

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ROSEVILLE JOINT UNION SCHOOL  
DISTRICT.

OAH CASE NO. 2010040311

DECISION

Eileen M. Cohn, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 14-17, 2010, and July 13-14, 2010, in Roseville, California.

Student was represented by F. Richard Ruderman, Attorney at Law, of the Law Offices of Ruderman & Knox LLP. Student's mother (Mother) was present on all hearing days, and Student's father (Father) was present on one hearing day. Mother and Father are sometimes referred to herein as Parents.

Roseville Joint Union School District (District) was represented by Heather Edwards, Attorney at Law, of Girard Edwards & Hance. Craig Garabedian, District Special Education Director, was present on all hearing days.

On April 5, 2010, Student filed her Due Process Complaint (Complaint). The matter was continued on May 11, 2010.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were granted a continuance and were ordered to file and serve closing briefs by no later than 5:00 p.m. on July 26, 2010. District and Student each timely filed their closing briefs on July 26, 2010. On that date, the record was closed and the matter was submitted.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free and appropriate public education (FAPE) during the 2009-2010 school year by failing to implement the April 8, 2009, Settlement Agreement (Agreement) in the following ways:<sup>2</sup>

- A. Failing to provide measurable annual goals during the 2009-2010 school year;
- B. Failing to provide appropriate services, including, physical therapy (PT), occupational therapy (OT), orientation and mobility training, social skills training, speech and language (LAS) therapy;
- C. Failing to provide appropriate special education placement;

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<sup>1</sup> Issues were restated to be consistent with the governing law and the manner in which the claims were presented at trial. At the beginning of the hearing, Student withdrew the following claims: District failed to provide a FAPE during ESY 2009; District's psychoeducational assessment was inappropriate; and District failed to provide a qualified teacher for the orthopedically impaired. Student raised issues at the hearing that were not part of the Complaint, including District's failure to provide a FAPE for the 2010-2011 school year, and the inappropriateness of District's proposed designation of Student as a pupil eligible for special education under the category of mental retardation. The only issues that will be addressed in this Decision are the specific issues that were alleged in the Complaint as modified by Student's notice of withdrawal of particular claims at the hearing. (Ed. Code, § 56502.)

<sup>2</sup> Student did not specifically limit her claim that District denied Student a FAPE during the 2009-2010 school year to the Agreement, but based upon the factual chronology, her claims are necessarily related to the Agreement and the operative IEP.

- D. Failing to provide appropriate accommodations and modifications to the curriculum;
- E. Failing to provide as appropriate accommodations accessible textbooks;
- F. Failing to provide appropriate assistive technology (AT) services, supplies and equipment.

2. Whether District violated the procedural rights of Parents and Student during the 2009-2010 school year by failing to make an offer of a FAPE at Individualized Educational Program (IEP) meetings convened as a result of Student's triennial assessment, including the IEP meetings of November 19, 2009, December 15, 2009, January 29, 2010, and March 8, 2010.

3. Whether Parents were entitled to an independent educational evaluation (IEE) of Student's PT needs.

4. Whether District's PT assessment was appropriate.

## FACTUAL FINDINGS

### GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student resides with Parents and her younger sister within the boundaries of the District. Student reached 16 years of age in the early part of the 2009-2010 school year when she was in tenth grade. Student has attended Woodcreek High School (Woodcreek) in the District since ninth grade.

2. Student was made eligible for special education services as a pupil with an orthopedic impairment (OI) at an early age. Student was diagnosed with cerebral palsy (CP), spastic-athetoid quadriplegia, which is a mixed-type cerebral palsy that affects all four limbs and presents with both the tight muscle tone of spastic cerebral palsy and the involuntary movements of athetoid cerebral palsy. Student had limited movement of her lower body but was able to use some muscle groups. She was unable to walk or stand

independently. She could not independently perform handwriting tasks. Student required adult one-on-one assistance throughout the day to assist her with classroom assignments, note- and test-taking, mobility around the campus, to transfer in and out of her wheelchair, and to utilize the bathroom facilities. During the 2009-2010 school year, Student utilized a motorized wheelchair to access the school campus.

#### FEBRUARY 2009 IEP

3. On February 18, 2009, an IEP team meeting was convened at Woodcreek to review the results of a PT assessment performed by Easter Seals on behalf of the District, and to prepare Student's annual IEP.

4. Easter Seals recommended PT consultation services to allow the physical therapist to instruct school personnel working with Student, including her paraeducators, teachers, and other staff, on equipment use and appropriate positioning of Student. Based upon Easter Seals' recommendations, the District IEP team members offered a limited number of hours per year of PT consultation services.

5. The IEP team prepared reading and writing goals for Student. To address her inability to independently compose a single paragraph that included a topic sentence, supporting sentences and a concluding sentence, a goal was developed requiring Student to compose a single paragraph with these elements with 80 percent accuracy (using a scribe or AT as needed) by February 18, 2010. This goal referenced statewide curriculum standards for grade three. A reading comprehension goal was prepared to improve Student's ability to restate the details of a text from her baseline ability to do so with 70 percent accuracy, to 90 percent accuracy. This goal referenced statewide curriculum standards for second grade in the areas of reading and writing.

6. The IEP team prepared goals for functional academics and to assist Student in accessing her curriculum. IEP team members observed that Student read slowly and could not read independently. She was unable to hold her reading material,

turn pages and keep her place due to her visual tracking problems arising from her disability. The goal developed to address Student's baseline challenges required Student to independently cut and paste five paragraphs into a screen reader program to read in four out of five opportunities. The goal did not refer to statewide curriculum standards but was designed to address other educational needs arising from Student's disability. The teacher for the OI was responsible for working with Student on this goal.

7. Goals were developed to enhance Student's breath and volume control. As described in the IEP, Student spoke in a quiet voice and the listener needed to be seated within one to two feet from her to be heard. One goal required Student to use appropriate oral volume for the teacher to hear her while presenting information in classroom settings 100 percent of the time as measured by teacher documentation and observation. Another goal was designed to increase Student's breath control by improving her ability to sustain an "ah" for one to two seconds, 90 percent of the time. The goal required Student to imitate a vowel with a duration ranging from three to five seconds and to sustain breath control 90 percent of the time.

8. Additional goals were developed in the areas of math. Goals were developed for adapted physical education (APE) for grasping and releasing, and swimming. The IEP did not recommend any goals for PT.

9. District also offered additional services: individual and group LAS services to address articulation and voice difficulties; OI services with a OI teacher from the Placer County Office of Education (PCOE), to work with Student, Parents and staff regarding AT needs in order to facilitate access to the curriculum. Student would also receive additional adult assistance throughout her school day.

10. At the February 18, 2009, IEP team meeting, District recommended accommodations and modifications to Student's curriculum which included: reduced and shortened assignments in the general education class; modified assignments in the

general education class, note-taking support in all classes that require writing; use of a visual place holder; use of a calculator for math classes; access to a computer on campus and printer for all written work; staff assistance in all classes; use of a scribe when AT writing devices are either not available or impractical; and Intellikeys, assistive software and hardware to access curriculum. As a strategy, Student was further provided with extended time to complete assignments in regular education classes. For testing, Student was provided use of the special education classroom to take exams. For tests in her regular education classes, Student was allowed to use notes, the textbook, and to have items read aloud for the entire test. For statewide assessments, such as the STAR, a paraeducator would read the test to Student and mark the answer book for her.

11. Large print books and books on tape were not checked as options on the list of accommodations needed for Student to access her educational program. These accommodations were included in the previous IEP.

12. As provided for in the February 18, 2009, IEP, Student would continue her placement in a SDC for two, 75-minute periods of specialized academic instruction to support Student's language arts and math goals. The IEP did not identify any regular education academic classes for Student during the 2009-2010 school year, nor was there a discussion of general education academic classes for the 2009-2010 school year. Only the accommodation and modifications portion of the IEP referenced general education classes. The February 18, 2009, IEP stated that Student participated in the general education environment 66 percent of time and the special education environment 34 percent of the time. Student, however, spent the majority of her instructional time in special education. Three of Student's four class periods of academic and nonacademic instruction were in special education. District included, as part of Student's general education participation, lunch and bathroom breaks.

13. As specified in the IEP, Student was on track to receive a certificate of completion in 2012. She was not on a diploma track. Education and grading for pupils on a certificate of completion track was different than that for pupils on a diploma track. The statewide general education curricula for academic general education subjects taught to pupils on a diploma track were modified for pupils on a certificate of completion track. Modifications were distinguished from accommodations. Accommodations addressed the special needs of pupils for adjustments in the delivery of general education academic content or test administration. Modifications referred to the content of education. Pupils on a diploma track were required to learn and master the content identified in statewide general education curricula standards. Pupils obtaining a certificate of completion were required to master only about half the content of curricula, with the curricula often stripped down to the basic concepts underlying the general education subject area.

14. Mother attended the IEP team meeting with Student's physical therapist, Dr. Kristine Corn, of Sierra Therapy. Dr. Corn had been providing physical therapy services to Student since she was six months old when Student received funding for physical therapy through California Children's Services (CCS). CCS discontinued Student's PT services because she failed to make progress on goals designed by CCS to allow Student to function independently without assistance. For example, PT services would not result in Student gaining the muscle control and dexterity to transfer to the toilet unassisted. Dr. Corn was a qualified and experienced licensed physical therapist. She received her undergraduate degree with a certification in PT from the University of Southern California. Dr. Corn obtained a master's degree and a clinical doctoral degree in physical therapy (DPT).

15. Prior to the IEP team meeting, Dr. Corn prepared a progress report which was submitted to District regarding her PT services to Student over a nine-month period

of time. Dr. Corn treated Student during twice weekly 60-minute PT sessions. Dr. Corn reported that Student had made positive gains in postural control, head control, hand use, beginning ability to stand and transfer. Dr. Corn further concluded that Student made improvement in her breath control for assisting in speaking in a louder and more audible voice. Dr. Corn deemed it essential that Student continue to be seen twice weekly for direct PT sessions. She also recommended that Student receive LAS and OT services. Dr. Corn identified four physical therapy goals for education: improving Student's postural control to promote head, trunk, and visual control in an upright position so that Student could participate in reading and classroom instruction; developing spinal extension and rib cage mobility to assist in increasing respiratory volume for speech and sound production; developing sufficient strength in the trunk and lower extremities to allow for assisted transfers for toileting; and increasing strength and control of the upper extremities to promote hand use and aide in written communication.

16. At the February 18, 2009, IEP team meeting, Dr. Corn re-stated her position that Student needed to continue to develop her motor control to be successful in school.

17. Mother expressed her disagreement with the District's recommendation for consultation-only PT services. Mother did not consent to the February 18, 2009, IEP.

18. On March 13, 2009, in anticipation of Student's enrollment in tenth grade during the 2009-2010 school year Mother submitted a course request form for the 2009-2010 school year. Although not specified in the IEP, Student, as she had in the ninth grade, was provided with an opportunity to participate in one general education class per semester. Mother requested college preparatory biology, or "CP Biology." Next to the preprinted course title "History," Mother selected "World History."



## APRIL 8, 2009, SETTLEMENT AGREEMENT

19. Parents, on behalf of Student, filed for due process with OAH regarding the District's offer of FAPE in the least restrictive environment (LRE) during the 2008-2009 school year, including the 2009 extended school year, and the 2009-2010 school year.<sup>3</sup>

20. On April 8, 2009, District and Parents, on behalf of Student, entered into the Agreement, which resolved Parents' and Student's due process complaint. All parties were represented by counsel. In reliance upon the advice of counsel, Parents and Student released and discharged District from "any and all" special education, 504 or ADA claims "of any kind" through April 8, 2009. The parties further expressly waived any right "to assert hereafter that any claims were excluded" from the Agreement "through ignorance, oversight, or error."

21. The Agreement provided that Student would participate in APE each day.

22. The Agreement required District to provide a variety of related services to Student. An OI teacher from PCOE was required to provide 900 minutes per year of specialized services for low-incidence disabilities. The Agreement provided one 60-minute session per week of OT; two 30-minute sessions per week of LAS; and additional adult assistance throughout the school day.

23. Under the heading "Computer Laptop," the Agreement provided that District would contact PCOE "to coordinate assistive technology assessment and software for Student" no later than April 17, 2009, and provide Student with a computer laptop no later than May 15, 2009. The Agreement further provided that Student could pursue a compliance complaint with the California Department of Education if District failed to provide the laptop by May 15, 2009.

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<sup>3</sup> OAH case number 2009030001.

24. Under the heading "Private PT and OT Assessments," the Agreement provided that District would provide private PT and OT assessments on or after November 1, 2009, using a nonpublic agency (NPA) of District's choice, such as, Laguna Physical Therapy. It also provided that Parents' signature on the Agreement constituted "informed written consent" for the private PT and OT assessments.

25. The Agreement provided two 60-minute sessions of direct PT services weekly for Student. The Agreement provided that Dr. Corn would provide direct PT services through February 18, 2010, and that her services after that were not "stay put." The Agreement also required PT consultation services monthly to assist staff that work with Student and the APE teacher to use assistive technology or equipment, and to work on positioning. PT consultation services were used to assist staff in raising Student to an upright position in a device referred to as a stander. Student's doctor required that Student be out of her wheelchair every two hours. Doctor did not testify and no document memorializing his instructions was introduced as evidence. From the testimony and documentation, however, it was established that the common means for ameliorating the side effects of being wheelchair-bound as a pupil with CP, was to place Student in the stander.

26. In addition to resolving all special education claims through April 8, 2009, the Agreement expressly resolved claims for PT, APE, OT, LAS, acquisition of a computer laptop, and compensatory education, through February 18, 2010. The parties agreed that "[a]ll other services and placement" would be addressed through the IEP process.

27. The Agreement required District to convene an IEP meeting for Student no later than January 18, 2010, to discuss the results of the PT and OT assessments, determine Student's special education needs and services, and determine service providers.

28. The parties agreed that applicable federal and State special education laws governed the interpretation and enforcement of the Agreement. They further agreed that the language and terms of the Agreement were to be understood in their ordinary sense, except where they were defined. They also agreed that the Agreement would not be construed as having been prepared by one party or the other. In the event of a breach, they agreed that the non-breaching party would have available all legal and equitable remedies.

29. On April 17, 2009, Mother signed the February 18, 2009, IEP, consenting to the IEP, as amended by the Agreement.

#### IMPLEMENTATION OF COMPUTER LAPTOP PROVISION OF AGREEMENT

30. Before Mother signed the Agreement, Craig Garabedian, District's Director of Special Education, contacted PCOE, regarding the laptop computer. He communicated with the specialist at PCOE responsible for working with Student on her AT needs. The PCOE specialist assured him that she was working with the available computer laptop and related software to make sure everything was working and suitable for Student. Mr. Garabedian understood that the assessment referred to in the Agreement was satisfied by PCOE's informal review of the laptop and the work the PCOE's specialist was doing to make sure the laptop equipment and software was adapted to Student. There were no discussions regarding a formal AT assessment. From his communications with the PCOE specialist, Mr. Garabedian understood that she had assessed the computer laptop and related software by reviewing the hardware and software and making sure it was adapted to Student. Student was provided with a computer laptop and software as dictated by the Agreement.

## STUDENT'S SDC

31. In August 2009 Student began her 10th grade year at Woodcreek. At Woodcreek, the classes were structured on a block schedule, 85 minutes a period, four periods per day. On Mondays, class periods were 75 minutes because the school day was shorter. As part of the block schedule, one full year of general education academic course curricula was collapsed into one semester. As set forth in her IEP, Student participated in the Special Day Class (SDC) for academic literacy and functional academics for two of her four periods of instruction daily. The SDC focused on reading, writing, comprehension, and math skills. In addition to her special education courses, Student was mainstreamed into one general education class each semester.

32. Student's two periods of SDC were taught by Leslie Peterson. Ms. Peterson had been Student's special day class teacher since ninth grade. Student was one of fifteen pupils in Ms. Peterson's special day class. Ms. Peterson had taught special education at Woodcreek for about ten years and possessed all the required credentials for instructing Student. In addition to Student's one-on-one assistant, Ms. Peterson was assisted by a paraeducator assigned to her classroom. In Ms. Peterson's class, Student worked on written language every class day, and reading comprehension twice a week. Two books were read each semester. Student was required to read various materials and then write three to five sentences. She was also required to write in her journal. Ms. Peterson made available to Student books on tape.

33. Three days a week, Ms. Peterson also utilized a special education direct instruction reading program entitled SRA Corrective Reading program (SRA). Ms. Peterson used the Decoding portion of the SRA program (SRA Decoding) only. Decoding refers to the ability to recognize word syntax, phonemes, and the properties of words, or semantics. SRA was designed for students from fourth grade through adulthood who were poor readers, who did not read at an adequate rate, and who

confused words. The SRA Decoding program consisted of scripted curriculum. SRA was one of approximately 20 research-based and scientifically validated intensive reading intervention programs available for special education pupils. Ms. Peterson attended SRA training programs and, given her background and credentials, was qualified to teach it.

34. SRA Decoding was divided into three levels, B1, B2 and C. Ms. Peterson administered a placement assessment as dictated by SRA protocols to determine which level of the SRA Decoding should be followed for her pupils. Ms. Peterson directed her paraeducator to administer the placement assessment to Student. There was no evidence that the paraeducator was not qualified to administer the placement assessment. Ms. Peterson interpreted the results of the placement test according to the SRA guidelines and her own experience with Student.

35. Student's placement test indicated that she should be placed in B1. Ms. Peterson placed her in B2 based upon her knowledge of Student's ability from her experience as her teacher for the past year. SRA Decoding B2 teaches phonemic awareness, phonics and word analysis, fluency and comprehension. It also addressed story details, cause and effect, main idea, story grammar/retelling, story summarizing, and compare and contrast. B2 consists of 65 lessons of 45 minutes in duration. It was designed to improve a pupil's reading accuracy to 98 percent at a 4.5 through 4.9 grade level.

36. The SRA Decoding program included an assessment approximately every 10 lessons to check on pupils' progress. Ms. Peterson administered the assessments as required.

37. Ms. Peterson also instructed Student in math. Mother complained about the math level in Ms. Peterson's class, but did not dispute District's, or Ms. Peterson's, provision of Student's special education math during the 2009-2010 school year.

38. At the beginning of each school year, Ms. Peterson administered a commonly used screening measurement where she estimated the reading level of her pupils, including Student. At the beginning of the 2009-2010 school year, Ms. Peterson's screening measurement revealed Student to have a fourth grade independent reading level, a fifth/sixth grade instructional reading level, and a seventh grade frustration level.

39. On August 12, 2009, two days after Student began 10th grade, Mother requested an IEP team meeting to discuss modifications to Student's biology curriculum. Mother also wanted to discuss placing Student on a diploma track.

40. In addition to her teaching responsibilities, Ms. Peterson was Student's case manager. In that capacity, she was responsible for working with general education instructors assigned to Student such as Kristy Worley, Student's biology teacher. Ms. Peterson provided Ms. Worley with the modifications and accommodations portion of Student's IEP, but not the complete IEP. Ms. Peterson did not inform Ms. Worley that Student was on a certificate of completion track, as opposed to a diploma track. Ms. Worley consulted regularly with Ms. Peterson regarding modifications to the biology curriculum. Ms. Peterson's expertise and experience as a special education educator was in language arts and math. She used an alternative curriculum to teach these subjects. She had no experience teaching biology to special education pupils. She made recommendations to Ms. Worley regarding how to make modifications to the material to reduce the amount of critical thinking skills required, and the accommodations required by the IEP, but she left to Ms. Worley's discretion the final decision on how to modify the materials and to test Student.

#### SEPTEMBER 10, 2009, IEP TEAM MEETING

41. Mother requested the IEP meeting because she was also concerned that Ms. Peterson, Student's special education teacher, was not providing English language arts instruction to Student that was commensurate with Student's abilities and potential.

42. On August 28, 2009, Mother prepared a written request for assessments which District received three days later, on August 31, 2009. Mother requested standard academic assessments in the areas of reading, writing, language, and math, for the purpose of determining Student's goals and placement. Mother anticipated that the assessments would be discussed at an IEP team meeting.

43. On September 10, 2009, District convened an IEP team meeting in response to Mother's request. In attendance were: Parents; Mr. Garabedian; Ms. Peterson; Carrie Roninger, District's physical therapist; Karen Hummel, Woodcreek's special services coordinator; a representative of the PCOE; Elise Haugh, Student's speech and language pathologist (SLP); the school nurse; Louise Cullen, Student's OI teacher; Kelly Mayo, Student's APE teacher; and Kristy Worley, Student's biology teacher.

44. Mother's request for assessment and her concerns about appropriate academic placement for Student were discussed at the September 10, 2009, IEP meeting. Mother read a prepared statement about her concerns. Ms. Peterson answered questions about the SRA program and explained that the formal assessments contemplated would provide the information needed to determine whether or not Student was appropriately placed in her academic classes. District IEP team members explained that a reassessment of Student's IEP goals and placement would require more than the reading, writing, and math assessment she requested.

45. Ms. Worley provided feedback on Student's progress in biology and indicated that Student was working well with her paraeducator. Ms. Worley stated that Student was unprepared at times, but when she completed her homework, she was capable of providing appropriate answers to questions in class. Ms. Worley offered to work with Student after school.

## TRIENNIAL ASSESSMENT PLAN

46. On September 21, 2009, Mr. Garabedian provided Mother with an assessment plan to conduct a comprehensive triennial reassessment of Student for the purpose of re-evaluating Student's IEP goals, services and placement. Student's next triennial reassessment was not due until February 2011. District proposed conducting the triennial assessments earlier. The triennial reassessment plan included: a psychoeducational assessment; an assessment of Student's adaptive skills by the District school psychologist; a speech, language and communication assessment by a District speech and language pathologist (SLP); and a health/vision/hearing assessment by the District nurse. The assessment plan also included the PT and OT assessments required by the Agreement, to be conducted by Laguna Physical Therapy. Mother signed the assessment plan on September 23, 2009.

## MOTHER'S REQUEST TO CHANGE STUDENT'S PLACEMENT TO OAKMONT

47. Sometime in late September, Mother spoke with a representative of PCOE about Student's instruction in Ms. Peterson's class, and the SRA Decoding program. The PCOE representative informed Mother that the SRA Decoding program was a good program. However, she suggested that she look at another District special day class located at Oakmont High School (Oakmont) where the SRA Decoding program was being administered by another special education teacher, Kevin Tellefson. Oakmont was not Student's home school. It was eight miles from Student's home and required Student to travel by bus 45 minutes each way, much longer than the travel time each way to Woodcreek.

48. On October 15, 2009, Mother visited Oakmont. Mother observed Mr. Tellefson's class and had an opportunity to speak with him at length about his delivery of the SRA program, his use of supplemental books, and how he moved through the



lesson each day. Mr. Tellefson taught the same B2 level as Ms. Peterson. By the time of Mother's visit to Mr. Tellefson's class, it was her understanding that Mr. Tellefson was half-way through the B2 level and would be finished with B2 by Christmas.

49. On October 19, 2009, Mother requested that Student be transferred to Oakmont. Mother maintained that Oakmont provided the "same program" as Woodcreek. Mother expressed her disappointment with Woodcreek's inability to further the "fair gains" Student had made during her first eight years of education and its failure to keep the "bar" of education high. Mr. Garabedian deferred Mother's placement request to the IEP team to be addressed as part of Student's placement options after the assessments were reviewed, and revisions to Student's goals were made.

50. Mr. Tellefson testified at the hearing. Mr. Tellefson stated that he completed all the lessons by the end of the 2009-2010 school year, not the first semester. Ms. Peterson completed all but six lessons by the end of the 2009-2010 school year. Mr. Tollefson's testimony concerning the SRA Decoding program was consistent with Ms. Peterson's testimony. He also placed pupils in the SRA Decoding program primarily based upon the SRA assessments. He did look at other data to confirm his understanding of the pupil's areas of deficits, but it was "rare" that the SRA placement assessment proved to be inconsistent with a pupil's correct placement level. Although the SRA Decoding program was a reading fluency, not a comprehension, program, Mr. Tollefson confirmed that improved decoding skills resulted in improved comprehension. Eighty percent of pupils improved their comprehension skills by improving their fluency skills.

51. Mr. Tellefson had the requisite training and experience to administer the SRA Decoding program, and to provide expert testimony about it. He was certified to teach learning handicapped students and as a resource specialist. He has been a resource teacher with District for 17 years. Mr. Tellefson had an engaging and animated

personality. He responded directly and thoroughly and without hesitation to questions asked and his testimony about the SRA Decoding program was given great weight to determine whether Student received educational benefit during the 2009-2010 school year in Ms. Peterson's class.

#### DR. RONINGER'S TRIENNIAL PT ASSESSMENT

52. During October 2009, Carrie Roninger, DPT, conducted a triennial PT assessment of Student to determine her eligibility and school-based need for PT. Carrie Roninger is the owner of Laguna Pediatric Therapy (Laguna). Laguna contracted with District as a NPA to administer PT to its pupils. Dr. Roninger is a licensed physical therapist and possesses all the necessary qualifications to provide PT services. Dr. Roninger obtained an undergraduate degree in kinesiology and a clinical doctorate in PT. She has been professionally employed as a physical therapist for six years. She worked with children as a PT in a private pediatric practice, and with adults in a hospital setting. Dr. Roninger estimated that she has worked with upwards of 30 pupils with CP.

53. Dr. Roninger found Student to be a happy, kind and social individual. She was able to propel her wheelchair in short spurts. She could assist with standing activities for five to 10 seconds with moderate assistance, and tolerate approximately 60 seconds of standing activities with maximal assistance. Consistent with Dr. Corn's earlier report, Dr. Roninger noted Student's challenges related to her diagnosis, including her increased muscle tone, her low muscle control, and her difficulty maintaining proper head and upper extremity positioning without constant reminders.

54. Dr. Roninger made specific observations regarding Student's ability to maintain certain positions. Student could keep her head up for 20 seconds to several minutes, depending on her level of interest in the activity. She could not maintain a constant push on the joystick accompanying her electric wheelchair. Student exhibited an extreme range of motion deficits in her ankles, hips, shoulder, wrist, hand and fingers.

Student needed maximal verbal cues to maintain her hands down on her tray with wheelchair mobility.

55. Dr. Roninger used the School Functional Assessment (SFA), an observation-based assessment to assess Student's PT needs. Dr. Roninger did not personally examine Student. She did not interview Mother. Her assessment consisted of the SFA and interviews with staff. She also reviewed the reports prepared by Dr. Corn and Easter Seals. The SFA was commonly used to observe Student's needs for assistance, adaptations, travel, maintaining and changing positions, recreational movement, and manipulation with movement. Dr. Roninger concluded that Student required a high level of assistance, and significant adaptations. She required a one-on-one aide to maintain and change positions and could not manipulate with movement her environment without a one-on-one aide. Student could access the campus with her electric wheelchair and was provided an aide for all her daily school routines and physical needs.

56. Dr. Roninger distinguished between educationally related and medically related services. In her report, Dr. Roninger acknowledged Student's severe physical limitations, but recommended that Student's services be limited to nine one-hour sessions per year, consisting of 45 minutes of direct services, and 15 minutes of consultation. She also recommended that a larger joystick be obtained for Student to control her electric wheelchair. In her report, Dr. Roninger noted that Student's physical limitations, including her range of motion, her biased movement patterns and tone were all part of her diagnosis, but were not educationally related. Dr. Roninger explained that "educationally necessary" meant that to access their education, pupils required improvements in their functional skills that were related to their school performance. Dr. Roninger conceded that pupils may have both medical and educational needs. However, if the medical needs do not directly impact educational performance, the medical need

may not also constitute an educational need. Dr. Roninger referred Student to CCS or private insurance to obtain medically related services directed at treating her diagnosis.

#### DISTRICT'S SPEECH AND LANGUAGE ASSESSMENT

57. As part of the triennial assessment, Elise Haugh, District's SLP assessed Student over a five-day period during October and November 2009. She administered a full battery of tests including standardized assessments, informal oral-motor dysphagia and pragmatic assessments, and reviewed language samples.

58. Ms. Haugh administered the four core subtests of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) from which she derived Student's Core Language Score (CLS). Ms. Haugh considered the CLS the most representative of Student's overall language performance. The CELF-4 has a mean of 100 and a standard deviation of 15, with a score of 100 representing the performance of a typical pupil in Student's age range. Scores of 115 and above are above average, scores between 86 and 114 are average, scores between 78 and 85 are borderline, scores between 71 and 77 are within the low range, and scores below 70 are considered within the very low range. Student received a CLS score of 76, placing her in the low range.

59. Ms. Haugh measured Student's performance on several CELF-4 indices. Student obtained a score of 62, or very low, on the Receptive Language Index (RLI), which measured Student's ability to comprehend language she heard. She obtained a score of 71, or low range, on the Expressive Language Index (ELI), which measured Student's ability to express herself orally by examining her expressive language at the one-word to sentence levels. She obtained a borderline score of 84 on the Language Content Index (LCI) which measured several elements of language including comprehension of paragraphs, concepts, directions and vocabulary. She obtained a score of 72, or low range, on the Language Memory Index (LMI), which measured Student's ability to remember oral directions, formulate sentences, and identify

relationships between words. She obtained a score of 63 or very low, on the Working Memory Index (WMI), which measured attention, concentration, and the ability to recall numbers, letters, and familiar sequences.

60. Ms. Haugh also performed a discrepancy analysis between the LCI score of 84 and the LMI score of 72. She concluded that the 12 point difference was significant and demonstrated that Student's semantic skills were a relative strength compared with her ability to use language that depended on memory. Student's strength encompassed the areas included in the LCI tests, including defining and describing words, answering questions about paragraphs, and creating sentences by rearranging and combining words and phrases.

61. In contrast to her strengths as reflected in the LCI score, Student's relative weaknesses as reflected in the LMI score included tasks that involve "repeating sentences that increase in complexity without substitutions or omissions, using a word presented orally in a complete sentence, and identifying relationships based on word and sentence meaning." Student may also "have difficulty understanding information presented in class, or following directions to complete in-class assignments."

62. On particular subtests of the CELF-4 Student's scores revealed that she had average abilities when it came to recalling sentences and reproducing sentences of varying length and syntactic complexity, skills required for following directions and academic instruction. She also scored in the average range for word definitions which tested her ability to analyze words for their meaning features, to define words by referring to shared meanings, and describing meanings that are unique to the reference or instance. This skill in the classroom was used to broaden word meanings to form concepts, matching words to definitions, and developing in-depth understanding of word use. She also scored in the average range in the subtest that evaluated her ability to understand information presented in spoken paragraphs.

63. In contrast, Student registered a severe difficulty on the subtest that measured her ability to understand relationships with words, which was important for understanding the precise use of words for expressing meanings in written text by comparing and contrasting related words, including antonyms and synonyms.

64. Student's oral language skills were age-appropriate. Ms. Haugh engaged Student in conversation and concluded that her pragmatic language was age-appropriate given her physical limitations.

65. From her conversation with Student, Ms. Haugh learned that Student enjoyed communicating with her peers and being with them, or in Student's words "hanging out" with other pupils. Student was "enthusiastic" when she spoke about the "fun" aspects of school and home.

66. At the time of the LAS assessment, Student was passing biology. Ms. Haugh concluded that Student was clearly engaged in her general education biology class. Student demonstrated that she had learned vocabulary from her general education biology class. She explained a science experiment by using words such as "data," "cell transport," and "salt bath."

#### MS. WELLS' PSYCHOEDUCATIONAL ASSESSMENT

67. On October 26, 27 and 29, 2009, and also on November 19, 2009, District's school psychologist Kim Wells conducted a psychoeducational assessment of Student. Ms. Wells' assessment was dated November 19, 2009.<sup>4</sup> Ms. Wells summarized Student's previous triennial assessments and conducted a wide range of additional assessments of

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<sup>4</sup> The heading of the assessment report also stated that a final draft was prepared on January 29, 2010. However, there was no indication from the report that any additional assessments or data were added to the report after November 2009.

Student's cognitive functioning, academic functioning, memory, executive functioning, and adaptive behavior.

68. Ms. Wells interviewed Ms. Worley. Ms. Worley communicated her concerns regarding Student's ability to earn a pass for the second half of the course. Student's curriculum was modified so that Student was only responsible for one-half, to one-third of the curriculum of the other Students. Student was successful at the beginning of each unit with the initial notes and vocabulary but had difficulty applying topics and synthesizing her knowledge by the third or fourth day of each unit. Generally, vocabulary-driven questions were successful, but verbal or written process questions were less successful. She had difficulty with visual tracking and critical thinking. Ms. Worley summarized all the accommodations and modifications being used for Student including, extended time, repetition, reduced and modified assignments, note-taking support. Ms. Worley was concerned that Student would not earn a passing grade for the second half of biology.

69. The results of the various standardized assessments generally mirrored the results from Student's previous triennial assessments. Student generally scored Very Low or Below Average on assessments measuring her cognitive ability and academic achievement. Ms. Wells administered the Woodcock Johnson Tests of Cognitive Abilities, Third Edition (WJ-Cognitive-III). WJ-Cognitive-III was scored according to a normed sample that is matched to the distribution of key nationwide population variables. It was considered a valid and reliable assessment of cognitive ability. Standard average scores on the WJ-Cognitive-III were 85 to 115. Student achieved a standard score of 44 on the measure of visual-spatial thinking, with a very low score of 14 on the measure of spatial relations, and a relatively higher below-average score of 83 on picture recognition.

70. Ms. Wells administered a neuropsychological assessment referred to as NEPSY-2 which provided information about Student's processing abilities. On selected subtests measuring her ability to judge spatial figures, including arrows, geometric puzzles, and picture puzzles, Student obtained a very low score of 1, where the average was a score of 7 through 13.

71. Standardized assessments of Student's cognitive ability were also supported by reference to her performance on an assessment tool referred to as the Differential Ability Scales (DAS-2). Student's overall verbal ability of 73 was low, but was much higher than her nonverbal ability of 39, which was very low.

72. Ms. Wells explained the challenges to Student's visual-spatial thinking as reflected in her performance on the visual-spatial cluster of the WJ-III and the subtests of NEPSY-2. According to the assessment results, Student's very low performance indicated that she struggled greatly to discriminate and accurately assess how different words were similar. Although Student had knowledge of a variety of words and what they mean, she struggled to be able to use higher processing skills, which allowed her to reason with the knowledge she acquired. The DAS-2 confirmed the information derived from the WJ-Cognitive-III and NEPSY-2. The results indicated that she had significant sub-average capabilities when reasoning with novel problems, and utilizing both inductive and deductive reasoning strategies.

73. Ms. Wells also utilized standardized assessments to measure Student's executive functioning skills, or skills related to organization, sustaining attention and the development of novel problem-solving strategies. Based upon the results of standardized tests, Ms. Wells concluded that Student was significantly impaired in these areas as well.

74. Ms. Wells administered the Woodcock-Johnson Tests of Academic Achievement, Third Edition (WJ-III). The WJ-III was a valid and reliable assessment of



achievement. Standard scores on the WJ-III were derived from the scores obtained by the normed sample, with the range of 85 to 115 considered an average standard score. Ms. Wells administered a composite Broad Reading assessment. Student scored within the Below Average to Far Below Average range within the areas assessed under the Broad Reading category: 82 on Letter-Word Identification; 60 on Reading Fluency; 69 on Passage Comprehension; and 82 on Word Attack. She scored 69 on the Spelling subtest. She obtained an average score of 100 on Story Recall, and an average score of 95 on Story Recall-Delayed.

75. Ms. Wells acknowledged that reading was an area of strength but Student still struggled with her overall reading skills; her ability to decode familiar and unfamiliar words placed her below her peers, and suggested that she still struggled with phonetic decoding skills. Student also struggled with reading comprehension and fluency. Ms. Wells concluded that Student is still learning to read and that she needed extra time and assistance in this area.

76. Ms. Wells concluded that Student did not have the cognitive ability to complete grade-level work. She proposed an educational environment that emphasized repetition, explicit and detailed instructions for work, breaking tasks down into small manageable chunks, and small-group instruction when acquiring new knowledge. Due to Student's impaired executive functioning, Ms. Wells recommended a classroom environment that allowed her to work at her own and slow pace, frequent breaks, and with more direct interaction with the teacher. For academics, Ms. Wells recommended special education and goals in the areas of basic reading skills including comprehension and fluency; and basic math calculations.

77. Ms. Wells also recommended goals to address Student's adaptive skills, including: speaking clearly, with appropriate volume and clarity; initiating conversations with peers and adults; increasing Student's independence within the wheelchair so as to

increase her mobility and independence within and outside the classroom; continued practice with money; and awareness of time.

### APE ASSESSMENT

78. On November 12, 2009, District's APE Kelly Mayo prepared an APE assessment. Mr. Mayo administered a variety of assessments. Mr. Mayo reported that his paraeducators administered a daily stretch routine during class time. Student was out of her wheelchair the majority of time during APE for stretching or other services. She did not participate regularly in any group activities. Mr. Mayo reported that his efforts to place Student in the pool had failed in spring 2009 and fall 2009 due to health concerns. Student did not always participate with the class and instead had chosen to stretch. She also received PT and OT during APE class which reduced her participation in APE.

### OI ASSESSMENT

79. On November 19, 2009, as part of the triennial assessment, Louise Cullen, Student's OI teacher from PCOE prepared an OI assessment. Ms. Cullen worked directly with Student and appreciated her humor, and her enjoyment of school. Ms. Cullen worked with Student to expand her use of the lap top computer connected to a specialized keyboard. She observed her progress in using a large key calculator. Ms. Cullen emphasized the need to provide Student extra time to get her materials, and to set up for all activities. She recommended that OI services be continued to help her facilitate her access to the curriculum, provide for her ongoing AT needs, and to train her and staff on the use of AT. She recommended that the goal of independently cutting and pasting five paragraphs into a screen reader program and reading them be continued, and an additional goal of inserting a picture into a document as she edits to be added.

80. Ms. Cullen testified at the hearing. She demonstrated that she had extensive experience in addressing the needs of the orthopedically impaired in general, and that she understood Student's particular needs. She worked with Student on her goals, on new AT, on trouble-shooting AT problems, and on teacher requests. Ms. Cullen had recently retired from PCOE. By the way she responded to questions, it was clear that she was providing a candid response about Student's needs, and was not biased by her former affiliation with PCOE and District. Given her close working relationship with Student, and her independent status, Ms. Cullen's testimony about Student's services was given great weight.

81. As part of the triennial assessment, District also conducted Vision, Hearing and OT assessments. These assessments were completed prior to the November 19, 2009, IEP meeting. No evidence was presented disputing the assessments or the OT services.

#### NOVEMBER 19, 2009, IEP TEAM MEETING

82. On November 19, 2009, a properly noticed IEP team meeting was held. The IEP notice indicated that IEP team members would discuss the triennial assessments and annual plan. IEP team members in attendance included: Parents, Mr. Garabedian, Ms. Peterson, a PCOE program specialist, Ms. Hummel, the Oakmont special services coordinator, a Regional Center representative, Ms. Cullen, Dr. Roninger, Ms. Worley, and Ms. Haugh.

83. District developed Student's IEP from a template that began with the February 18, 2009, IEP. Prior to the November 19, 2009, IEP, the previous IEP was updated with recent assessments and other data from the teachers and service providers. The goals and objectives from the February 18, 2009, IEP were revised or updated, and new goals were developed based upon recommendations from the

assessors, teachers, or service providers. As with all its IEPs, District did not provide Parents with a copy of the draft IEP, or goals and objectives, until the IEP was completed.

84. It was District's practice to go through the IEP systematically with IEP team members, beginning, where applicable, with a review of assessments, present levels of performance, goals and objectives, services, accommodations, and placement. District did not make an IEP offer until all these elements were addressed. Generally, the IEP process took no more than a couple of hours.

85. At the November 19, 2009, IEP team meeting, Ms. Worley discussed Student's progress in her biology class for one hour. Although Ms. Worley had made modifications to the curriculum, she informed the IEP team that Student continued to struggle. Ms. Worley reviewed the modifications she made. She clarified for Mother that the textbook was only supplemental to class instruction, and that the class was lecture-driven. Ms. Worley informed the IEP team that Student was not gaining an adequate understanding of the modified material and was in danger of failing the second half of biology.

86. The IEP team did not make any recommendations to Ms. Worley for additional modifications to the curriculum. Instead, the IEP team deferred recommendations for "appropriate modifications for the remainder of the term" until after the psychoeducational and speech and language assessments were reviewed by the IEP team.

87. The IEP team did not discuss the psychoeducational and speech and language assessments at the November 19, 2009, IEP team meeting.

88. The IEP team discussed Ms. Cullen's OI assessment report. Ms. Cullen recommended that Student be provided 20 to 30 minutes a day of keyboard/writing practice. Mother requested that Student be provided more opportunities to use the

computer in her special day class. The IEP team discussed Dr. Roninger's PT assessment report as well as the OT and health assessment reports.

89. Mother questioned the amount of PT service Dr. Roninger recommended and requested that Dr. Corn be allowed to assess Student at Woodcreek. Mr. Garabedian said that he would consider an additional PT assessment. Dr. Roninger's recommendations were added to the draft IEP.

90. Witnesses at the hearing elaborated about their contribution to the IEP team meeting. Ms. Cullen testified that she told the IEP team that Student required a study period given her disability because she needed time to work on her assignments and homework and to practice using AT. At the hearing, Mother insisted that she too requested that Student be provided a study period. However, Mother's request for Student to have a study period would have required her consent to eliminate another course, such as APE, which was provided as part of the Agreement. Mother never requested that APE, or any other course, be eliminated in exchange for a study period.

91. District prepared draft goals and objectives for the November 19, 2009, IEP team meeting, based upon the results of the triennial assessments, but these goals and objectives were not reviewed at the IEP team meeting, or provided to Mother during the IEP team meeting. Dr. Roninger did not prepare PT goals. She approved one mobility goal prepared by Mr. Mayo to increase Student's independent ability to navigate her electric wheelchair with her joystick by a set number of feet, measured by the APE observation.

92. At the hearing, Dr. Roninger was questioned about her conclusion that PT services were not required for Student to access her education, but were medically related. Dr. Roninger testified that she referred to a publication from the California Department of Education in determining what was educationally necessary. The publication entitled "Guidelines for Occupational and Physical Therapy in California

Public Schools” (Guidelines) was developed by a volunteer group of occupational and physical therapists working with government staff in 1996. The Guidelines were less specific about the distinction between medical- and educational-related therapy. In determining whether a pupil needed PT to function within the educational environment, the Guidelines recommended, among other things, that consideration be given to whether Student was functional within the educational environment without therapy services, and whether pupil’s performance remained unchanged despite multiple efforts to remediate the area of concern. The Guidelines did not provide a neat distinction between medically and educationally related PT.

93. Dr. Roninger conceded that it was often difficult to distinguish medical- from school-based physical therapy, that medically related services could benefit Student educationally, and that the distinction generally depended on the funding source. Medical-based physical therapy focused on improving the full range of motion and the quality of motion with reference to the neuromuscular system, not the activity. School-based therapy focused on the range of motion needed to function or participate in a particular activity; e.g., the range of motion needed to position a joystick.

94. At the hearing, Dr. Corn critiqued Dr. Roninger’s assessment. Given Student’s severe disability, Dr. Corn conceded that there were no standardized measures that would adequately identify Student’s needs or adequately measure her progress. Dr. Corn acknowledged that Dr. Roninger adequately captured Student’s physical disabilities; however, she maintained that the best way to assess Student was to personally examine Student. Dr. Corn’s primary critique of Dr. Roninger’s assessment was with her opinion that Student’s primary needs were medical, not educational. Dr. Corn maintained that Student required direct physical therapy services to enable her to be successful in the educational environment.

95. The November 19, 2009, IEP team meeting concluded without a written offer. The participants agreed to continue the IEP team meeting.

#### BIOLOGY EXAMS

96. Ms. Worley scheduled an ecology exam and a final exam close together at the end of fall semester. In preparation for the ecology exam and the final exam, Ms. Worley sent Student home with a large volume of material, some highlighted, some not. On December 14, 2009, Mother requested that Student's ecology exam be split into two parts because of the large amount of material covered in the four chapters in the textbook pertaining to ecology. Ms. Worley refused Mother's request that same day, but sent her additional documents, including Power Point presentations for the unit, with handwritten notations.

97. On December 15, 2009, Ms. Worley prepared a letter to the IEP team, explaining the content of the material she sent home to Mother, and her reason for refusing to provide further modifications or accommodations to the ecology and year-end exams. She stated that the material could not be divided by chapter as the material was not driven by the textbook, but by state, national, department and teacher standards. She explained that the curriculum was divided by units with each unit having targets and "as per [Student's] IEP," she is given a reduced and more focused collection of goals. Student's exam was the same as the exam given by all District biology instructors with modifications. Second, she explained that she could not push back the exam without causing a change in time allocations to study and take the final exam.

#### DECEMBER 15, 2009, IEP TEAM MEETING

98. The IEP team meeting reconvened on December 15, 2009. In attendance were: Mr. Garabedian; Ms. Peterson; Parents; Ms. Wells; Ms. Haugh; Dr. Roninger; the Oakmont special services coordinator; a PCOE representative; Dr. Corn; Mr. Mayo;

Student's grandmother; and Parents' advocate. Ms. Worley did not attend the IEP team meeting.

99. The IEP team reviewed District's speech and language assessment. Dr. Corn provided input regarding Student's volume and breath control based upon her experiences with Student. Goals for articulation and voice control were reviewed. These goals were similar to the goals in the last annual IEP. Two goals were developed to enhance Student's breath and volume control.

100. Ms. Wells began her review of the psychoeducational assessment, but the review of her assessment was not completed.

101. Mother expressed her concerns regarding Ms. Worley's modifications provided to Student in Ms. Worley's biology class. Ms. Peterson represented that she would go over Mother's concerns with Ms. Worley. Ms. Worley's letter was not presented for discussion.

102. The time scheduled for the IEP team meeting expired and the meeting concluded.

103. Mother estimated that the IEP team had spent approximately five hours in IEP team meetings by the end of the fall semester. Mother anticipated that it would take at least eight more hours to complete the IEP based upon the material she wanted to discuss. Mother anticipated that in addition to the triennial assessments, the IEP team would need to review Student's biology course. After considering Mother's time estimates and the calendars of all the IEP team members, District continued the IEP team meeting to January 29, 2010.

#### BIOLOGY MODIFICATIONS AND ACCOMMODATIONS

104. On December 16, 2009, Ms. Worley e-mailed Mother that Student came to class without her biology materials and could not adequately participate in her ecology exam or the cumulative course review without them. Student usually kept her biology



binder, collection of supporting documents and class assignments in her backpack. Ms. Worley offered to reschedule the ecology exam for Student, but insisted that Student take the final exam the same time as the other pupils.

105. Mother refused to allow Student to take the ecology or final exams without further modifications or accommodations. The last day of fall semester was December 18, 2009. Student did not complete the requirements to pass the second half of CP Biology by the end of the fall semester.

106. Ms. Worley testified about her experiences with Student in biology. Ms. Worley worked hard to reduce the volume and content of the biology material for Student. She was an experienced general education biology teacher with twelve years experience teaching biology. She had previous experience with pupils with disabilities in her class, but admittedly their disabilities required accommodations, but not the extensive modifications in content required for Student. She was attentive to Student's needs and tried her best to implement the accommodations and modifications set forth in Student's IEP. Ms. Worley spent approximately 20 percent of her teaching time making modifications to the curriculum, underlining the relevant portions of the curriculum in Student's homework packet and worksheets, providing copies of her powerpoint presentation, reducing the number of questions on tests, and working with Student's paraeducator. Over time she reduced the number of curriculum "targets" that Student would be responsible for learning. In modifying the biology curriculum for Student, Ms. Worley focused more on vocabulary and less on critical thinking. Ms. Worley provided Student with course material and homework packets with notations and markings indicating what portion of the material Student would be responsible to learn.

107. At the hearing Ms. Worley testified that Student was not provided large print and did not use a computer in the class. Ms. Worley maintained that there was very

little opportunity for the class to use the computer and when a computer was used for some minor graphing exercise it was used as part of a group activity. From her observations of Student she maintained that Student would have been distracted from focusing on the teacher if she were to use a computer. Ms. Worley maintained that computer use by any pupil in her biology class was a distraction from developing their note-taking and listening skills. Student relied upon her paraeducator to keep pace with reading and assignments. Student was allowed to bring notes and class materials to the test. Ms. Worley provided extended time for Student to complete exams, and Student was allowed to complete her exams in a separate room with her paraeducator.

108. Ms. Worley enjoyed having Student in her class. She believed that Student benefitted from her class, and that the other pupils benefitted from her participation. Student was able to respond to questions and in small groups became more assertive. In turn, her classmates benefitted from her participation in the biology class. Once her classmates saw Student responding to questions, they began interacting with her. When asked whether it would have been better to use the alternative curriculum available from the California Department of Education, Ms. Worley replied that the curriculum would have been such a far departure from the college preparatory curriculum she taught that Student would not have been more isolated from her peers and unable to participate in classroom discussion and projects as she had.

#### PARENTS' IEE REQUEST

109. Shortly after the December 15, 2010, IEP team meeting, Mother informed Ms. Hummel that she disagreed with Dr. Roninger's PT assessment and requested an IEE. On December 18, 2009, District gave Mother an assessment plan which provided that District would contract with a nonpublic agency for an independent PT assessment. District did not identify the assessor. District did not provide Mother with a list of independent assessors. District did not provide Mother with its agency criteria for IEEs.

At the time of Mother's request for an IEE, District did not publish a list of independent assessors, or have agency criteria for IEEs. At the time of Mother's request for an IEE, all physical therapists retained by the District to provide services to its pupils were independent contractors.

110. On December 16, 2009, Mother e-mailed Mr. Garabedian that Student would be evaluated over the Christmas break by Sandra Bellamy, DPT. Mother provided Mr. Garabedian with Dr. Bellamy's contact information if he wanted to arrange her participation in the next IEP team meeting. In her e-mail, Mother represented that Dr. Bellamy's report would be available for the IEP team by no later than mid-January.

111. In response to Mother's e-mail, Mr. Garabedian reiterated District's agreement to grant her request for an independent PT assessment at public expense, but notified Mother that District was not responsible for funding Dr. Bellamy. Mr. Garabedian provided Mother with another copy of the assessment plan for her approval.

112. Mother did not consent to District's assessment plan. Based upon her experience with District's assessment timeline, she anticipated that District would not provide a quality assessment or complete its assessment for two and a half months. Mother communicated to Mr. Garabedian that she considered it in the best interest of Student to complete the assessment expeditiously.

113. In an e-mail to Mr. Garabedian on December 16, 2009, Mother repeated her request for a transfer to Oakmont. She referred Mr. Garabedian to Student's progress on her goals and District's, mainly Ms. Peterson's, failure to improve upon Student's reading and math goals, as justification for transferring Student to Oakmont. Mother referred him to Student's eighth grade goal written on February 21, 2008, for Student to read a five-and-a-half grade level text with 80 percent accuracy on comprehension questions. Based upon the goal first written when Student was in eighth

grade, Mother maintained that Student should be reading at a five-and-a-half grade level with 80 percent accuracy.

114. In her e-mail to Mr. Garabedian, Mother also requested that the IEP team review at its next meeting Student's biology course materials.

#### INDEPENDENT PT ASSESSMENT

115. On December 30, 2009 Sandra Bellamy, DPT, a licensed physical therapist, conducted a physical therapy assessment of Student at Mother's request. Mother paid Dr. Bellamy \$125 dollars for her assessment. Dr. Bellamy was well qualified to render an opinion about Student's physical therapy needs. Dr. Bellamy holds a bachelors degree in sports medicine and a masters and clinical doctoral degree in physical therapy. She is currently an associate and clinical professor in physical therapy at the University of the Pacific where she is responsible for training on average 36 physical therapy doctoral students per year. She taught courses including pediatric physical therapy, and two clinical courses on managing patient care. Part of her responsibilities as an associate professor included instructing pupils on the criteria for delivering PT services to pupils with special needs. As part of her responsibilities she also operated a PT clinic on campus. Dr. Bellamy has also consulted with school districts. On average she administered 50 PT assessments yearly for pupils with CP. Dr. Bellamy demonstrated that she had the experience as a clinician and the background knowledge required of her as a professor to provide thoughtful testimony about school-based PT requirements. Although retained by Student, Dr. Bellamy was more objective than either Dr. Corn or Dr. Roninger because she was unaffected by the combative nature of the dispute between District and Mother, did not participate in IEP team meetings, and did not have a close connection to Student.

116. Dr. Bellamy prepared a report of her assessment. Her report was dated December 30, 2009. Dr. Bellamy's report was based upon her physical examination of

Student. She examined Student for approximately one-and-a-half hours. She spent approximately two-thirds of her examination time physically moving Student. From her physical examination of Student, Dr. Bellamy assessed the severity of Student's muscle tone, her ability to initiate movement and to provide physical support for transfers from her chair, and the length of time she could remain seated.

117. Dr. Bellamy interviewed Mother as part of her assessment. Mother reported that Student had progressive physical and mental fatigue during the day including low endurance in postural muscles of the neck and back, and degradation of fine motor control affecting her ability to operate her power wheelchair and vocalize during classroom discussion. Mother also reported that Student had recently experienced a period of rapid growth in the length of her torso which increased her muscle tone in that area.

118. In her report, Dr. Bellamy explained that it was difficult to separate Student's physical therapy needs into the domain of medical or educational because her participation in school was limited by the structure and function of her neuromuscular system. Student's weakness in postural muscles of neck, trunk and extremities affected her ability to hold her head erect in midline and resulted in diminished hand and visual function. Dr. Bellamy linked Student's elevated rib-cage and decreased spine and pelvis mobility to poor respiratory capacity and low vocal volume, and diminished motivation to speak in class.

119. Dr. Bellamy recommended the continuation of Student's current level of service including two hours of direct physical therapy intervention from a private facility, consultative services for positioning from a school-based physical therapist, and direct OT services and APE.

120. Mother provided District with Dr. Bellamy's PT assessment prior to the January 29, 2010, IEP team meeting.

121. At the hearing, Dr. Bellamy critiqued Dr. Roninger's reference to the 1996 California Department of Education reference material regarding physical therapy and occupational therapy in the schools. She stated that it was outdated and not utilized. She stated that the guidelines followed by physical therapists do not specifically address school-based therapies. She conceded that there were different opinions about the meaning of medical or school-based therapy. Based upon her understanding of the literature and her practice, physical therapy for pupils should allow them to participate fully in educational activities; e.g., getting across campus, going to lunch, talking in the classroom, turning a page, manipulating a pen or pencil. Medically- based physical therapy focused more on restoration of function. For Student, physical therapy should be focused on adaptive skills that enhanced her functioning. Her recommended school-based goals included holding Student's head up for 60 seconds while activating a joystick with a minimum of distractions.

122. Dr. Bellamy's assessment was limited to her examination and her interview with Mother. She did not observe Student at school, and did not have an opportunity to speak with her teachers or service providers. Dr. Bellamy conceded that it would have been preferable to observe Student on campus. She maintained that her opinion regarding Student's needs was unaffected by this omission because based upon her examination, Student's functioning was similar across environments given the extreme nature of her diagnosis. Dr. Bellamy's explanation may be true with regard to Student's physical disabilities, but does not explain how Student functions given the specific tasks required of her in her school environment. For this reason, in matters relying upon best practices regarding educationally-related PT, her opinion was given more weight than the opinion of Dr. Roninger. Because she did not observe Student at Woodside, Dr. Bellamy's recommendation for continued private PT was not given weight.

## STUDENT'S ENROLLMENT IN WORLD HISTORY

123. The spring semester began on January 6, 2010. Based upon Mother's request Student was enrolled in world history during the spring semester without review or discussion from the IEP team. Like general education biology, the full year course of history was covered in one semester. Ms. Hummel questioned Mother as to whether she thought Student could meet the requirements of world history. Mother reacted with concern about District's commitment to provide Student an appropriate program. Student was enrolled in world history.

124. Grant Guensler was Student's world history teacher. He was a credentialed general education history teacher with 9 years teaching experience. Mr. Guensler had no previous training in working with disabled pupils. World history was a college preparatory course with over 30 pupils. Before the semester began, Mr. Guensler was not contacted by Ms. Peterson or anyone from the IEP team about Student and had not reviewed her IEP. He received the accommodations, modifications and support pages from Student's February 18, 2009, IEP the first week of the semester.

125. Mr. Guensler did not rely upon the world history textbook for instruction. The textbook supplemented Mr. Guensler's lectures and could be used by pupils to answer questions in the class unit packets and to review definitions of key terms.

126. District supplied Student with a computer version of the world history text. The textbook was obtained in January 2010, but it was incompatible with Student's computer. Ms. Cullen and PCOE worked on making the text compatible, and eventually obtained another version from the publisher that was compatible.

127. Mr. Guensler provided Student with many modifications and accommodations. He provided Student with hard copies of the assignments which he did not provide to other pupils. He also typed out questions specifically for Student, and provided the answers complete with key terms. He modified powerpoint presentations

presented to the class, printed them and provided them to Student. Student did not use a laptop computer or any AT in class. She was not provided with a large print book. Student relied upon her paraeducator to complete homework and class assignments, and to take tests.

128. Mr. Guensler did not use the alternative curriculum published by the California Department of Education. He relied upon his own expertise and the assistance from Woodcreek's administrators, to modify the curriculum. He observed that Student struggled with critical thinking. He drastically reduced the amount of concept-driven material she was required to master in favor of vocabulary and key terms. Mr. Guensler believed that Student was more successful where lessons did not rely upon concepts, especially concepts that build upon concepts from previous lessons. Mr. Guensler spent two hours a week on average to modify the world history curriculum for Student.

129. Eventually, due to the extensive modifications made to the curriculum for Student, Mr. Guensler, with input from Woodcreek's administrators, reclassified the class from a college preparatory class to a basic introduction to world history class, suitable for Student's status as a pupil pursuing a certificate of completion. Overall Student was required to learn about 50 percent of the modified curriculum. Mr. Guensler kept a separate grade book for Student. Student received a "Pass" for the re-named course.

130. Student benefitted from her participation in Mr. Guensler's class.. His world history class engaged weekly in discussions on a variety of current topics and Student was able to participate and contribute to these discussions. Mr. Guensler observed Student explaining her current event. He heard her laugh at an appropriate time during another pupils current event presentation. At the hearing Student enthusiastically testified that her favorite course was world history.

131. During January, Ms. Hummel continued to work with Mother to arrange the IEP meeting. Mother notified Ms. Hummel that she intended to explore with the IEP



team changing Student to a diploma track to ensure that she would be receiving “more challenging expectations in English language arts and math” by aligning Student’s instruction more closely to grade level level expectations. Mother requested the presence of Woodcreek’s principal so that he would be informed as to how Woodcreek was treating its special education pupils.

132. Mother requested that two hours of the continued IEP team meeting be devoted to reviewing biology. Student’s biology grade had not been resolved. At the beginning of the spring semester, Student had an incomplete in biology. Ms. Hummel warned Mother that Student’s incomplete in biology would soon turn into a failing grade if Student did not take her biology exams. Student did not take the exams and did not pass the second half of biology. Each half of the biology class was five credits toward her certificate of completion. Student received 5 credits for the first half of biology, and zero credits for the second half of biology.

133. Mother requested that the schedule for the IEP meeting be set so an IEP could be completed for Student. Ms. Hummel provided Mother with an agenda from Mr. Garabedian which included a continued discussion of assessment results, and identification of Student’s needs, goals and objectives, services, and placement, but would not commit to a time allotment. Given the need to coordinate the schedule of the large number of IEP team participants, Ms. Hummel could not schedule the meeting before January 29, 2010.

#### JANUARY 29, 2009, IEP TEAM MEETING

134. On January 29, 2010, the IEP team met for approximately four hours. In attendance were: Woodcreek’s principal and assistant principal; Mr. Garabedian; Ms. Peterson; Mr. Mayo; Mr. Guensler; Ms. Wells; Ms. Haugh; Dr. Roninger; the Oakmont’s special services coordinator; the PCOE program specialist; Parents’ advocate; and a representative of the teacher’s union. In addition, given the increasing level of conflict

between Mother and District, Mr. Garabedian asked Tom Neary from PCOE to attend and to facilitate the meeting. Mr. Neary utilized the agenda for the IEP team meeting that Ms. Hummel provided to Mother and attended the meeting as a facilitator.

135. Mother had an opportunity to share information about Student. Student's personality, interests, and strengths were reviewed. Ms. Wells completed her review of the fall 2009 psychoeducational assessment. From her assessments of Student's verbal and nonverbal ability, Ms. Wells explained that Student could grasp vocabulary, provide definitions to vocabulary words and engage in conversation; however, Student struggled when asked to process information and use it. Student's advocate inquired as to whether these disparate skills could change or improve over time with supports. Ms. Wells stated that strategies could be used to help Student learn, but Student's deficits could not be remediated because these disparities were related to brain damage sustained by Student during her infancy. Mother understood from an earlier neurological assessment that the brain damage affected motor, not cognitive skills. Ms. Wells and Mr. Garabedian, a neuropsychologist, disagreed with Mother's interpretation of the doctor's report, and explained that the brain was damaged on both sides, with most of the damage occurring to the right side of Student's brain which affected Student's cognition. District members of the IEP team recommended that Student be designated as mentally retarded (MR) in addition to OI. Parents objected and maintained that Student should remain as OI with "multiple disabilities" based upon the degree of her learning disabilities.

136. Parents' advocate requested an AT assessment. Ms. Cullen agreed that an AT assessment would be valuable to determine whether additional AT was required.

137. The IEP team discussed Student's participation in general education. Mother participated in the discussion. Mother was concerned about accommodations in world history and asked for larger print and references to web sites to complement

Student's assignments in world history. She requested access to the computer version of the textbook at home, in addition to the one supplied to Student on her computer at school.

138. The IEP team discussed modifications required for Student to participate in general education academic courses. Woodcreek's principal questioned whether Student should be responsible for all the learning targets and suggested a reduction in test questions. Woodcreek's vice principal recommended modifying the curriculum to include vocabulary but not higher-level critical thinking activities. Mother opposed reducing the number of questions Student was required to complete. She also wanted Student to be taught and to learn critical thinking skills in world history. Mother was reminded that all Student's general education courses required modifications, not just accommodations.

139. The IEP team discussed Mother's interest in placing Student on a diploma track. Student's transcript and modified grades were reviewed. Requirements for earning a diploma were reviewed. Mother withdrew her request for Student to be placed on a diploma track. Mother still wanted Student to learn to her potential. She agreed that Student should remain on a certificate of completion track with a high degree of accountability.

140. At the IEP team meeting, District also notified Mother that pursuant to the Agreement, the physical therapist service provider would be changed from Dr. Corn to Dr. Roninger as of February 19, 2010.

141. There was no evidence that Dr. Bellamy's report was reviewed by the IEP team.

142. By the end of the January 29, 2010, IEP team meeting, the team had completed its discussion of District's assessments of Student, her eligibility, her strengths and weaknesses, and her areas of need. Some goals were identified but the

IEP team did not review a full set of goals at the meeting. District agreed to provide draft goals to Parents no later than February 5, 2010, and Parents agreed to provide feedback on the goals prior to the next IEP team meeting if time permitted. The next IEP team meeting was scheduled for March 8, 2010.

143. On February 2, 2010, District provided Mother an assessment plan for an AT assessment to be conducted by PCOE. The assessment plan also included a referral packet to PCOE which Mother had to sign. The referral packet informed PCOE of Student's disability and current interventions being used, including keyboard, scribe, word prediction software, electronic books, and slant board. By February 24, 2010, Mother had signed the assessment plan and referral packet.

144. On February 5, 2010, Ms. Wells sent proposed goals and objectives to Mother, including a motor skills goal to assist Student in traveling a straight line in her wheelchair; a computer skills goal to be implemented by the OI; an OT goal for Student to be able to maintain a sitting position on the therapy ball for up to three minutes; a communication goal; and an academic goal. The academic reading goal referred to Student performing at a fourth-grade reading level.

145. On February 11, 2010, Mother requested an independent psychoeducational evaluation at public expense. District agreed to fund a psychoeducational assessment by Catherine Christo, Ph.D., a licensed educational psychologist.

#### MARCH 8, 2010, IEP TEAM MEETING

146. Four hours were set aside for the March 8, 2010, IEP team meeting. Mr. Neary facilitated the IEP team meeting. In addition, the following individuals attended: Mother; Student's grandmother; Mr. Garabedian; Ms. Hummel; Woodcreek's assistant principal; a PCOE representative; the Oakmont special services coordinator; Ms. Peterson; Ms. Wells; Dr. Roninger; and Ms. Cullen. The IEP team began reviewing

District's draft goals. Mother left the meeting after one hour. Mother was frustrated with the extended time it was taking to develop an IEP. She wanted the District to present her with strong goals which included clear baseline information. She requested that the District provide her with an IEP offer.

147. District scheduled an additional IEP team meeting on March 12, 2010. Mother informed Mr. Garabedian that she would not attend IEP team meetings unless she received a completed IEP offer which included strong goals. Additional meetings were scheduled to occur in April and May after the filing of Student's complaint. At the time of the filing of Student's Complaint, District had not made an IEP offer.

#### DR. RONINGER'S PT SERVICES

148. As provided in the Agreement, District could replace Dr. Corn as Student's physical therapist after February 18, 2010. District replaced Dr. Corn with Dr. Roninger. Dr. Roninger provided one hour of direct PT services, twice weekly, at Woodcreek through the end of the school year. Dr. Roninger administered PT in a classroom or in an area of the gymnasium. She had available a mat, a bench, which she adjusted to different heights to work on sitting-to-standing movements, and a therapy and peanut ball. She did stretching activities including elbow and wrist extensions for greater mobility while Student was stationary in her wheelchair. She worked with Student on head, and pelvic mobility. She worked with Student to increase her independent operation of her motorized wheelchair. She worked with Student to keep her arm down, not up, and her head up, not down, while operating the wheelchair.

149. Dr. Roninger testified that she regularly asked Student how she was feeling and she never complained about pain resulting from her school-based PT. Dr. Roninger was concerned that Student was not placed in her stander over the weekend. At the beginning of the school week, she observed that Student was stiffer than later in the school week.

150. Dr. Roninger stated that Student made progress during the 2009-2010 school year. She was able to maintain her hand on her joystick for longer periods of time. She could do sit-to-stand exercises which required her to bear her weight for periods of time. Dr. Roninger indicated that improving weight-bearing capabilities was important to assist transfers to the toilet.

151. As required by the Agreement, Dr. Roninger provided consultation services to school staff throughout the 2009-2010 school year. She consulted with Mr. Mayo, and worked with staff and paraeducators on proper lifting techniques to transfer Student to her stander. Student's aide accompanied her to physical therapy so Dr. Roninger had an opportunity to speak with her before and after each session to ensure that Student was placed in her stander correctly. With the help of two aides, Student was transferred from her wheelchair to the stander within one or two minutes. At the outset of the 2009-2010 school year, District planned a specific stander schedule for Student to ensure that she was placed in a stander at least twice daily. District was also instructed by Student's private PT, Dr. Corn, to keep Student in the stander for no more than 20 minutes. Student was often only placed in the stander once a day. Student was removed from her wheelchair other times during the school day. Each day during APE, Student was removed from her wheelchair for a specific stretching routine. She was removed from her wheelchair for PT services.

152. At the hearing, Mother testified that she retained Dr. Corn to provide Student physical therapy services after school on or after April 12, 2010. Mother testified that Student cried in pain when she came home from school. Dr. Corn also testified that after Dr. Roninger started working with Student, Student reported to Dr. Corn that her back and hips were hurting. Dr. Corn insisted that Student regressed from Dr. Roninger's PT services, and based upon her experience with other patients that have used Dr. Roninger, insisted that Dr. Roninger could not competently provide PT services to pupils

like Student with CP. Dr. Corn stated that Student could communicate her needs. However, Dr. Corn conceded that Student never attributed her pain to Dr. Roninger. Neither Mother nor Dr. Corn observed Dr. Roninger during her PT sessions with Student, or Student's position changes at school, so their disparaging comments about Dr. Roninger were not credible.

#### AT SERVICES DURING THE 2009-2010 SCHOOL YEAR

153. A detailed AT assessment was conducted by PCOE on April 27, 2010, after Student filed her complaint. Leslie McCann performed the assessment. She was not assigned to assist Ms. Cullen or Woodcreek staff previous to her assessment so could not testify with assurance about Student's needs at the time of previous IEPs. At the hearing, she was asked about the benefits of a larger font size. She had not assessed font size, but observed that Student could read small Windows-based text. She agreed that a larger font size would be helpful, but declined to state that it was required for Student to access her curriculum.

154. Ms. Cullen, Student's OI teacher, was principally responsible for guiding Student's use of AT. Student had available a range of AT during the 2009-2010 school year including: a laptop computer; a specialized joystick with a round ball alternative handle, as a method for moving the cursor and operating all mouse functions; an alternative keyboard (Intellikeys) with a keyguard that provided large, well-spaced keys in high-contrast colors, with multiple overlays that allowed Student to access the computer differently depending on task; word prediction software (co-writer); word processing with auditory feedback software (WriteOut: Loud); screen reader software (ReadOut: Loud, ReadPlease, BrowseOut: Loud); a large-key calculator; a slant board to hold books upright; and a small white board.

155. Although Student had a range of AT available, she only had the opportunity to use it in her SDC for about 30 minutes per week. Student did not get to

use her AT in the general education classroom. She relied exclusively on her paraeducator as a scribe. Ms. Worley and Mr. Guensler testified that, given the class pace and the modifications required, Student would not have been assisted by a laptop computer or other AT resources in her general education and world history classes.

156. Ms. Cullen testified that Student made progress during the school year on her goals which included her use of AT. Ms. Cullen was scheduled to provide 30 minutes a week of services, but on average, spent one hour per week with Student. Student made progress on cutting and pasting paragraphs into a screen rider, but she didn't meet the full goal and still needed to be prompted. She substantially met her goal of using the Qwerty keyboard overlay on her Intellikeys but hadn't mastered using her web access overlay independently.

#### STUDENT'S GOALS AND OBJECTIVES IN READING IN MS. PETERSON'S SDC DURING THE 2009-2010 SCHOOL YEAR

157. Mother testified that Student received an educational benefit during the 2009-2010 school year, but not what she expected. She admitted that Student had an opportunity to engage with other pupils and be social. Mother maintained that Student's reading strengths were not being acknowledged or furthered by Ms. Peterson.

158. Student made some progress on her reading and writing goals during the 2009-2010 school year. Based upon Ms. Peterson's observations and testing, Student made partial progress in her reading comprehension goal of restating details with 70 percent accuracy. Student scored 81 percent on her reading comprehension mid-term exam, and by the last progress report, Student was restating facts from the passage with 80 percent accuracy. Based upon Ms. Peterson's observations and review of Student's work samples, Student made partial progress in her writing goal to compose a single paragraph including a topic sentence, supporting sentences and concluding sentence, with 80 percent accuracy. Student also increased her decoding skills by one grade level



by the end of the 2009-2010 school year based upon the assessment measure used by Ms. Peterson.

159. Mother provided Student with 72 hours of reading intervention services from Linda-Mood Bell (LMB) between March 2009 and March 2010, which she maintained were more effective than Ms. Peterson's instruction in advancing Student's language arts. Mother presented LMB testing results to demonstrate Student's improvement from LMB. No one from LMB testified as to the administration of the assessments by LMB. Student's expert witness, Robert Goode Patterson, Psy.D., conceded that in the past, the administration of assessments by LMB was questionable. Dr. Christo also expressed confusion as to how the results were presented. For these reasons, the validity of the LMB assessments could not be established. In addition, the LMB assessments were conducted during the same period of time that Student was receiving instruction in Ms. Peterson's class. As a consequence, it was difficult to isolate whether school-based or LMB interventions were responsible for the improvement.

#### PROGRESS ON STUDENT'S OTHER GOALS DURING THE 2009-2010 SCHOOL YEAR

160. Student made progress on certain goals from her February 18, 2009, IEP. Student made partial progress on her three LAS goals: breath control, articulation, and volume. She did not make progress on her APE goals of swimming, which had to be terminated due to health reasons, and grasping and releasing a three-inch ball and placing it into a basket once. Student also made progress in her math goals.

#### DR. CHRISTO'S TESTIMONY

161. At the hearing, Dr. Christo testified as to the sufficiency of the goals and objectives in the February 18, 2009, IEP. In particular, she was asked to review Ms. Peterson's goals for reading comprehension, and written language. For Student's baseline level, the goal provided that Student could restate details of an appropriate

text with 70 percent accuracy. The goal was designed to increase her ability to restate details to 90 percent accuracy. The writing goal provided as a baseline that Student was unable to independently compose a single paragraph that included a topic sentence, supporting sentences, and a concluding sentence. In both goals, Student's baseline performance level was described without reference to what Student was currently capable of doing, and therefore the goals lacked an objective basis from which to determine whether progress was being made. In addition, Student's reading comprehension goal did not anticipate her reading level at year's end. The written language goal was somewhat more objective because the goal of writing a paragraph could be measured.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].) As the petitioner, Student had the burden of proof.

### ISSUE 1: DENIAL OF FAPE DURING THE 2009-2010 SCHOOL YEAR

2. Student claimed that the District's failure to abide by the April 8, 2009, Agreement resulted in a loss of FAPE during the 2009-2010 school year. Student specifically claimed that District failed to provide: measurable annual goals; appropriate services; placement; accommodations and modifications; and appropriate AT services, supplies and equipment. District maintained that it complied with the Agreement and also provided Student with a meaningful educational benefit. For the following reasons, Student met her burden of proof on Issue 1E, but failed to meet her burden of proof on the remaining issues.

3. OAH does not have jurisdiction to enforce a settlement agreement. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1030.) It does have jurisdiction to hear due process claims under the IDEA based upon allegations that a pupil has been denied a FAPE. (Id. at pp. 1028-1029.) The interpretation of settlement agreements is based on familiar and well-established principles of contract law. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727, 733.). The words of a contract are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs. (*Vaillette v. Fireman's Fund Ins. Co* (1993) 18 Cal.App.4th 680, 686.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate a latent ambiguity; however, the contract must be "reasonably susceptible" to the interpretation. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4 th 384, 391,393.)

4. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) A FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)<sup>5</sup>

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<sup>5</sup> All citations to the Code of Federal Regulations are to the 2006 edition.

5. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) In California “related services” are referred to as designated instruction and services (DIS). (Ed. Code, § 56031, subd. (b)(1).)

6. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 106 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a pupil’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a pupil’s abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F3d 786 at p. 793.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra*, at p. 201.)

7. To determine whether a school district’s program offered a student a FAPE, the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student’s IEP, then the school district provided a FAPE, even if the

student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by Rowley and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.) Furthermore, educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in the IEP. (*County of San Diego v. Cal. Sp. Ed. Hrg. Off.* (9th Cir. 1996) 93 F.3d 1458, 1467.) (*County of San Diego*). An IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.)

8. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.)

9. Prior to the placement of pupils with exceptional needs in general education academic classes, the school district shall ensure that the teachers have access to the pupil's IEPs, are knowledgeable of the content of their IEPs, and are informed of their specific responsibilities related to implementing the pupil's IEP, and the specific accommodations, modifications, and supports that shall be provided for the pupil. (Ed. Code, § 56347.)

## ISSUE 1A: FAILURE TO INCLUDE MEASURABLE GOALS

10. Student claimed that the absence of measurable goals during the 2009-2010 school year denied her a FAPE. More specifically, Student contended that the absence of PT goals and the vague reading and language goals, resulted in a denial of FAPE during the 2009-2010 school year. District maintained that the goals were measurable and known to the IEP team members. For the following reasons, Student failed to meet her burden of proof that the procedural violation resulted in a loss of FAPE.

11. The IEP must include a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and a description of how the child's progress toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§300.346, 300.347.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. The failure to include a statement of measurable annual goals is a procedural violation. Procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

12. Student did not meet her burden of proof that District failed to provide Student a FAPE by not providing Student with any measurable annual goals during the 2009-2010 school year. As part of the Agreement, Mother waived her objections to defects in goals drafted prior to April 8, 2009. In addition, Mother consented to goals as written in the February 18, 2009, IEP. Further, Student did not present evidence that Student's LAS, math, OT or OI goals were deficient. Finally, as further set forth in Issue Two below, Student did not present persuasive evidence that new measurable annual

goals were required in these areas prior to the March 8, 2010, IEP team meeting. Rather, during the hearing Student focused exclusively on the absence of PT goals and Ms. Peterson's reading and writing goals.

13. Student failed to meet her burden of proof that measurable PT goals were required during the 2009-2010 school year. As part of the Agreement, District agreed to provide PT services to Student for 2009-2010 and the parties agreed that all claims related to PT would be resolved through February 18, 2010. No goals were specified in the Agreement, and Mother consented to the February 18, 2009, IEP, without any goals for PT. Further, both Dr. Corn and Dr. Roninger provided PT services without goals and there was no evidence that the absence of PT goals deprived Student of an educational benefit. From Dr. Roninger's testimony, it was apparent that her PT services were educationally relevant and appropriate.

14. As established by Dr. Christo, Student's reading and language arts goals were deficient as to Student's present levels of performance. Mother waived any defects in these goals as part of the Agreement, and agreed to the implementation of these goals as part of the February 18, 2009, IEP. As set forth in Issue Two, the goals should have been more specific, and rewritten after the assessments were completed and reviewed, by March 8, 2010. Further, despite the shortcomings of Ms. Peterson's reading and written language goals, Student received an educational benefit in Ms. Peterson's class.

15. In sum, Student failed to meet her burden of proof that District denied Student a FAPE by failing to provide her with measurable goals and objectives during the 2009-2010 school year. (Legal Conclusions 1, 3-7, and 11-14; Factual Findings 1-8, 14-15, 19, 25-26, 28-29, 31-39, 47, 49-50, 91, 148-152, 157-158, and 160-161.)

## ISSUE 1B: FAILURE TO PROVIDE APPROPRIATE SERVICES

16. Student contended that District denied her a FAPE by not providing her appropriate services. District maintained that it provided Student with all required and appropriate services. Student failed to meet her burden of proof on this issue.

17. Student did not meet her burden of proof that District failed to provide her with the following services: OT; orientation and mobility; social skills training; and speech and language therapy. OT services were included in the February 18, 2009, IEP. Student did not provide any evidence of District's failure to provide OT services. Student did not provide any evidence that Student was deprived of orientation and mobility services. Student did not provide any evidence that she was deprived of social skills training. On the contrary, the evidence, including Mother's testimony, demonstrated that Student was very social, and that she liked communicating with her peers and being in their presence. LAS services were included in the Agreement. Student did not present evidence that she was denied LAS therapy.

18. Student further alleged that Student was not provided with adequate PT services. Based on the Agreement, Dr. Corn provided PT services to Student through February 18, 2009. District had the option of replacing her with another physical therapist after that date. District replaced Dr. Corn with Dr. Roninger. The Agreement settled all PT services through February 18, 2009. Student sought unsuccessfully to establish at the hearing that Dr. Roninger did not provide all therapy sessions, but she did. Dr. Roninger administered a full range of PT direct and consultative services during the 2009-2010 school year. Student received an educational benefit from Dr. Roninger's PT services.

19. Student failed to show that District denied her a FAPE by ignoring the advice of her doctor to place her in a stander or remove her from her wheelchair every two hours. Student failed to provide evidence of the directive by Student's doctor, and



failed to show that District's failure to place her in the stander every two hours, or its transfer of Student out of her wheelchair for other activities, including APE, denied Student a FAPE.

20. In sum, Student failed to meet her burden of proof that District denied Student a FAPE by failing to provide her with special education related services during the 2009-2010 school year. (Legal Conclusions 1, 3-7, and 17-19; Factual Findings 1, 14-15, 19-22, 25-26, 28-29, 148-156, and 160.)

#### ISSUE 1C: FAILURE TO PROVIDE APPROPRIATE SPECIAL EDUCATION PLACEMENT

21. Student contended that District failed to provide her an appropriate placement in the least restrictive environment. Student's placement claims encompassed a range of purported FAPE violations, including District's placement in Ms. Peterson's SDC, District's failure to provide Student with a study period, and District's failure to mainstream Student in more than one general education academic class per semester. District maintained that Student was provided an appropriate placement. For the following reasons, Student did not meet her burden of proof on this issue.

22. Student failed to meet her burden of proof that District denied Student a FAPE by placing her in Ms. Peterson's SDC. Mother consented to the February 18, 2009, IEP which provided for Student's placement in Ms. Peterson's SDC. Further, as more fully set forth in Issue Two below, District was not required to prepare an IEP prior to March 8, 2010. Further, from the abundance of assessment data, and the observations of Student's two general education teachers during the 2009-2010 school year, Student had difficulty with general education courses that relied upon critical thinking skills, and she required additional supports that she could only get in her SDC. Contrary to Student's assertion, Student received an educational benefit in Ms. Peterson's SDC. Ms. Peterson utilized the SRA program, a research-based standardized educational program according to the protocols of that program. Although the SRA is a decoding program,

improved decoding skills improved Student's comprehension. Ms. Peterson also provided Student with other literacy-related lessons, and Student made some progress on her goals.

23. Student failed to meet her burden of proof that District denied Student a FAPE by not providing her with a study period during the 2009-2010 school year. A study period was not provided for by the Agreement or the February 18, 2009, IEP. It was Ms. Cullen's opinion, which Mother claimed she endorsed at the November 19, 2009, IEP team meeting, that Student required a study period to do her academic homework and assignments and utilize her AT. However, when a study period was mentioned, District and Mother were operating under the Agreement which required that Student be involved in APE. Contrary to Mother's assertion, District wasn't required to guess that the study period could replace APE. Finally, as more fully set forth in Issue Two below, although the Agreement provided that placement would be determined through the IEP process, at the time the study period was mentioned, the IEP team had been working through multiple assessments, and no conclusions had been reached as to Student's placement needs. District wasn't required to make an IEP offer until March 8, 2010.

24. Student further failed to meet her burden of proof that District failed to provide her a FAPE by not placing her in two general education academic classes during the 2009-2010 school year. The Agreement did not address Student's general education academic placement. The February 18, 2009, IEP did not specify a general education academic placement. Although the IEP miscalculated the time Student was spending in general education, Mother consented to two periods a day in Ms. Peterson's SDC. As part of the Agreement, Student was also provided one period a day of APE. Given the block schedule, there was time for only one general education academic class.

25. Further, although the Agreement left to the IEP process placement and services, as more fully described in Issue Two, District wasn't required to amend the IEP to include two general education academic classes, if at all, until March 8, 2010. Within the snapshot of the 2009-2010 school year through April 5, 2010, the evidence was overwhelming that Student's profile was complex and that her ability to perform in general education academic placements was not fully understood until well after the semester began. Most assessments encouraged support in a small academic setting. Given the overwhelming testimony regarding Student's diverse cognitive skills, District did not deprive her of an educational benefit during the 2009-2010 school year by not placing her in two general education academic courses per semester.

26. In sum, Student failed to meet her burden of proof that District denied Student a FAPE by failing to provide her with an appropriate placement during the 2009-2010 school year. (Legal Conclusions 1, and 3-8; Factual Findings 1-2, 12-13, 21, 29, 31-39, 41, 47-51, 57-64, 67-76, 78-88, 90, 106, and 23-129.)

#### ISSUE 1D: FAILURE TO PROVIDE APPROPRIATE MODIFICATIONS AND ACCOMMODATIONS TO THE CURRICULUM

27. Student contended that District failed to provide her a FAPE by failing to provide necessary modifications and accommodations so that Student could pass the second half of the biology class. District maintained that it provided Student an educational benefit during the 2009-2010 school year because, among other things, she received passing grades in all her classes, except the second half of biology, and despite her grade, she learned a great deal in the biology class and enjoyed being with her peers. For the following reasons, Student met her burden of proof on this issue.

28. The February 18, 2009, IEP required modifications to the general education curriculum and test-taking accommodations, including, modified and shortened assignments and extended time to complete assignments. Neither the Agreement nor

the February 18, 2009, IEP identified specific general education classes for Student. The IEP team did not review in advance Student's election to take biology. However, as the evidence showed, District insisted that Mother address her concerns with the biology curriculum and modifications within the IEP process. Ms. Peterson promised Mother at the September 20, 2009, IEP team meeting, that needed modifications would be addressed once Student's psychoeducational assessment was completed. However, District failed to timely utilize the IEP process to review Student's participation in biology during the fall semester, to provide additional modifications or accommodations so that Student could receive credit for the second half of the biology course. Ms. Worley warned the IEP team that Student might fail the second half of her class. Ms. Wells' and Ms. Haugh's assessments demonstrated that Student required more modifications than Ms. Worley, as a general education teacher, could provide without direction from the IEP team or District administrators. As evidenced by her refusal to further modify the course materials for the exams, or provide testing accommodations, Mr. Worley did not appreciate that Student was on a certificate of completion track and that Student's exam did not have to meet state or biology department standards. Ms. Worley worked hard and Student enjoyed the course. However, after the assessments were completed, the IEP team should have directed further modifications of the biology curriculum and accommodations so that Student could have satisfied the certificate of completion requirements for the second half of the course. The IEP team's intervention was especially important given the heightened workload of a one-year college preparatory course collapsed into a one-half-year timeline. As demonstrated by Mr. Guensler's re-designation of his course title, District could have provided Student with the modifications and accommodations she needed to obtain credit for the second half of the course. Mother was overly ambitious in placing Student in biology, but District should have expedited its intervention for Student's educational benefit. As a

consequence of District's actions, District denied Student a FAPE by depriving her of course credit towards her certificate of completion for the second half of the biology course.

29. In sum, Student has met her burden of proof that she was denied a FAPE due to District's failure to implement appropriate modifications and accommodations to the biology curriculum so that Student could receive credit towards her certificate of completion. (Legal Conclusions 1, 3-9, and 28; Factual Findings 1-2, 10, 12-13, 18-20, 26, 29, 31, 39, 44-45, 57-76, 85-86, 96-97, 101, 104-108, 123-130, 132, and 138.)

#### ISSUE 1E: FAILURE TO PROVIDE ACCESSIBLE TEXTBOOKS

30. Student contended that District denied her a FAPE by failing to provide other accommodations including accessible textbooks, large-print materials, and books on tape or CD. District maintained that it provided all accommodations that were included in Student's operative IEP, and all necessary to provide Student a FAPE. Student has not met her burden of proof on this sub-issue.

31. Student executed the Agreement and consented to the February 18, 2009, IEP, which did not include enlarged print or books on tape, or accessible (or highlighted textbooks) on the accommodations page. In addition, as further set forth in Issue Two below, revisions to the IEP were not required until March 8, 2009. Further, Student failed to provide probative evidence that the absence of these accommodations impeded Student's access to her education. Student's biology class was not based upon the textbook. Although there were initial problems with the software, Student was provided an accessible textbook for world history. Mr. Guensler provided larger print when requested. Ms. Peterson provided Student with books on tape. Student had been provided with customized materials directly from the teachers. As a result, Student was not deprived of an educational benefit.

32. In sum, Student has not met her burden of proof that she was denied a FAPE due to District's failure to supply accessible books, large print, or books on tape or CD. (Legal Conclusions 1, and 3-7; Factual Findings 1-2, 10-11, 107, 124-130, 137, 153, and 155.)

#### ISSUE 1F: FAILURE TO PROVIDE APPROPRIATE ASSISTIVE TECHNOLOGY SERVICES, SUPPLIES AND EQUIPMENT

33. Student claimed that District was obligated by the Agreement to conduct a formal AT assessment in April 2009, and that it failed to do so. Further, Student claimed that District failed to provide AT devices and services during the 2009-2010 school year. District maintained that the Agreement did not require it to conduct a formal AT assessment and that it complied with the Agreement. District further maintained that Student was provided with a full range of AT devices and equipment. Additionally District maintained that it enlisted the services of an OI and an AT specialist at PCOE to assist Student. For the following reasons, Student has failed to meet her burden of proof on this issue.

34. When developing the IEP, the IEP team must consider whether the pupil requires AT devices and services. (Ed. Code § 56341.1(b)(5).) An AT device includes any item or piece of equipment that increases, maintains, or improves the functional capabilities of an individual with exceptional needs. (Ed. Code § 56020.5.) AT services include any service that assists the pupil with the selection, acquisition, or use of AT devices, including evaluating the pupil's needs, acquiring AT devices, selecting, designing, fitting, customizing, repairing devices, coordinating other interventions or services with AT devices, and training. (20 U.S.C. § 1401(2).)

35. The Agreement did not require District to conduct an AT assessment of all Student's needs. Mr. Garabedian's testimony that the provision only required District to provide the computer laptop and to assist Student in setting it up is supported by the

language of the Agreement. District's obligations were set forth under the heading "computer laptop." Unlike the provision referencing the OT and PT assessments, Mother was not required to provide her consent to any assessment. Although the Agreement referenced the terms used by the IDEA, the term assessment, as used in the Agreement, was not intended as a formal assessment of all Student's AT needs. Significantly, the Agreement provided for an IEP team meeting in January 2010 to review the PT and OT assessments. The Agreement did not provide for a review of an AT assessment at the January 2010 IEP team meeting. Further, as evidenced by Mother's request for an AT assessment at the January 29, 2010, IEP team meaning she did not understand the Agreement to require a formal assessment. District was not obligated to provide a broad assessment of Student's AT needs until Student requested an AT assessment at the January 29, 2010, IEP team meeting.

36. Further, Student's February 18, 2009, IEP provided AT devices and specialized OI services to assist Student with, among other things, AT. As further established by Ms. Cullen's testimony, AT supports and services were provided during the 2009-2010 school year. Although Ms. Cullen requested more time for Student to practice with her AT, given Student's class schedule, and the number of other services she received throughout the day, Student was provided an educational benefit from her AT services and support. Finally, although Student did not have access to her computer in her general education classes, it would not have enhanced her access to the curriculum.

37. In sum, Student failed to meet her burden of proof that District failed to provide Student a FAPE by failing to provide an AT assessment, AT devices, or AT services. (Legal Conclusions 1, 4-9, and 34-36; Factual Findings, 1-2, 9, 12, 19-20, 23-24, 26, 27-28, 79-80, 107, 127, and 154-156.)

## ISSUE 2: FAILURE TO DEVELOP AN IEP DURING THE 2009-2010 SCHOOL YEAR

38. Student contended that District committed a procedural violation by failing to make an IEP offer after the triennial assessments were completed. Student contended that District should have made an offer at the November 19, 2009, IEP team meeting where the triennial assessments were scheduled to be discussed. Alternatively, Student contends that District should have made an offer at any time thereafter, through April 5, 2010, the date of the filing of the Complaint. Student contended that, as a result of District's failure to make an IEP offer, Parents were prevented from meaningfully participating in the development of the IEP, and Student was deprived of educational benefit.

39. District conceded that it did not make an IEP offer of FAPE during the 2009-2010 school year. It denied that its failure to complete an IEP offer constituted a procedural violation. District maintained that an IEP offer of placement and services could not be made until the IEP team reviewed Student's assessments, determined her present levels of performance and developed goals and objectives. District further maintained that it could not prepare an IEP offer without Parents' participation, and Mother's refusal to complete the review of the goals and objectives as part of the IEP team prevented District from completing the IEP. Parents were full participants in the IEP team meetings and, due to the complexity of the issues and the length of the IEP team meetings, it could not make an offer before April 5, 2010, without denying Parents their right to meaningfully participate in the IEP.

40. For the following reasons, Student did not meet her burden of proof that District was required to make an offer at the November 19, 2009, IEP team meeting; the December 15, 2009, IEP team meeting; or the January 29, 2010, IEP team meeting, but did meet her burden of proof that District was required to make an IEP offer as of the March 8, 2010, IEP team meeting.



41. An IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days, not counting days between pupil's regular school sessions, terms or days of vacation in excess of five school days, from the date of receipt of the parent's written consent for the assessment. (Ed. Code § 56344, subd. (a).)

42. An IEP team shall meet at least annually, to review the pupil's progress, the IEP, including whether annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions. (Ed. Code § 56343, subd. (d).) The IEP team shall also meet when a pupil demonstrates a lack of anticipated progress. (Ed. Code § 56343, subd. (c).) The school district is required to have an IEP in effect at the beginning of each school year, for each child with a disability. (34 C.F.R. § 300.323(a).)

43. School districts shall ensure that the parents of a child with a disability are members of the IEP team that decides the educational placement of the child. (20 U.S.C. § 1414 (e).) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.)

44. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.)

45. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324.)

46. A school district is required to provide a formal written IEP offer when it proposes, or refuses, to initiate or change the educational placement of a disabled child. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal written offer creates a clear record about the substance of the offer and assists parents in presenting complaints. (Ibid.) In *Union*, the school district never formally offered a placement as required by the IDEA, and parents placed pupil in a private school. The school district argued that it was not required to do so because parents would not have accepted District's placement offer. The court explained that a formal written offer would have allowed the parents to consider whether the school district's

offer of placement was appropriate and given them an opportunity to oppose or accept it. (Id.)

47. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (Id. at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (Ibid.)

48. Student’s claim that an IEP offer was required at the November 19, 2009, IEP team meeting is not meritorious. An IEP required as a result of triennial assessments shall be developed within a total time not to exceed 60 days. In this case, the IEP team meetings began the process of developing an IEP on November 19, 2009, within the 60-day timeline, but the IEP was not completed on that day due to the number of assessments, the range of issues, and the extensive discussion among IEP team members. At the November 19, 2009, IEP team meeting, it was not yet apparent what revisions to the IEP were required as a result of the triennial assessments. The evidence established that Mother was an intricate part of the IEP process. There was substantial evidence of collaboration between the District and Mother in scheduling the IEP team meetings. Mother actively participated in setting the agenda and broadening the time period, as is her right, to discuss her concerns. District accommodated her requests and scheduled multi-hour IEP team meetings. The District took care to include the full range of participants at the IEP team meetings that would potentially be involved with Student’s educational program. It was understandable, given the extensive amount of assessments and the range of service providers involved with Student, that the IEP team meeting could not be completed in one day.

49. Student has not met her burden that an IEP offer was required at the December 15, 2009, IEP team meeting. Given the range and complexity of Student's needs as reflected in the assessments, two meetings during fall 2009 were reasonable. The meetings were close to the end of the fall semester. Mother and District agreed to continue the meetings to January to develop a complete annual IEP.

50. Student has not met her burden of proof that an IEP offer was required at the January 29, 2009, IEP team meeting. Before the January 29, 2010, IEP team meeting, an agenda was distributed which included establishing goals and objectives, agreement on services, and placement. As reflected in the IEP team meeting notes, and testimony, District and Mother had an opportunity at that meeting to discuss Student's assessments, unique needs, and accommodations and modifications, including modifications needed for her in world history. Significantly, the IEP team members began to discuss goals and objectives, but even after several hours could not complete the discussion because they were addressing other issues of concern to Mother. From the beginning of the 2009-2010 school year, Mother repeatedly communicated her intent to place Student on a diploma track. Based upon the assessment information presented to her at the IEP team meeting, she agreed with the District to keep Student on a certificate of completion track. Further, at this IEP team meeting, based upon Mother's additional concerns, the complexity of Student's needs and the amount of information exchanged, more time was needed to understand what revisions were required to the IEP. The January 29, 2010, IEP team did not complete its reviews of goals and objectives, but shortly after the IEP team meeting, District forwarded draft goals and objectives to Mother for her review and comment.

51. Student met her burden of proof that District was required to provide an IEP offer at the March 8, 2010, IEP team meeting. District followed a deliberative process where the IEP was developed step-by-step with the final offer completed after the

parties resolved each step. Understandably, most IEPs were completed within two hours with discussion of each step. However, District had a draft document and draft goals and objectives prepared before the November 19, 2009, IEP team meeting, which it updated to form a revised IEP document at each meeting. By the time of the March 8, 2010, IEP team meeting, District had reviewed and summarized its assessment data, prepared and distributed draft goals and objectives, based upon the assessments and recommendations from its service providers, and had all the necessary information to provide an IEP offer that encompassed Student's total educational program including her eligibility, goals and objectives, accommodations and modifications, related services and placement. Mother may have agreed to extend the timeline for District's offer by agreeing to continue the IEP team meetings, and been highly contentious throughout the school year, but by the March 8, 2010, IEP team meeting, Mother and District had exchanged in great detail ideas on the assessments, Student's needs, accommodations and modifications, goals and objectives, and placement. District was aware of Mother's concerns about Student's placement in general education, and cognizant of her request for a transfer to Oakmont.

52. District maintained that it could not provide Mother with an IEP offer when she demanded one at the March 8, 2010, IEP team meeting, because to do so would violate its co-extensive obligation to ensure meaningful parental participation. District argued that to provide Mother an offer before it completed each step of the IEP process would have undermined its obligation to develop an IEP with meaningful parental participation. (*Ms. S. ex rel G. v. Vashon Island School*/ District (9th Cir. 2003) 337 F.3d 1115, 1131.) Mother had been extensively involved in the IEP process. Despite her agreement to continue the IEPs, the IDEA requires that District provide a timely offer of FAPE, here, when Mother demanded it on March 8, 2010. Given the many hours of input Mother had given during several IEP team meetings, and her request for an offer,

District's contention that giving her an IEP offer at the March 8, 2010, IEP team meeting was without merit.

53. District's failure to provide Mother with an IEP offer when she asked for one after several IEP team meetings, and after the previous IEP expired, denied her the clarity she required to resolve disputes regarding Student's latest annual plan. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) Accordingly, District's failure to provide an offer impeded Parents' right to participate in the IEP process as of March 8, 2010.

54. In sum, Student met her burden of proof that District failed to provide Student a FAPE when it failed to provide Mother with an IEP offer on March 8, 2010. (Legal Conclusions 1, and 41-53; Factual Findings 1-147.)

### ISSUE 3: STUDENT'S REQUEST FOR AN IEE AT PUBLIC EXPENSE

55. Student alleged that District was required to fund Dr. Bellamy's independent PT assessment because it failed to respect the procedural safeguards provided in the IDEA for Parents when they requested an IEE. Specifically, Student alleged that District failed to abide by the governing law when: 1) it improperly conditioned its agreement to provide Parents with an independent educational evaluation (IEE) at public expense on District's right to choose the independent assessor; 2) and it failed to fund Student's independent assessor or file for due process. District maintained that it followed the requirements of the IDEA when it agreed to provide an IEE at District's expense. District maintained that the IDEA only required that the District fund an independent assessor; it does not require District to fund an assessor of Student's choosing. For the following reasons, Student has met her burden of proof.

56. The procedural safeguards of the IDEA provide that under certain conditions, a pupil is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1)(2006); Ed. Code § 5329, subd. (b).) "Independent educational

evaluation” means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i)(2006).) To obtain an IEE, parents must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1)(2006).) When parents request an IEE, the school district must provide to parents information about where an independent educational evaluation may be obtained, and the agency criteria applicable for IEEs. (34 C.F.R. § 300.502(a)(2)(2006).) The school district may publish a list of names and addresses of evaluators that meet its criteria, but parents have the right to select an evaluator and school districts cannot restrict a parent’s choice of an evaluator to its list. (*Letter to Parker* 104 IDELR 155 (Off. Of Special Education and Rehabilitative Services, February 20, 2004).) A parent has the final choice of the evaluator to conduct an examination, but it must follow the school district agency criteria for an IEE, which can only be the same criteria that the school district uses for its evaluations, including the qualifications of the examiner. (34 C.F.R. § 300.502(e)(1)(2006).) Other than its agency criteria, the school district cannot impose conditions or timelines related to obtaining an IEE. (34 C.F.R. § 300.502(e)(1)(2006).) If the school district believes its evaluation was appropriate and it does not wish to pay for an IEE, it must request a due process hearing and prove that the evaluation was appropriate. (34 C.F.R. § 300.502(b)(2)(2006).)

57. Student met her burden of proof that District committed a procedural violation by failing to comply with the law governing funding of IEEs. First, Mother properly requested an independent PT educational evaluation at public expense because she disagreed with Dr. Roninger’s evaluation. Mother notified District that she intended to obtain an independent assessment during December. She advised them that she had chosen Dr. Bellamy. Second, District’s practice of selecting its own so-called independent assessor did not comply with the governing law. Mother had the right to

choose an assessor. Third, District did not provide Mother with a list of evaluators, and the agency criteria it required. District did not have, or publish, agency criteria. Fourth, District's utilization of an assessment plan and the timelines contained therein, constituted time limits that exceeded the scope of permissible agency criteria for conducting an IEE. Mother declined District's request because she did not want to wait 60 days for the assessment process to be completed.

58. In sum, District's response to Mother's request for an IEE did not comply with the governing law. District was required to fund the IEE or file a request for due process hearing. It did neither. As a consequence, District should be ordered to pay for Dr. Bellamy's assessment in the amount of \$125. (Legal Conclusions 1, and 55-57; Factual Findings 108-113.)

#### ISSUE 4: THE APPROPRIATENESS OF DISTRICT'S PHYSICAL THERAPY ASSESSMENT

59. Student asserted that Dr. Roninger's assessment on behalf of the District was inappropriate, because she didn't apply the correct standard when determining whether Student's PT services were necessary for Student to access her education. District maintained that Dr. Roninger's assessment fulfilled the requirements for an appropriate assessment under the IDEA. More particularly, District maintained that Dr. Roninger's opinions resulting from her assessments did not affect the appropriateness of her assessment. As more fully set forth herein, Student has met her burden of proof.

60. Physical therapy services are included as "designated instruction and services" or "related services," designed to enable pupils with exceptional needs to receive a FAPE as described in their IEP. (Ed. Code § 5636(a)(b)(6).)

61. Student's severe orthopedic impairment is a "low incidence disability" or a severe disabling condition. (Ed. Code § 56026.5.) The assessment of a pupil with a low-incidence disability shall be conducted by persons knowledgeable of that disability. (Ed. Code § 56320(g).) Special attention shall be given to the unique educational needs,



including, but not limited to, skills and the need for specialized services, materials and equipment. (Ibid.) As with all other assessments, tests and assessment materials used must be administered in the language and form most likely to yield accurate information as to what the pupil can do developmentally and functionally; must be used for the purposes for which the assessments are valid and reliable; and must be administered by trained and knowledgeable personnel in accordance with the instructions provided by the publisher. (Ed. Code § 56320.) A variety of assessment tools and strategies should be used to gather relevant functional, developmental, and academic information about the child, including information from the parent, that may assist in determining whether a child is a child with a disability and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum. (34 C.F.R. § 300.304 (b)(1).)

62. "Medically necessary" physical therapy services are defined as "services directed at achieving or preventing further loss of functional skills, or reducing the incidence and severity of physical disability." (2 C.C.R. § 60300 (n).)

63. Dr. Roninger was retained by the District to conduct a PT assessment as part of the Agreement. Dr. Roninger fulfilled many of the requirements of an appropriate assessment. She was fully qualified to conduct a PT assessment. She used a variety of assessment tools, including reviewing Student's records, and utilizing the SFA, an observation measure to review Student's functional needs on the campus from the perspective of Student's staff and teachers. However, Dr. Roninger did not comply with all the requirements of an appropriate assessment. She did not interview Mother. If Dr. Roninger had interviewed Mother as Dr. Bellamy had, she would have learned that Student had progressive physical fatigue during the day which affected her endurance of the postural muscles of the neck and back, and her fine motor control needed to operate her power wheelchair and vocalize during classroom discussion. Dr. Roninger

would have obtained information about Student's disability and its effects on her in her educational setting.

64. Further, Dr. Roninger did not utilize all assessment tools appropriate to a physical therapy assessment; particularly, she did not physically examine Student. Although Dr. Roninger correctly identified the broad scope of Student's physical limitations, Dr. Bellamy provided a strong rationale for including a physical examination of Student as one measurement of school functioning. From her physical examination of Student, Dr. Bellamy understood the degree of difficulty for Student to remain seated, provide support for a transfer from her chair, the length of time she could remain seated, and whether she could initiate movement. Dr. Roninger's description at hearing of her physical therapy services to Student supported Dr. Bellamy's opinion that a physical examination should have been one of the assessment tools utilized. By providing Student with direct PT services, Dr. Roninger would have acquired a better understanding of Student's range of motion, her ability to make progress, and the benefits of PT for Student in the educational setting.

65. Most significantly, Dr. Roninger's assessment was compromised by her failure to provide adequate support for her opinion that Student's PT needs were medically based, not school-based. The components of an assessment cannot be isolated from the overall purpose of an assessment, which is to inform the content of the IEP. To evaluate is to judge or determine the significance, worth, or quality of; as in "to evaluate the results of an experiment." (Webster's Encyclopedic Unabridged Dictionary of the English Language (new deluxe edition 2001) p.670, col. 2.) Dr. Bellamy persuasively testified that Dr. Roninger's conclusion that Student's needs were medical, and not educational, was not supported by the literature and protocols of the profession. Dr. Roninger maintained that educationally relevant PT services included services that would enhance Student's functional skills related to school performance.

Dr. Roninger's reliance upon outdated guidelines from the California Department of Education did not support her opinion. As an example, according to Dr. Roninger's own assessment, Student's then current level of functioning, was not sufficient to navigate through campus, to keep her head up, and to keep her hands stable. Further, Dr. Roninger did not evaluate for the IEP team whether Student's performance could improve. For example, she acknowledged as educational concerns that Student needed to improve her navigation of her motorized wheelchair, but without any analysis dismissed direct PT services as medically, not educationally related. Dr. Roninger testified that she reviewed Dr. Corn's report as part of her assessment. However, her conclusions did not square with Dr. Corn's report of Student's progress from direct PT services in educationally related areas of concern. Moreover, Dr. Roninger did not address the relationship between PT services and other educational concerns. For example, she did not consider Student's SLP goal to improve her breath control. In contrast to her assessment report, at the hearing, Dr. Roninger articulated clearly the relationship between the school-based services she supplied to Student under the Agreement and Student's educationally related needs.

66. In sum, Student has met her burden of proof that Dr. Roninger's assessment was inappropriate. (Legal Conclusions 1, and 60-65; Factual Findings 1-2, 7, 14-15, 24, 52-56, 92-94, and 115-122.)

## REMEDIES

67. Student's requested equitable remedies include:

- (1) Finding that District failed to offer a FAPE during the 2009-2010 school year;
- (2) Ordering District to convene an IEP;
- (3) Ordering District to make a written offer of FAPE that provides Student with placement in the least restrictive environment, including one period a day in a regular education U.S. History class and one period a day in an English

- Literature class, where Student has a modified curriculum and is working on a certificate of completion;
- (4) Ordering District to retain a consultant or staff person who is qualified to modify the curriculum;
  - (5) Ordering District to provide enlarged print for all textbooks and instructional materials;
  - (6) Ordering District to provide Student with books on tape or CD;
  - (7) Ordering District to reimburse Parents for Dr. Bellamy's assessment;
  - (8) Ordering District to reimburse Dr. Corn's private physical therapy services;
  - (9) Ordering District to allow Student to retake biology during the 2010-2011 school year with a one-on-one aide, a modified curriculum, and working on a certificate of completion;
  - (10) Ordering Student to change placement to Oakmont due to Woodcreek's failure to track her academic progress and developing an IEP; and
  - (11) Ordering, as compensatory education, 160 to 200 hours of one-on-one instruction through the LMB program.

68. The ALJ has the authority to order a school district to comply with the procedures of the IDEA. (Ed. Code § 56505, subd., (f)(4).) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374, 105 S.Ct. 1996, 2005.) In addition to reimbursement, school districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School District* (9<sup>th</sup> 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.1296.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party.

69. Based upon the equitable considerations and the Factual Findings of this decision, the ALJ makes the following determination of appropriate remedies.

70. District committed procedural violations when it failed to deliver an IEP offer. As a consequence of District's failure to deliver an IEP offer on March 8, 2010, Parents' right to participate in the IEP process was impeded. To remedy District's procedural violation, District and Student will be required to attend an IEP team meeting with a facilitator and complete an IEP document. At the IEP team meeting, District and Parents must address the appropriateness of Mother's mainstreaming choices for Student, and needed modifications and accommodations. Student should be included only in those classes where she can best join in discussion, and not have to heavily rely on critical thinking or math skills. Moreover, as a remedy to District's failure to prepare an IEP offer with goals and objectives, or to provide adequate guidance in general education modifications and accommodations, it shall retain independent assessor Dr. Christo, if available, or another independent assessor, to assist in the development of clear goals and guide the IEP team's selection and number of general education courses for Student.

71. District denied Student an educational benefit and a FAPE when it failed to provide sufficient accommodations and modifications for Student to receive credit towards her certificate of completion in biology. In all other respects, District had fulfilled its obligations to provide Student a FAPE under the Agreement and the February 18, 2009, IEP. Student received a variety of services from District, and had made progress. Mother was not blameless. She chose to place Student in a college preparatory biology course even though it was clear from the beginning that Student was struggling. However, District prevailed upon Mother to work collaboratively within the IEP process on modifications to the biology curriculum, asked her to wait until after the assessments were complete, and then did nothing to direct further modifications

and testing accommodations to allow Student to obtain credit towards her certificate of completion.

72. District shall be required to fund Dr. Bellamy's IEE in the amount of \$125 as a consequence of its failure to follow the statutory guidelines for funding an IEE.

73. Dr. Roninger's assessment was inappropriate, but Student was not denied a FAPE as a result of her assessment. Student was provided all required services set forth in the Agreement through the 2009-2010 school year.

74. District's failure to provide clear baseline levels for goals in reading and writing did not result in a loss of an educational benefit during the 2009-2010 school year. Student did not make a convincing case for LMB therapy. Mother may have considered the SRA Decoding too simplistic but within the snapshot of this matter, it was a one of the few research-based programs available. It was also being used in the classroom Student preferred at Oakmont. Therefore, Student's objection to its use at Woodcreek was inconsistent with her demand for an alternative program like LMB.

75. Student's request for a transfer to Oakmont was not supported by the evidence. Mr. Tollefson taught the same program as Ms. Peterson.

## ORDER

1. District shall convene an IEP team meeting to be completed no later than September 20, 2010, to make an offer of FAPE. The IEP team meeting may be held over a two-day period, but shall not be scheduled for more than a total of eight hours. District shall distribute a draft IEP three days prior to the IEP team meeting to all participants which shall include District's proposed offer. District shall consult with independent assessor Dr. Christo, if available, in the development of its proposed offer, including proposed IEP goals, an appropriate reading program, and appropriate general education academic class(es) for Student. At the conclusion of the IEP team meeting, an IEP offer shall be made even if consensus has not been reached.

2. District shall provide Student an opportunity to recover her credits for biology by allowing her to either retake the whole or part of the biology course as an inclusion Student, by providing Student with an alternative curriculum from the California Department of Education, or by redefining the biology course on her transcript so that she can receive full credit.

3. District shall reimburse Parents for the cost of Dr. Sandra Bellamy's assessment in the amount of \$125 within 30 days of this decision.

4. All other relief sought by Student in her Complaint is denied.

## 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 Issues 1D, 2, 3, and 4. District prevailed on Issues 1A, 1B, 1C, 1E, and 1F.

## 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: August 30, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
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EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings