mother about Student's medical history, conditions at home, and Student's abilities at home. Kasr did not see Student communicate even "yes/no" answers and saw Mother interpreting a finger gesture as "yes/no." Kasr checked Student's range of motion and

found a full range of passive motion with hypertonicity of the muscles. Student was unable to perform active movements, other than rolling. Student was only able to sit without assistance for between five and ten minutes. Student appeared fatigued within 30 minutes. In the clinic, Kasr was not able to observe the skills Mother reported Student to possess at home. Kasr asked Mother to make a videotape of Student's skills at home. CSLOT subsequently called Mother about the videotape but did not get a response.

21. Kasr's OT assessment report makes no mention of being a District assessment for the purpose of developing an IEP. Instead, the purpose of the report is listed as "per parent's request in order to determine [Student's] current level of functioning." At hearing, Kasr acknowledged that, at the time of the assessment, she did not understand that the purpose of the assessment was a District assessment to develop an IEP for Student. The recommendations in the report consisted only of generalities about accessing services from various agencies. The one concrete recommendation notes that, because Mother described abilities that Kasr could not assess in the clinic and the family did not provide a videotape, six diagnostic session therapy sessions should be conducted. Kasr called Mother to discuss the report. Mother stated that she would call to arrange the follow-up visits. At hearing, Kasr explained that her report was not complete and she could not even write goals without the opportunity to see Student's skills in the home setting. There was no reason to doubt Kasr's factual testimony; however, the opinions in her assessment are of little value given that she was not aware of the purpose of the assessment and, regardless, the assessment was incomplete.

22. Heather Schulz (Schulz) was a speech therapist who worked for CSLOT in June of 2009. Schulz received her master's degree in speech therapy in 1994 and was licensed in the State of Texas from 1994-2000. Schulz had a certificate of clinical competence from the American Speech-Language-Hearing Association (ASHA). Between

May of 1997 and January of 2000, Schulz was employed by a Texas school district to perform assessments and attend IEPs. Schulz was never employed by a California school district. From 2000-2009 she did not work as a speech therapist, but was employed in her husband's business. In 2009, she renewed her license and held a temporary license in the State of California.

23. Schulz assessed Student at CSLOT's clinic in the afternoon on June 11, 2009, and prepared a report dated June 23, 2009. Schulz believed the assessment was at Mother's request to determine Student's current level of functioning and was not aware at the time that the assessment was intended to be a District assessment for purposes of developing an IEP. Schulz reviewed Student's records and took a history from Mother. Mother reported that Student received nutrition through a feeding tube but was fed a meal of solid food each day for Student's enjoyment. According to Mother, Student "shuts down" when outside the family home. Mother reported that Student indicated "yes" by moving her right arm and "no" by saying "nuh uh."

24. Schulz determined from Mother and observation of Student that expressive vocabulary could not be assessed. Schulz attempted to assess receptive vocabulary by having Student move her right arm to indicate a choice from one of four possible pictures of the target word. Student was non-responsive 80 percent of the time and sometimes responded by moving her whole head to cover the choices. At most, Student identified two words in 20 trials. When asked "yes/no" questions using the communication method identified by Mother, Student was only 25 percent accurate. Student was unable to follow one-step directions related to the assessment. Mother reported her belief that Student's performance was caused by a combination of non-compliance and fatigue.

25. Student's oral-motor abilities were also assessed. Student drooled throughout the assessment, even before assessing feeding. A review of a February 7,

2008 videofluoroscopy swallow study (moving x-rays of swallowing mechanics) showed that Student was at risk for aspiration and there had been a recommendation for electrical stimulation therapy such as "Vital Stim." During Schulz's assessment, Student was unable to perform any oral-motor movements upon request including closing her lips or sticking out her tongue. When given a small cracker, Student required maximum prompting to chew it, could only move her jaw slightly, and coughed even after Mother wiped the residual food from her mouth.

26. Schulz recommended that oral feeding be stopped until another videofluoroscopy swallow study could be done based on the risk caused by Student's severely decreased oral-motor sensitivity, coordination, delayed swallowing reflex, and inability to follow directions to assist with oral feeding. Schulz noted in the body of the report, "Electrical stimulation/VitalStim therapy could be a viable option to increase sensation in the oral-pharyngeal mechanism." At hearing, Schulz expressed the opinion that swallow therapy could have a social/emotional benefit, particularly for disabled children that attend school.

27. Schulz suggested that Mother provide a videotape of the abilities Student was unable to demonstrate in the clinic setting. Because CSLOT's policy was to issue written reports within two weeks of an assessment, and no videotape was obtained, Schulz recommended six diagnostic therapy sessions would be needed to complete the assessment. Schulz did not consider her assessment to be complete if the purpose was to develop an IEP. Schulz's lack of familiarity with California schools and education law, her long absence from speech therapy practice, and her unawareness of the purpose of the assessment, made her professional opinions generally unpersuasive other than the conclusion that her assessment was incomplete.

28. Mother convincingly testified that she could not prepare a videotape of Student for purposes of the OT and speech assessments in less than two weeks given

her responsibilities to her family and for Student's care. Similarly, Mother requested that CSLOT conduct the diagnostic therapy sessions at Student's home but was told by the office manager of CSLOT that it was against their policy. Mother's request for the recommended diagnostic therapy sessions to take place at home was reasonable given that this was Student's educational placement at the time and other assessors were willing to visit the home.

29. Sonja Biggs (Biggs), was an orientation and mobility specialist and teacher of the visually impaired for the Vista Center for the Blind and Visually Impaired (Vista). Biggs held a bachelor's degree in religion, a master's degree in school counseling and guidance, and at the time of hearing was working on obtaining a doctorate in Education. Biggs had approximately 14 years of teaching experience prior to becoming a teacher of the visually impaired in 2003. Biggs's testimony regarding her observations and opinions within her field was generally credible.

30. Biggs received notice of the District's need to assess Student for functional vision, learning media, and orientation and mobility in early June of 2009. Biggs assessed Student at home around June 18, 2009, as well as during horseback riding. Biggs prepared a written report of her assessment and recommendations. A medical record review and history from Mother showed that Student had a Cortical Visual Impairment (CVI) from her brain injury and was legally blind. CVI is a condition where the brain does not accurately translate information from the eyes. In Student, her CVI resulted in a delay in attending to new objects, difficulty discriminating objects in complex visual fields, reduced perception in her lower right visual field, lowered attention to novel faces or objects, "light gazing" (distraction by bright, moving light), and a color preference for red objects.

31. Biggs assessed Student by exposing her to different materials to see how she visually responded. Biggs also observed Student's interactions with other people,

her visual attention, and her response to varying lighting conditions. Biggs saw Student standing with help from a special suit during private PT therapy. Biggs also saw Student manipulate a computer screen using biofeedback. Biggs did not see Student purposefully reach with her right hand at any time.

32. Biggs recommended that visual materials be presented in simple, high-contrast environments (white, red, and black) in uncluttered areas. Outside light should be limited to avoid distraction by "light gazing." Books or written materials should have 36 point "Ariel" black font. Use of a choice board of words or pictures should be implemented to help Student communicate choices.

33. Overall, Biggs recommended that Student receive a combination of direct instruction and consultation with the home teacher from a teacher of the visually impaired for two, 60-minute sessions per week. As to orientation and mobility, although Biggs saw Student standing upright with assistance from a therapist, Biggs recommended that an initial goal would be to have Student work on reaching toward a visual target and visually locating targets at increasing distances. Orientation and mobility services were recommended at two, 60-minute sessions per week. Although Biggs's report included a recommendation that Student continue her private PT and neurofeedback training, this recommendation was not credible as Biggs was not established to have expertise in these areas, and her report and testimony did not address how either service was educationally related.

34. Biggs believed that Student's needs and her recommendations to address them would have been the same had the assessment occurred in October of 2008. Biggs did not have an opinion regarding compensatory education other than providing the amount of services missed.

35. In July of 2009, the District hired Richard Newman (Newman) to conduct the PT assessment of Student. Newman had a bachelor's degree in PT and had

specialized in pediatrics. Newman was state licensed and had 11 years experience as a PT assessor for the California Department of Children's Services (CCS). CCS provides medically necessary equipment and supplies to severely disabled children. Newman had stayed current in his field through course work and workshops in various techniques. Newman had performed hundreds of pediatric PT assessments both at CCS and in private practice and had extensive experience with cerebral palsy and traumatic brain injury patients. Although Newman's work at CCS consisted of determining the medical PT needs of children from infancy to 21 years old, as opposed to educational needs for PT, he was aware of the distinction and frequently consulted with schools on how PT could improve school performance. At the time he assessed Student, Newman had completed three other educational PT assessments. Newman's extensive experience and training, as well as his knowledgeable demeanor about PT techniques while testifying at hearing, made him a credible witness.

36. Newman called Mother on July 22, 2009, and left a message about who he was and why he was calling. Newman called again on July 29, 2009, and reached Mother. Mother asked questions about why he was calling, whether he worked for the District, and why District was doing the assessment. Mother communicated that there was some type of dispute between her and the District and that she thought the assessment was late. Mother said she needed to think about having Newman assess Student.

37. On September 22, 2009, Newman left a message for Mother. Newman left another message on September 27, 2009. On October 1, 2009, Newman called again and was able to speak to Mother. Mother agreed to have Newman observe Student's PT with a private therapist on October 7, 2009.

38. On October 7 and 8, 2009, Newman watched Student receive PT for a total of three hours at home from Jola Dawol (Dawol), who was privately paid by Student's

family. Dawol worked with Student three days a week for approximately two hours a session. Newman agreed to observe to try to gain Mother's trust so that she would permit him to assess Student. Dawol performed a series of exercises on Student to keep her muscles working using a "universal cage" pulley system that Newman understood was developed in Poland. The therapy did not require initiation from Student and Dawol either manipulated Student or prompted her to help with sitting up. At one point, the therapy included having Student "walk" with support from a therasuit (a bodysuit), supported shoes, and knee immobilizers. Without such supports, Student could not stand because her body is contracted. Any movement of Student was with maximum assistance from the therapist, i.e., the therapist contributed approximately 75 percent of the effort. Dawol had worked with Student for approximately three years. Dawol confirmed that Student did not reach with her arms. Newman saw that the house was also equipped with a track system that could be used to move Student. Overall, Newman formed the opinion that, although there was an impressive amount of equipment in the home, the equipment served to accommodate Student's lack of function rather than help her improve her function.

39. Mother cancelled a visit by Newman on October 13, 2009, citing scheduling. Newman made telephone calls on October 15, 20, 22, and 23, 2009, and either left messages or was not given a definite answer. On October 26, 2009, Newman called the home, reached a household assistant, and was able to schedule a visit for November 4, 2009.

40. Newman conducted his own assessment of Student at her home on November 4, 2009. Standardized PT tests of fine motor skills were not appropriate to use because they generally targeted fine motor skills in young children and would not have been helpful given Student's motor deficits. Overall, Newman assessed Student using the Michigan Gross Motor Development Profile. Newman interviewed Mother and

observed Student's functioning. Mother stated that Student did not reach, but could sometimes assist with sitting up, and that Student could roll either left or right. Newman's observation did not confirm Mother's impressions. Student did not appear to assist with sitting up. When Newman rolled Student left, she did not roll back but appeared to be trying. When Student's arms were extended, resistance was constant because Student was generally contracted. Student's self-initiated body movement was extremely limited and at most was observed to consist of halfway bridging her body to assist with putting on theratogs (a bodysuit used for PT). Student's spine was curved to the left (scoliosis) and her left side appeared "wind swept" due to contracted muscles. Student could not independently raise herself to a sitting position and was dependent for all transfers. When Student was unsteady in a cross-legged sitting position on the floor, she fell to her left side without putting up her arms for protection.

41. Overall, Newman concluded that Student's rehabilitation prognosis was "guarded" based on Mother's report that Student had regressed in the area of sitting up independently and Student's lack of progress in reaching for objects. Newman recommended PT twice a week to work on the goals of: 1) reaching for an object; 2) rolling to one side or another completely and consistently; 3) getting into a sitting position with minimal assistance; and 4) putting arms out for protection. Newman recommended two, 45-minute PT sessions per week to work on the above goals. Newman believed this recommendation was greater than Student's ability to attend and participate, but he thought it was a good starting point considering that the goals he was proposing were to work on novel movements. Mother told Newman she disagreed with his service recommendation because it was less than the amount of private therapy provided by Student's family. Newman did not have an opinion about what level of PT Student would need to remediate any deficit from not having PT as part of an education program because it would be impossible to estimate and depended on the individual.

42. Newman did not perform a seating assessment, which is normally done to determine the type of chair best suited to a particular task such as driving or sitting in a classroom. Overall, Newman concluded that a seating assessment was premature because Student could not sit up without assistance and it would be a higher priority to try to improve Student's function. Although not in his original report, Newman ultimately included seating goals in his recommendations at an IEP held in January of 2010.

43. Mother believed that, overall, the private PT services Student received from Dawol had improved Student's core strength, leg strength, and motor planning. Mother had no information about whether Dawol was licensed to provide PT in California. Dawol was from Poland and Mother believed she was licensed in Europe.

44. Mother testified that she paid a total of \$15,736.00 (at \$65.00 per hour) to Dawol for PT services rendered in November 2008, December 2008, January 2009, February 2009, March 2009, August 2009, September 2009, and October 2009. However, Mother's testimony on this point was not sufficiently corroborated to be persuasive. The majority of claimed expenses occurred while Student was represented by an attorney in a due process hearing request seeking reimbursement for PT. Mother did not provide any written invoices showing the services rendered and the dates, and did not provide proof of payment via cancelled checks or credit card statements. The lack of corroboration of this item is highlighted by Mother's production at hearing of receipts for amounts in the tens of dollars. Further, assuming that necessary PT services had been rendered, receipts and proof of payment should have been kept to either file a medical insurance claim or take an itemized tax deduction. Mother was not persuasive on this point.

45. Mother also wanted the District to reimburse her for \$93.00 for a "theratogs" suit used by Dawol in Dawol's therapy.

46. In July of 2009, Mother hired Marcia Shigemoto (Shigemoto) to provide swallowing therapy using electrical stimulation, as recommended in the CSLOT speech and language assessment. At the time, the instant due process hearing request was pending. Shigemoto was a state-licensed speech-language pathologist who had a master's degree in communication disorders and a certificate of clinical competence from ASHA. At the time Shigemoto provided the therapy, Student was getting her nutrition from a feeding tube connected directly to her stomach. Shigemoto used an electrical stimulator called "Vital Stim" to produce swallowing and tongue movement reactions by Student. Shigemoto unequivocally described this as a medical therapy to improve swallowing and prevent aspiration of food into the lungs. The therapy provided by Shigemoto was not relevant to improving speaking or communicating. Shigemoto generally provided this type of therapy in skilled nursing facilities with patients over the age of 60 who suffered from dementia, cerebral palsy, or stroke. Shigemoto was not familiar with the standards for determining whether speech and language therapy was necessary to provide a FAPE. In general, Shigemoto believed that there were social benefits to being able to eat with others. In addition, proper swallowing reduced long-term medical costs and reduced the risk of death from aspiration.

47. Shigemoto described Student as compliant during therapy, based on Student not trying to remove the electrical stimulators; however, Shigemoto could not recall any time when it appeared Student was trying to communicate using her arms. Shigemoto concluded, based on her observations and review of video fluoroscopy studies done in 2008 and August of 2009, that although Student had difficulty with oral/motor control, her swallowing had improved from the "Vital Stim" therapy. Shigemoto recommended that Student continue to receive this type of therapy three to four times a week. Shigemoto believed that Student may eventually be able to take nutrition orally.

48. Mother implemented the "Vital Stim" therapy based on the results of the prior videofluoroscopy and the recommendation by CSLOT. Mother paid Shigemoto \$7,980.00 for "Vital Stim" therapy conducted prior to October 8, 2009, the date Student filed her second request for due process hearing.

49. The District presented expert testimony from Joseph Totter, Ph.D. (Dr. Totter) regarding the use of videofluoroscopy and "Vital Stim" therapy. Although at the time of hearing he was employed by the District as the Assistant Superintendent of Human Resources, Dr. Totter held bachelor's and master's degrees in education, and had earned his doctorate in speech-language therapy and special education. Dr. Totter was a state-licensed speech-language pathologist who had a certificate of clinical competence from ASHA. He held teaching credentials in special education for the communicatively handicapped, learning handicapped, and severely handicapped, in addition to a clinical rehabilitative services credential in language, speech and hearing. Beginning in 1972 through the time he took his current position in the District in 2006, Dr. Totter had extensive experience as a special education teacher and administrator. Dr. Totter's extensive experience and knowledgeable testimony made him a credible witness.

50. Dr. Totter explained that a videofluoroscopy swallow study is a medical test that is performed to determine whether a person needs a medical intervention to assist with swallowing. ASHA has not authorized or endorsed the use of "Vital Stim," although it is approved by the FDA. "Vital Stim" should be done under the supervision of a medical provider with the willing participation of the patient, which was not shown by the Shigemoto report. In Dr. Totter's opinion, videofluoroscopy and/or "Vital Stim" were not "related services" under the IDEA because they did not assist a child in benefiting from special education.

51. In September of 2009, District hired the Partnership for Augmentative Communication and Technology (PACT) to conduct the AT and augmentative communication assessments called for in the October 31, 2008 assessment plan. Catherine Sementelli (Sementelli) of PACT assessed Student on October 2 and 30, 2009, and prepared a written report dated December 14, 2009. Sementelli had a bachelor's degree in speech-language pathology and a master's degree in communication disorders and speech science. She was a state-licensed speech-language pathologist with a certificate of clinical competence and a rehabilitative services teaching credential. Sementelli had over 20 years experience in speech-language therapy, augmentative communication and special education. Sementelli's depth of training and experience, in conjunction with her detailed testimony, made her a credible witness.

52. Sementelli's assessment consisted of record review, home observation of private PT and home instruction by Chambliss, interviews with Mother and interaction with Student. Sementelli reviewed the District's August 2008 AT report, believed it was generally competent, and concluded that it had not been implemented. Mother reported a belief that simple communication systems like a single switch were frustrating to Student and had not worked in the past because Mother perceived Student to have the ability and desire of a typical teenager to talk. Mother also reported a belief that Student did not like to be placed in a wheelchair because Student remembered walking and did not want to be in the wheelchair.

53. Sementelli saw that, overall, Student's daily life did "not require nor solicit much communication from her." For example, the private PT Sementelli observed did not include soliciting active feedback from Student. Similarly, Chambliss's home instruction did not demand responses other than "yes/no" responses to rudimentary questions, which Chambliss did not think were accurate. Overall, Student was not using a consistent, systematic means of communication, either no-tech, like paper and pencil,

or high-tech, like switches and a computer. Instead, people were attempting to communicate with Student using natural communication strategies like Student's eye gaze.

54. Experimenting with switches owned by the family or brought by PACT showed that Student was most successful when seated in a manual wheelchair with the switch in a position for Student to use the side of her head to activate a switch. During the assessment, Student displayed an extremely limited ability to purposefully move her hands toward a switch.

55. Based on the above, Sementelli recommended use of an "e-tran" board to indicate "yes/no." The two choices were recommended to be mounted vertically, to accommodate the lower right visual deficit of Student's CVI. Reliable communication could then be established through eye gaze by having her hold her gaze on one of the two choices, "yes" or "no." Once an "e-tran" was in use, a similar technique could be used to assess receptive vocabulary by having Student choose the correct answer with eye gaze from a field of three choices consisting of photographs or symbols. In addition, "live voice scanning" was recommended in conjunction with the above. "Live voice scanning" consisted of a communication partner verbally giving three choices plus a "none of the above" choice at a scripted pace that would allow Student to indicate choice by gazing at the "yes/no" choice board. AT recommendations were to acquire switches and interfaces of increasing complexity, in order for Student to expand her use of a switch interface to make choices, either to access learning or leisure software, or other leisure activities like listening to music. To accomplish the above, Sementelli recommended that Student and those interacting with her receive ten hours per month of combined consultation and direct service to train them to implement the AT and augmentative communication strategies.

56. As to compensatory education, Sementelli concluded that Student should have been supported by AT and augmentative communication services at all relevant times to access her education and that she would have made the same recommendations in October of 2008. Sementelli was unable to form an opinion as to the exact amount of services required to make up for the failure to have such services.

57. Mother had purchased an assistive technology switch for \$109.00 on December 11, 2008.

58. Mother had sought out horse therapy for Student prior to the family moving into the District. It had been recommended by a PT at a children's hospital. Mother understood from her own research that it could benefit core strength, balance, vestibular senses, and overall could improve focus. Mother believed Student benefited from horseback riding and wanted the District to reimburse her for its cost.

59. Dennis Bright (Bright) was a lifelong horseman who ran Bright Ranch. Bright Ranch provided horseback riding lessons to riders of all levels, including people with special needs. Bright had no training in using horseback riding as therapy and Bright Ranch was not certified as a therapeutic riding center. Since 2003, Student has attended horseback riding sessions at Bright Ranch. Student rides a pony, assisted by a horsecwalker and unpaid volunteer sidewalkers. At times, Student wore a special suit provided by Mother that helped her stay upright. Bright believed that horseback riding resulted in increased core strength and balance. Bright saw that, although Student generally had the same affect, she showed an improvement in interest and interaction (through eye gaze and body language) over the time she has attended Bright Ranch. Although Bright was factually credible and sincere, he was neither an educator, nor a therapist, such that his testimony did not establish the necessity of horse therapy as a related service. Mother paid Bright \$2,412.00 for a package of 48 half-hour rides during 2009.

60. District PT assessor Newman explained that there could be benefits to horse therapy because horses created multi-dimensional movements that the body reacts to. However, although he believed Student likely got some social/emotional benefit from participation, he did not think Student had the "dynamic stability" to benefit given the severity of her movement dysfunction as shown by her scoliosis.

61. Mother wanted the District to reimburse her for \$198.32 for charges related to Student's wheelchair. Review of the supporting documents shows that one charge of \$98.32 was the family portion of an amount billed to an insurance company for trays and accessories. Another document shows a \$100.00 charge for maintenance of worn parts and adjustments.

62. Mother also wanted the District to reimburse her for \$155.77 for neurofeedback supplies consisting of a "protocol guide" and saline reagent for electrodes. According to Mother, Student had benefited from neurofeedback, it had been recommended to her by a parent of another child with special needs, and her use of it was supported by Student's physician. Mother's testimony alone, without corroboration, was not sufficient to support a finding that neurofeedback should have been supplied to Student by the District as a related service.

63. District Special Education Director Rizzuto agreed that, as of the date of hearing, Student required the types of PT, AT, augmented communication, and orientation and mobility/vision services and equipment recommended in the assessments by Newman, PACT, and Vista. As of the date of hearing, the materials and equipment recommended by Vista and PACT had been, or were in the process of being, acquired by the District. As to OT and speech therapy, Rizzuto could not say whether the District believed such services were necessary because the assessments were incomplete.

64. For the remainder of the 2008-2009 school year, beginning November 1, 2008 (because the parties settled all claims prior to then), until the end of the school year on June 5, 2009, there were 27 weeks of instruction (calculated by excluding holiday periods that lasted a full week). The District's extended school year for high school students was generally six weeks. The 2009-2010 school year began August 18, 2009. There were eight weeks of instruction from the start of the school year until Student filed her second request for due process on October 8, 2009. In total, 41 weeks of related services were at issue in the hearing.

CONCLUSIONS OF LAW

BURDEN OF PROOF

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

CONTENTIONS OF THE PARTIES

2. In her first issue, Student contends that she was denied a FAPE from October 31, 2008 through the filing of her second due process hearing request because the District: a) did not timely conduct the agreed upon assessments in assistive technology, augmentative communication, speech and language, physical therapy, occupational therapy, and orientation and mobility (including vision); b) did not develop annual goals in all areas of unique need in an IEP; c) did not provide Student with physical therapy, assistive technology services, orientation and mobility services, occupational therapy, and speech and language therapy; and d) did not provide appropriate assistive technology and augmentative communication equipment. In her second issue, Student contends that she was denied a FAPE because no IEP was in place prior to the start of the 2009-2010 school year and no IEP team meeting was even convened. Because Student's second issue is closely related to the first, and relies on the

same evidence and legal principles, it is being considered with the first issue. Specifically, Student contends that the evidence showed no current IEP was ever in place during the relevant time period, and after October 31, 2008, no IEP team meetings were noticed or held. Student contends any delay in conducting the assessments is solely the District's fault because the District did not timely coordinate assessments and availability of assessors. Student's placement at home and the appropriateness of the home instruction provided by District are not at issue.²

3. District contends that, as to the delay in assessments, it made efforts to contact Mother to coordinate the assessments, but the delays were caused by Mother not timely returning phone calls by District personnel or assessors like Newman. In addition, District contends that the OT and speech and language assessments by CLOT were not completed because of Mother's failure to provide information about Student through the suggested videotape of daily activities. As to the failure to develop an IEP, District contends Mother unreasonably did not participate on October 31, 2008, and that the overall history between the parties shows that, even if an IEP team meeting had been held, no agreement could have been reached.

APPLICABLE LAW

4. A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction

² During closing argument, Student also contended that the PT assessment by Newman was improper because he was not qualified and not listed in the assessment plan. However, because neither contention was alleged in the due process hearing request, these contentions cannot be addressed in this Decision.

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).)

5. 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 reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.) *Rowley* expressly states that, as long as a child is offered a FAPE as defined above, questions of educational methodology are left to the discretion of the state and local educational agencies. (*Rowley* at p. 208.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a

school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

7. After parents consent to an assessment plan, an IEP team meeting must be held and an IEP developed within 60 days, excluding days between regular school sessions and school holidays in excess of five days. (Ed. Code, § 56344, subd. (a).)

8. A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The

report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

9. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

10. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

11. A local educational agency is required to have an IEP in effect for each individual with exceptional needs within its jurisdiction by the beginning of each school year. (Ed. Code, § 56344, subd. (c); see also 34 C.F.R. 300.323(a) & (b).) An IEP team meeting must be held at least annually to review the student's progress, any reassessments, and whether the placement, annual goals, and related services are appropriate. (Ed. Code, §§ 56043, subd. (d), 56341.1, subd. (d) & 56343, subd. (d).)

12. An IEP is a written statement for each individual with exceptional needs that includes, in relevant part: 1) A statement of the individual's present levels of academic achievement and functional performance; 2) A statement of measurable annual goals, including academic and functional goals, designed to meet the student's unique needs and enable the student to be involved in and make progress in the general education curriculum; 3) A description of the way progress on goals will be measured and reported; and 4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the pupil, or on behalf of the pupil, and a

statement of the program modifications or supports for school personnel that will be provided to enable the pupil to advance appropriately toward attaining the annual goals and be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

13. When developing an IEP, the IEP team must consider whether the student requires assistive technology devices and services. (Ed. Code, § 56341.1, subd. (b)(5).) "Assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

14. Although local educational agencies are not required to purchase medical equipment for individual students, the local educational agency is responsible for providing other specialized equipment for use at school that is needed to implement the IEP. (Ed. Code, § 56363.1.) Medical equipment does not include assistive technology devices. (*Ibid.*)

ANALYSIS OF ASSESSMENT DELAY (ISSUE 1(A))

15. First, as to assessments, the evidence demonstrated unequivocally that the District violated the procedural requirement that assessments be completed and an IEP held to consider them within 60 days of the date of parental consent. The incomplete OT and speech therapy assessments were conducted in June, as was the orientation and mobility/vision assessment by Vista. The District did not contact Newman regarding the

PT assessment until July, six months after the assessment should have been completed. Similarly, PACT was not contacted to conduct the AT/augmentative communication assessment until September of 2009, ten months after the assessment plan had been signed. Undoubtedly, communication between Mother and the District was difficult, and the evidence supports an inference that Mother would selectively make herself unavailable by telephone. However, contrary to the District's contention, Mother's unavailability by telephone does not alleviate the District from its affirmative responsibility under the IDEA to assess Student to determine her unique needs and offer her a program designed to meet those needs through the IEP process.

16. Although Rizzuto was understandably absent from the District due to his family medical issues, the evidence showed that his delegation of responsibility to Dr. Fried failed. Dr. Fried's emails to Mother demonstrate that the District was not coordinating its efforts, had not made the necessary financial arrangements, and that the District expected Mother to oversee the assessment process. Further demonstrating that Mother's actions cannot excuse the District from its failures is that the CSLOT assessors had no idea that the OT and speech therapy assessments were District assessments for purposes of developing an IEP. One of the main purposes of assessments is to develop information and recommendations for an IEP team. Given this fundamental flaw in the assessment process, the failure to complete the assessments cannot be ascribed to Mother's failure to provide a videotape. District, not Mother, was required to obtain the information necessary to make an offer of a FAPE. Considering that Student was being instructed in the home, the District should have, but did not, arrange for home observation or assessment by CSLOT.

17. Similarly, although Mother delayed Newman's PT assessment by not calling him back after he contacted her in July of 2009, the District cannot escape the fact that by that time the assessment was already six months late. Although not at issue

in this Decision, Mother undoubtedly questioned why she was being contacted by an assessor who was not listed on the October 31, 2008 assessment plan. The evidence showed that the District did not even contact PACT until September of 2009 and that the PACT report was not completed until December 14, 2009. Any delay to the PT assessment that was caused by Mother's non-responsiveness to Newman is overshadowed by the District's utter failure to have all assessments in the assessment plan performed prior to December of 2009, a full year after the assessment plan was signed.

18. To prevail on a claim that a FAPE was denied due to a procedural violation, Student has to show that the violation significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) Here, Student has shown both. No IEP team meeting was noticed during the relevant time period and no recent IEP exists for Student that even comes close to meeting the IDEA requirements. The entire purpose of the assessments was to provide the IEP team, which included Parents, with information to make educational decisions. Parents could not be expected to participate in the decision-making process without any information about Student's unique needs, her present levels, or recommendations for related services. Although not necessary, having found that Parents' opportunity to participate in decision-making was impeded, Student has also shown a deprivation of educational benefits as to PT, AT/augmentative communication, and orientation and mobility/vision. The credible and knowledgeable assessments of Newman, Vista, and PACT showed that Student should have received related services of PT, AT/augmentative communication and orientation and mobility/vision at all relevant times. The testimony of home teacher Chambliss showed that, although she was trying as best she could, Student needed the above services just to reach a point where Student's understanding and preferences could be

determined through reliable communication that was initiated by Student. As to OT and PT, Student did not present evidence supporting a finding that Student was deprived of an educational benefit because only the incomplete CSLOT reports were introduced at hearing and no independent evidence was introduced. In sum, Student has demonstrated that she was denied a FAPE by the District's delay and/or failure to complete the assessments in the October 31, 2008 assessment plan. (Factual Findings 1-4, 6-10, 12-42, 51-56, 63; Legal Conclusions 1, 4-6, 10.)

LACK OF AN IEP (ISSUES 1(B) AND 2)

19. Student's next contention is that she was denied a FAPE during the relevant time period because she did not have a current IEP, either during the 2008-2009 school year or prior to/during the 2009-2010 school year. Like the assessment issue above, to demonstrate a denial of a FAPE for a procedural issue like this, Student must show that the IDEA procedures were not followed and that, as a result, the procedural defect significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Again, the evidence of a procedural denial is unequivocal. District did not notice an IEP team meeting during the relevant time period, let alone develop an IEP. District fails to appreciate that regardless of whether a parent is pleasant and cooperates, it had an affirmative duty to offer Student a FAPE. Although it appears the October 31, 2008 meeting did not go well (and any issues related to it are outside the scope of this Decision), District could have, but did not, notice an IEP meeting. However, even if District had noticed an IEP meeting, the District's failure to timely conduct assessments shows that, regardless of Mother, it did not possess sufficient information about Student's needs to develop an IEP.

20. Like the assessment issue above, Student has also met the second element of showing that this procedural violation resulted in a denial of a FAPE. Obviously,

Parents had no opportunity to participate in the decision-making process if no IEP meetings were even noticed. Alternatively, Student showed a deprivation of educational benefit to the extent that the evidence established that Student needed, but did not receive, PT, AT/augmentative communication, and orientation and mobility/vision services in the frequency and duration recommended by Newman, Vista, and PACT. Student did not present evidence regarding what, if anything, she was denied by the failure to have annual goals. None of the District's assessors addressed the issue of IEP goals other than general recommendations and Student offered no independent testimony describing what appropriate goals would have been, and what Student lost by not having them. Accordingly, Student has only prevailed on this claim to the extent she has shown that an IEP should have been developed that included related services in PT, AT/augmentative communication, and orientation and mobility/vision in the frequency and duration recommended by Newman, Vista, and PACT. (Factual Findings 1-4, 6-10, 12-42, 51-56, 63; Legal Conclusions 1, 4, 5, 7-12.)

FAILURE TO PROVIDE RELATED SERVICES AND EQUIPMENT (ISSUES 1(C) & (D))

21. Student also contends she was denied a FAPE because the District should have, but did not provide the related services of PT, AT/augmentative communication, and orientation and mobility/vision, OT, and speech and language therapy during the relevant time period. Student also makes the related claim that she was denied a FAPE because the District did not supply AT and augmentative communication equipment. In general, a FAPE consists of access to specialized instruction and related services which are individually designed to provide some educational benefit to a child with special needs. (*Rowley, supra*, at pp. 200, 203-204, 207.) "Related services" are developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) Although school districts are required to support assistive technology services with "any item,

piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs," they are not required to provide medical equipment. (20 U.S.C. § 1401(1); Ed. Code, §§ 56020.5 & Ed. Code, § 56363.1.)

22. Student has met her burden of showing that she was substantively denied a FAPE during the relevant time period by the District's failure to provide related services in AT/augmentative communication, and orientation and mobility/vision in the frequency and duration specified by Vista and PACT. Student has also shown that she was denied a FAPE by not being provided with equipment and materials to implement the recommendations. As to Vista and PACT, their recommendations of what Student required, and that Student's requirements were the same throughout the relevant time period, were uncontroverted. District Special Education Director Rizzuto did not disagree with the recommendations. Home teacher Chambliss's report of Student's present levels of performance as of October 31, 2008, as well as her testimony at hearing, demonstrated that a fundamental component missing from Student's instruction was the establishment of a reliable communication system with Student. In addition, the severity of Student's physical impairments prevented her from completing simple, functional acts like turning on preferred music.

23. To the extent Student contends that her claim for reimbursement for wheelchair repair or neurofeedback supplies are the type of AT or augmentative communication equipment the District should have provided, her claim fails. No evidence supported the need for neurofeedback as part of AT or augmentative communication. Although Mother believed Student benefited from it, no evidence established a definition for it, let alone that it would assist Student in benefiting from special education. To the extent the Vista report referred to "neurofeedback" in its recommendations, the recommendation is not persuasive as Biggs was not shown to

have the training or education that would even allow her to opine on its appropriateness. As to the wheelchair parts and maintenance, although Student might potentially be seated in her wheelchair to use a head switch, the wheelchair itself is medical equipment. Given Student's inability to be mobile without assistance, the wheelchair does not fit the definition of a device to "increase, maintain or improve" Student's functional capabilities, nor would its maintenance fall under the definition of a "related service." Student's wheelchair is a medical device to move her that is necessitated by her medical condition.

24. As to PT, Newman's assessment was credible and persuasive in light of his extensive experience and knowledgeable demeanor. No contrary opinion was offered by a licensed PT. Newman's recommendations were corroborated by the Vista Orientation and Mobility Assessment, which also recommended having Student focus on purposeful arm movement as an initial goal for educational access. Mother's opinions regarding PT were not persuasive because she was not shown to have any professional training in this area. Moreover, Mother's testimony was limited to general impressions of her positive view of the private therapy Mother was paying for and Mother offered no persuasive evidence of home therapist Dawol's qualifications or ability to render an opinion about special education related services. District Special Education Director Rizzuto did not disagree with Newman's recommendations. To the extent Student claims that the District should have provided "theratogs" as part of PT, she did not meet her burden of proof. Student's private PT therapist, who used the "theratogs" with Student, did not testify at hearing. Moreover, although Mother's devotion to the maintenance of Student's body strength is commendable, the evidence did not support a finding that the private PT and equipment supplied by Mother would assist Student in benefiting from special education. The un rebutted opinions of PT Newman and orientation and mobility instructor Biggs were persuasive, i.e., that in light of Student's severe mobility

and communication limitations, it was a far higher priority for educational access for Student to try to acquire basic skills, like reaching.

25. Student did not meet her burden of demonstrating that the District substantively failed to provide her a FAPE by not providing OT and speech therapy. The CSLOT reports in both areas were not completed and were fatally flawed by the assessor's complete lack of understanding of the purpose of the assessment. To the extent Student contends that the District should have provided "Vital Stim" therapy, like that provided by Shigemoto, Student's claim fails as well. Shigemoto unequivocally viewed her services as medical, confirmed that her services were unrelated to the production of speech or communication, and had no understanding of speech therapy as a related service in special education. Moreover, Dr. Totter provided persuasive testimony that such services were medical and not a related service intended to help a student benefit from special education.

26. In sum, Student met her burden of demonstrating that she was denied a FAPE by the District's failure to provide related services in PT, AT/augmentative communication, and orientation and mobility/vision in the frequency and duration specified by Newman, Vista and PACT. Student also met her burden of showing that she was denied a FAPE because the District did not supply the types of AT and augmentative communication equipment listed in the PACT report and the Vista report, with the exception of the recommendation for continued PT and neurofeedback. Student failed to show that wheelchair repair, neurofeedback supplies, or her private PT and equipment were required to provide her a FAPE. (Factual Findings 1-4, 6, 7, 9, 12, 19-27, 29-35, 38, 40-56, 61, 62; Legal Conclusions 1, 4, 5, 6, 13, 14.)

REMEDIES

27. Student contends that the appropriate remedy for any denial of a FAPE is a combination of reimbursement of parental expenses and compensatory education. For

reimbursement, Student requests reimbursement for supplies purchased by Mother consisting of books, a computer monitor, wheelchair maintenance, an AT switch, a "theratogs" garment for PT, and neurofeedback supplies. Student also requests reimbursement for the following services: the "Vital Stim" therapy provided by Shigemoto, the private PT provided by Dawol, and Student's horseback riding at Bright Ranch. As compensatory education, Student requests an award of the six diagnostic therapy sessions for PT and OT that were recommended in the CSLOT report. In addition, Student requests vision/augmentative communication and AT services in the amounts recommended by PACT and Vista calculated from November 1, 2008, through October 8, 2009 (the filing of the second due process hearing request). For purposes of calculating reimbursement and compensatory education, Student contends that Mother's conduct was reasonable at all times and that Student benefited from the services privately obtained by Mother.

28. District contends that Student's claims for reimbursement for the services by private PT provider Dawol, "Vital Stim" provider Shigemoto, and Bright Ranch should be denied because the services were not required to replace services that would have been provided as part of a FAPE. In particular, the evidence did not support that the PT therapy by Dawol was appropriate either in type or amount, the "Vital Stim" therapy was medical and not related to education, and that the Bright Ranch expenses were not shown to be educationally appropriate. District contends that books and materials could have been provided by the District and were not shown to be appropriate curriculum, that the PT garment was to support Student's private medical therapy, and that no evidence supported the necessity for neurofeedback supplies including the computer monitor. As to the compensatory education claim, District contends overall that the evidence did not support an award because no witness could state an opinion as to what would be appropriate other than one-to-one, and there was no evidence

regarding appropriate levels of OT or speech therapy. If compensatory education is awarded, the District contends that the time period should be discounted to reflect that it had 60 days after the date of the assessment plan to develop an IEP.

29. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE.) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

30. Reimbursement may be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement "forfeit[ed] their claim for reimbursement." In *Patricia P.*, reimbursement was denied where the parents had enrolled the child in a private school

in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

31. Other than reimbursement, school districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

32. First, reimbursement for books and index cards is not warranted. Student expressly declined to raise her placement and home instruction as an issue in this due process hearing. Accordingly, there was no legal issue presented about the appropriateness of Chambliss’s home instruction, such that no denial of a FAPE related to home instruction was found. The evidence does not support a finding that the books or index cards were related to the deprivation of a FAPE found by the failure to develop an IEP or the District’s failure to assess and provide related services. Student did not present evidence that any particular goal or curriculum was missing from the IEP that should have been developed. The evidence further did not support a finding that the books were educationally appropriate for Student’s cognitive level and abilities. Thus, reimbursement for these items is not warranted.

33. Reimbursement for the computer monitor and neurofeedback supplies is not warranted. Mother purchased the computer monitor both for use by Chambliss for instruction in art history and for neurofeedback. As discussed above, Chambliss's instruction was not at issue in the hearing. Nothing in the evidence persuasively supported a finding regarding what neurofeedback is, let alone that it should have been provided as a related service. Further, review of the recommendations by Vista and PACT shows that a computer monitor was not one of the recommended items, and to the contrary, all recommendations were for initially working with Student using simpler, high-contrast materials.

34. Reimbursement for the wheelchair parts and maintenance is not warranted because, as discussed above, the wheelchair is a medical device that Student requires because she cannot walk independently. Wheelchair maintenance is not a "related service" and parts for the wheelchair are strictly medical equipment.

35. Reimbursement for the private PT services of Dawol and the "theratogs" garment is not warranted. Here, the evidence supported a finding that the District should have provided PT to Student as a related service in the amounts recommended by Newman. However, Student failed to put on any evidence, either from a doctor or Dawol regarding the purpose and necessity of Dawol's lengthy interventions. Student failed to demonstrate that Dawol was qualified to provide the service and Mother's vague testimony about Dawol's possible European licensing was not persuasive. This lack of evidence was compounded and heightened by Student's failure to prove the amount of claimed reimbursement with any itemized invoice or proof of payment. Moreover, the persuasive and credible evidence at hearing demonstrated that it was not educationally appropriate to have PT for Student that focused on walking and standing rather than the basic movement of indicating choice through purposeful arm

movement. For the same reasons, the request for reimbursement for a "theratogs" suit is rejected.

36. Reimbursement for horse therapy is not warranted. Although getting out of the home and doing something outdoors may be beneficial to Student, no persuasive evidence was presented that Student was denied a FAPE because the District failed to offer horse therapy.

37. Reimbursement for "Vital Stim" therapy by Shugimoto is not warranted. No persuasive evidence was offered that the District should have provided such a service in order to provide a FAPE. To the contrary, Shugimoto herself viewed her services as being entirely medical and had no ability to form an opinion about whether it was necessary for a FAPE. Dr. Totter was persuasive, particularly because his opinion that it was a medical service was shared by the provider, Shugimoto. Moreover, although Schulz discussed this type of therapy with Mother and included it in her report, it was not reasonable for Mother to incur the expense. No evidence was produced that any urgency existed, particularly when at the time the expense was incurred, the instant due process hearing request was pending, Student's nutrition was given through a feeding tube, and Schulz's report was incomplete. For the same reasons, the evidence also did not support a finding that "Vital Stim" therapy should be provided as a compensatory remedy.

38. Reimbursement is appropriate in the amount of \$109.00 for AT equipment. Mother acquired it in December 2008, at a time when an earlier District assessment had recommended it. Moreover, PACT used Student's existing devices as part of its assessment and recommended acquisition of switches. Based on PACT's recommendations, the device will likely be used in the future.

39. Student's request for CSLOT's recommendation of six diagnostic therapy sessions for speech therapy and OT as compensatory education is denied. Student only

proved that she was denied a FAPE because Parents needed information from completed assessments in these areas in order to participate in an IEP team. However, in order to support a compensatory remedy for this procedural violation, Student would have had to produce evidence demonstrating what her needs were in these areas and a recommendation for a frequency and duration of services if recommended. The six diagnostic therapy sessions were intended to be used to complete the assessment, not as therapy. Accordingly, this claim for compensatory education is denied.

40. As to AT/augmentative communication, the evidence supports an award of compensatory education. Even though Sementelli from PACT could not give an opinion about what it would take to make up for the District's failure to provide it during the relevant time period, an award equal to the exact amount of weeks lost is warranted. Notably, District had an AT report that was done at its behest in August and September of 2008. Sementelli credited the report in part and it made similar recommendations such as introduction of "live voice scanning" and use of a simple switch. Although the parties settled all claims prior to October 31, 2008, the District could have implemented at least some of the 2008 report. Moreover, equity favors an award equal to the exact amount of weeks lost because of the length of the delay caused solely by District. Sementelli from PACT recommended consultation/direct service of 10 hours per month. Accordingly, as compensatory education for the denial of AT services, Student shall be entitled to up to 102.5 hours of AT/augmentative communication consultation/direct service (calculated as 2.5 hours per week for each of the 41 weeks of school during the relevant time period). All compensatory hours are to be provided by a non-public agency in Student's home. All hours must be used prior to the time Student reaches the maximum age for special education eligibility. Any unused hours will be forfeited upon Student's exit from special education or permanent move outside of the District's

boundaries. No materials or equipment are being awarded based on District's representation that it was obtaining the recommended materials.

41. As to orientation and mobility/vision, the evidence supports a compensatory education award. Vista was listed as the orientation and mobility assessor in the October 31, 2008 assessment plan, such that there is no excuse for the assessment not beginning until June of 2009. District's position that Mother should be charged with the delay or that the District should get the benefit of the 60 days in which it should have completed the assessment is rejected. Given the IDEA's unambiguous requirement that District assess and offer a FAPE to eligible children, and District's utter failure to act swiftly or even have a current, intelligible IEP for Student at the time of hearing, District is not entitled to the benefit of equity. Specifically, District's conduct in this case should not be rewarded merely because Biggs from Vista would not speculate about what it would take to make up for District's failure to serve Student. Biggs recommended that going forward, Student required two, 60-minute session per week of consultation and/or direct instruction from a teacher of the visually impaired and two, 60-minute sessions per week of direct orientation and mobility services. Accordingly, as compensatory education for the denial of orientation and mobility/vision services, Student shall be entitled to up to 82 hours of consultation and/or direct instruction from a teacher of the visually impaired and 82 hours of direct orientation on mobility services (calculated as 2 hours multiplied by 41 weeks). All compensatory hours are to be provided by a non-public agency in Student's home. All hours must be used prior to the time Student reaches the maximum age for special education eligibility. Any unused hours will be forfeited upon Student's exit from special education or permanent move outside of the District's boundaries. No materials or equipment are being awarded based on District's representation that it was obtaining the recommended materials.

42. As to PT, the evidence supports a compensatory education award. As discussed in Legal Conclusions 40 and 41, above, the ALJ rejects District's attempts to defer blame to Mother for its own multiple failings in following the plain requirements of the IDEA. Newman persuasively recommended that Student required two, 45-minute PT sessions per week. Accordingly, as compensatory education for the denial of PT services, Student shall be entitled to up to 82, 45-minute PT sessions (calculated as two 45-minute sessions for 41 weeks). All compensatory hours are to be provided by a non-public agency in Student's home. All hours must be used prior to the time Student reaches the maximum age for special education eligibility. Any unused hours will be forfeited upon Student's exit from special education or permanent move outside of the District's boundaries.

43. In sum, as a remedy for District's denials of a FAPE, Student shall be reimbursed \$109.00 for an AT switch and the following compensatory education under the conditions described above: 102 hours of AT/augmentative communication consultation/direct service; 82 hours of consultation and/or direct instruction from a teacher of the visually impaired; 82 hours of direct orientation and mobility services; and 82, 45-minute PT sessions. All other claims for reimbursement or compensatory education are denied. (Factual Findings 1-64; Legal Conclusions 1, 29-42.)

ORDER

1. Within 45 days of the date of this Order, District shall reimburse Mother the sum of \$109.00.
2. As compensatory education, District shall provide Student with 102 hours of AT/augmentative communication consultation and/or direct services.
3. As compensatory education, District shall provide Student with 82 hours of consultation and/or direct instruction from a teacher of the visually impaired.

4. As compensatory education, District shall provide Student with 82 hours of direct orientation and mobility services.

5. As compensatory education, District shall provide Student with 82, 45-minute physical therapy sessions.

6. All compensatory education awarded shall be provided by a California non-public agency in Student's home. All compensatory education hours must be used prior to the time Student reaches the maximum age for special education eligibility. Any unused hours will be forfeited upon Student's exit from special education or permanent move outside of the District's boundaries.

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, Student prevailed on all issues except for part of Issue 1(b) related to goals, part of Issue 1(c) regarding OT and speech therapy, and part of Issue 2 related to OT and speech therapy.

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: April 19, 2009

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings