

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2009031077

DECISION

On November 30, 2009, and on December 1, 2, 7, 8, 9 and 10, 2009, Timothy L. Newlove, Administrative Law Judge (ALJ) from the Office of Administrative Hearings, Special Education Division (OAH), presided at the due process hearing in this case.

At the hearing, Student's Mother appeared and represented her daughter. Student appeared on November 30, 2009, and on various days after school. Student's maternal grandmother attended a portion of the hearing on November 30, 2009. Lori Murray, a former respite provider for Student, appeared on the second day of the hearing to support Mother.

Justin Shinnfield of Atkinson, Andelson, Loya, Rudd & Romo, attorneys at law, represented the Garden Grove Unified School District (Garden Grove or District). James Carter, Special Education Program Coordinator, also appeared at the due process hearing for the District.

## STATEMENT OF PROCEDURE

On March 19, 2009, Mother, on behalf of Student, filed with OAH a Request for Mediation and Due Process Hearing (Due Process Complaint). The Due Process Complaint contained a request for stay put.

On April 20, 2009, after OAH granted the District's Notice of Insufficiency, Mother filed with OAH an Amended Due Process Complaint which is the operative pleading in this case.

On June 5, 2009, during a prehearing conference in the matter, the parties agreed to continue the previously scheduled due process hearing. The continuance tolled the 45-day decision timeline in the case.

On August 24 and 25, 2009, and on September 2, 2009, OAH ALJ Robert Iafe presided at a due process hearing in the matter. The parties did not complete this hearing. Effective October 12, 2009, ALJ Iafe terminated his employment with OAH.

On October 21, 2009, the District filed with OAH a Motion for Mistrial. OAH granted the motion and subsequently set the due process hearing for November 30 to December 3, 2009, and from December 7 to 10, 2009.

During the due process hearing, the parties agreed to submit closing briefs no greater than 25 pages on or before December 21, 2009. On this date, the parties submitted to OAH their respective closing briefs. The ALJ marked Mother's brief as Student's Exhibit 6 for identification and the District's brief as District's Exhibit 39 for identification.

The closing brief submitted by Mother on behalf of Student, in addition to 25 pages of argument, contained 18 pages of document copies consisting of invoices, correspondence and price quotations. On December 22, 2009, counsel for the District filed with OAH a Motion to Strike Attachments which concerns the 18 pages of documents attached to Mother's closing brief. On the same day, Mother filed with OAH

an opposition to the motion. The District's Motion to Strike Attachments is granted. Mother did not make a showing that she was unable to produce and disclose the attached documents prior to the due process hearing in this matter.

## ISSUES

The issues in the Amended Due Process Complaint are as follow.

1. Did the District deny Student a free appropriate public education (sometimes FAPE) by failing to implement the OAH stay put order dated March 26, 2009?
2. Did the District deny Student a FAPE by performing or failing to perform certain assessments that were not appropriate for the following reasons?:
  - a. The Psychological Assessment, dated May 2, 2007, utilized a single test, the C-TONI, to measure Student's intelligence, stated that Traumatic Brain Injury is Student's primary eligibility category, and did not fully measure Student's aptitude, achievement level or educational needs.
  - b. The failure to perform an Augmentative and Alternative Communication (sometimes AAC) Assessment for Student's triennial individualized education program (sometimes IEP) meeting in 2007.
  - c. The AAC Evaluation Report prepared by the Assistive Technology Exchange Center (sometimes ATEC), dated June 23, 2008, and the ATEC AAC Consultation Summary Report, dated February 20, 2009, do not contain certain information, including the age of the previous AAC device, the number of communication files currently used by Student, and the persons who will be responsible for providing the communication file programming and support.
  - d. The Physical Therapy Assessment, performed by Gallagher Pediatric Therapy and dated April 2008, because such assessment recommended the discontinuance of educationally related physical therapy services for Student.

- e. The failure to perform educationally related Occupational Therapy assessments, since Student has severe orthopedic impairments and needs improvement in the area of fine motor.
  - f. The District's Vision Impairment & Blindness Summary Reports, dated March 6, 2007, April 17, 2008, and February 27, 2009, fail to recommend any direct services for the identification or evaluation of specially designed instructional materials and fail to address Student's reading and writing skills.
  - g. The District's Orientation & Mobility Evaluations, dated June 11, 2007, April 28, 2008, and March 1, 2009, fail to identify any of Student's needs outside the classroom environment and do not recommend any direct services assisting Student to identify, recognize and access matters relating to safety, community signs and services, and community resources for therapeutic recreations or transition.
  - h. The failure to perform assessments which contain recommendations that would assist Student and Student's parent in identifying Student's continuing education and vocational desires, abilities, needs and opportunities.
3. Did the District deny Student a FAPE by failing to provide a sufficient amount of direct, supportive services by Related Service Providers?

## CASE OVERVIEW

Student is a young woman with multiple disabling conditions. She is non-verbal and communicates language through a voice output or AAC device. In 2002, California Children's Services purchased Student an AAC device called the Gemini. Mother programmed the Gemini with many custom displays and Student became quite adept at using the device. However, the Gemini slowly became obsolete and, at a 2008 IEP meeting, Student's team recommended replacement of the Gemini with an AAC device called the Mercury II. In large part, this special education proceeding is the result of the

disagreement between Mother and the District over the appropriate replacement device for the Gemini.

Under the statute of limitations which governs special education administrative due process proceedings, the time period in this case runs from March 19, 2007, to the present. During this period, Student initially attended a non-public school (sometimes NPS) called SeaStar. In late October 2008, SeaStar closed, and the District placed Student at another NPS called Grace Education. In March 2009, the District cancelled the NPS contract with Grace Education because the private school was not fully implementing Student's IEP. Effective March 23, 2009, the District placed Student at another NPS called Buena Park Speech and Language Development Center (Buena Park SLDC).

For the time period applicable in this case, Student contends that the District either performed certain assessments in an inappropriate manner, or failed to perform needed assessments. On this issue, Student takes special aim at a June 2007 psychoeducational assessment performed by a District school psychologist, and a June 2008 AAC report performed by a non-public agency (sometimes NPA) on behalf of the District. Student also contends that the District failed to provide her with a sufficient amount of related services. Finally, Student contends that the District failed to timely implement her stay put placement at Buena Park SLDC.

Based upon the following findings of fact and legal conclusions, this Decision determines that (1) the District was ready and willing to place Student at Buena Park SLDC and did not violate her procedural right to stay put; (2) that the District assessed Student in an appropriate manner and did not fail to perform certain evaluations; and (3) that, as regards the provision of related services, including assistive technology devices and services, the District offered Student an adequate amount such that she was able to take advantage of the educational opportunities in her special education

program. However, the Decision determines that, at times during the 2007-2008 and 2008-2009 school years, the District materially failed to provide certain services designated in Student's individualized education programs, and that Student is owed equitable relief for such failures.

## FINDINGS OF FACT

### THE STUDENT

1. The Student is a petite young woman who has multiple disabling conditions caused by a premature birth. Born on December 7, 1988, Student has a diagnosis of cerebral palsy with spastic quadriplegia, seizure disorder, retinopathy of prematurity and encephalopathy. Student resides with her Mother and siblings within the boundaries of the Garden Grove Unified School District. At the outset of the due process hearing, Student indicated her consent that Mother represent her at the hearing.

2. Student has very poor vision. She is blind in her left eye which was removed and replaced with a prosthetic device when Student was ten years of age. She has an estimated vision of 20/400 in her right eye. With only one eye, Student has impaired depth perception and she does not effectively track items moving toward or away from her.

3. Student cannot speak. She communicates through gestures and facial expressions, by saying the word "ya," by nodding her head "yes" or shaking her head "no," by tapping her communication partner and by pointing. Student's primary method of communication at home, school and in the community is an augmentative alternative communication device which she uses exclusively to communicate language. Student relies to a great extent on her communication partner to ask questions or seek clarification when she attempts to communicate. Student's ability to communicate is

severely restricted when she interacts with a person who does not know her, and when she must convey unfamiliar information.

4. Student is not mobile. She cannot walk independently more than a few steps. She requires a person to assist her in walking. When she walks, Student drags her right toe. She has poor balance and requires stand-by assistance for safety. When she is fatigued or traveling long distances, Student is placed in a wheelchair. At home, she can ascend stairs, but descends in a seated position. Student has difficulty performing planned motor movements. Student's lack of mobility prevents her from independently carrying her AAC device.

5. Student has poor fine motor abilities. She cannot perform tasks that require traditional writing instruments and paper. She cannot use a fork; instead, she uses a modified spoon with a fist grasp. She has difficulty retrieving coins from a tabletop. She can use her pointer finger to target desired symbols on her AAC device and the touch screen on her desktop computer. She can also use a mouse to target desired symbols.

6. Student has limited adaptive and daily living skills. She requires assistance for most activities. She needs assistance in dressing. She can remove shoes and socks, but requires assistance to remove shirts and pants. She can pull a simple zipper and unsnap a button, but she needs assistance with all other fasteners. Student can feed herself with minimal assistance. She requires a high level of assistance with grooming and hygiene needs. She is not toilet trained and is incontinent.

7. Student suffers from seizures. She takes a strong anti-convulsant medication which causes dizziness, drowsiness and extreme sun sensitivity. Mother has reported that Student's seizures are triggered by stress or intense emotion. Upon suffering a seizure, Student is very lethargic and needs to rest.

8. Student has limited cognitive abilities. Although testing Student is difficult due to her disabling conditions, psychoeducational evaluations have shown consistently that Student is deficient in the different domains of intelligence. This deficiency is reflected in Student's academic achievement. She possesses a basic vocabulary of words and picture symbols, and she has a limited understanding of numbers and mathematical concepts.

9. Student has normal hearing. Her ability to understand the spoken word far exceeds her ability to communicate. Nevertheless, Student is very social. She takes great pleasure in communicating through her AAC device. She is inquisitive and has a good sense of humor. She has shown compassion by helping her classmates. She has a gentle and charming disposition. Over time, she has developed a facility with technology, especially in the use of her AAC device and the classroom computer.

10. The parties agree that Student's multiple disabling conditions make her eligible for special education and related services. Student's multiple disabilities have created unique needs in every area of her education, and especially in her abilities to communicate and comprehend educational material.

#### CALIFORNIA CHILDREN'S SERVICES

11. Student's disabling condition of cerebral palsy has qualified her for services and equipment provided by the California Children's Services (sometimes CCS) which is a state and county program providing medically necessary benefits for handicapped individuals under the age of 21. Through this program, Student received from CCS occupational and physical therapy treatments. She has also received from CCS different AAC devices as a form of medical equipment necessary to address her communication needs.



## ASSISTIVE TECHNOLOGY AND THE GEMINI AAC DEVICE

12. Student requires and uses an assortment of assistive technology (sometimes AT) devices and services in her special education program. An AT device is any item, piece of equipment or product system used to increase, maintain or improve the functional capabilities of a child with a disability. An AT service is any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device. The AT devices used by Student include her AAC device, a classroom computer and the software necessary to operate both the AAC device and computer. The AT services that Student has required include the evaluation of her assistive technology needs, the customization, maintenance, repair and replacement of the AT devices that she uses, and the training and technical assistance provided through funding by the District.

13. The sole method by which Student communicates with language is through an augmentative alternative communication device. An AAC device is a computer that has a voice output capability, and is sometimes called a speech-generating prosthetic device. Student has been using AAC devices since 1995, when she was seven years old. In 2002, California Children's Services purchased an AAC device manufactured by Tobii-ATI called the Gemini. The Gemini operates on a Macintosh computer platform. The Gemini contains a touchscreen and runs various software programs, including Speaking Dynamically Pro, BoardMaker and Picture Word Power. Speaking Dynamically Pro is a program that turns text into speech. BoardMaker is a program containing picture symbols that operates in conjunction with the text-to-speech capability of the AAC device. Picture Word Power is a program that assists Student in learning picture symbols and vocabulary. The Gemini weighs about seven pounds.

14. Over the years, Mother has taken responsibility for customizing her daughter's AAC device. Mother has created more than 300 communication files on the Gemini. The files consist of displays which appear on the screen of the device. The displays contain small squares, or buttons, that show a word or phrase and a representative picture. For example, on a display relating to Student's family, there is a button that states "Patches" and under this word appears a photograph of a dog. On a display relating to school work, there is a button that states "numbers" and under this word appears "1 2 3." Student utilizes the Gemini by navigating through various screens and touching with her index finger the button or icon that most closely corresponds with what she wants to communicate. Mother has protected the files that she has created on the Gemini with a password. She has not allowed the District, or AT specialists under contract with the District, to transfer files from the Gemini to either Student's classroom computer or other AAC devices loaned to Student during periods when the Gemini required repair. Mother testified at the due process hearing that she did not permit such file sharing because, without conducting trials in order to determine whether the files would transfer accurately, the District could not ensure that the files would be operational on the loaned devices.

15. Student is quite adept in using the Gemini. She communicates by using both single hit messages and by sequencing individual words to create a message. However, Student does experience difficulties. At times, she cannot locate symbols and vocabulary programmed on the Gemini. At other times, she cannot convey her meaning because certain symbols or words are not programmed on the device. In addition, Student can spell simple words on her AAC device only with great effort. Student also requires an aide to guide her through certain software programs.

16. Student's assistive technology needs, especially as regards her AAC device, have presented Mother and Student's special education team with a host of logistical

problems. California Children's Services purchased the Gemini with medical funding and intended that Student use the AAC device in the home, school and community. Undoubtedly, this multiple use placed heavy demands upon the Gemini and there was a frequent need for repair. When Mother sent the Gemini to the manufacturer for repair, Student required a replacement device that operated the same software. At various times, in order to preserve the device, Mother did not send Student to school with the Gemini. In such instances, Student resorted to the classroom computer to communicate with staff and perform her lessons. At times, Student's classroom computer also needed repair. In such instances, the replacement computer required the same software in order to allow Student to continue forward with her studies. When Student changed classes and schools, her new teachers and aides required training on the Gemini and the software operating on both the AAC device and the classroom computer. Finally, the Gemini gradually became obsolete. In April 2008, Tobii ATI informed Mother that the company was ending all repair of Gemini AAC devices. During Student's 2008 annual IEP meetings which occurred over the course of March, April and July 2008, the team recognized that the Gemini was non-operational and that Student required a replacement AAC device. Nevertheless, Student continues to use the Gemini in the home and community although the device has voice output problems and needs repair.

#### ASSISTIVE TECHNOLOGY EXCHANGE CENTER

17. Student has attended District schools since 1994. For much of this time, the District has contracted with the Assistive Technology Exchange Center, a Division of Goodwill of Orange County, to provide assistive technology services for Student. ATEC is a non-public agency. In particular, ATEC representatives have evaluated Student's AT needs; they have customized, maintained, repaired and replaced Student's AT devices, and they have provided consultation, training and technical assistance for Student, her Mother, and her teachers and aides.

## BACKGROUND

18. Pursuant to a Settlement Agreement reached in November 2004 between Mother and the District, on January 3, 2005, Student started attending SeaStar School for Neuroeducation (SeaStar) located in Tustin, California. SeaStar was a non-public school specializing in the education of children with neurologic needs.

### The February 2006 Annual IEP

19. On February 9, 2006, the District convened Student's IEP team for the purpose of conducting an annual review. At this meeting, the team offered Student a special education program for the 2006-2007 school year. On March 9, 2006, through a letter written by her attorney to James Carter, at the time a Program Supervisor for the District, Mother provided consent and dissent to the February 2006 annual IEP.

20. Mother provided consent to the following features of the February 2006 annual IEP.

- a. Placement of Student at SeaStar.
- b. Transportation of Student to and from home and SeaStar.
- c. Individual speech and language services in the amount of two 30-minute sessions each week provided by SeaStar.
- d. A full-time aide called an Independence Facilitator provided by SeaStar.
- e. Consultative vision impairment services in the amount of one 30-minute session each month, provided by the District.
- f. The assistive technologies "previously agreed upon." The February 2006 annual IEP referenced the following AT: Student's Gemini, the classroom computer and software in classroom. Under a section labeled "Accommodations and Modifications," the IEP listed books on CD-Rom, scheduling software, language arts/sight words software, and math (time/hour/sales) software.

- g. All consultative services deemed necessary. The notes in the February 2006 annual IEP stated that ATEC agreed to provide six hours of training by March 2006, and one and one-half hours of training every other week through June 2006.

21. Mother disagreed with the District's offer to reduce adaptive physical education (sometimes APE) services from five 30-minute sessions each week to two 30-minute sessions each week. Mother also disagreed with the District's offer to reduce physical therapy (sometimes PT) services from two individual 45-minute sessions each week to two consultative 30-minute sessions per week. Based upon such disagreements, the February 2006 annual IEP carried forward the previously existing levels of service for adaptive physical education and physical therapy.

#### THE 2006-2007 SCHOOL YEAR

22. For the 2006-2007 school year, Student attended SeaStar under the February 2006 annual IEP. Student shared her class with five other pupils. Student had a one-on-one aide that rotated through the classroom. The classroom contained a Macintosh computer called a PowerMac G3 computer. The computer contained a number of software programs, including BoardMaker and Speaking Dynamically Pro, which allowed staff to create communication displays for Student, and the Edmark Reading System Level 1 and Marblesoft Money Skills, which presented lessons in core vocabulary and mathematics. In April 2007, SeaStar moved to a location in Irvine, California, and Deborah Young became Student's classroom teacher.

#### The March 2007 Functional Low Vision Assessment

23. On March 6, 2007, Mark Winnick, a teacher of the visually impaired working for the District, prepared a Functional Low Vision Assessment Summary Report of the Student. Mother has challenged the appropriateness of this report; however, the

date on the document is outside the statute of limitations in this case. For his report, Mr. Winnick reviewed a September 2005 Orientation & Mobility Report and observed Student during an adaptive physical education session and in her classroom. For the APE session, Mr. Winnick noted that Student used her vision to perform various physical exercises such as spotting and following balls tossed towards her. In the classroom, Mr. Winnick noted that Student was able to visually identify and touch the screen on the classroom computer with good accuracy and consistency, and that "(Student) communicates well with her computer." Mr. Winnick recommended the continuation of vision impairment consultative services and made certain educational suggestions such as the provision of books on tape for Student.

#### The March 2007 SeaStar Speech-Language Progress Report

24. On March 19, 2007, Joseph Horodyski, a Speech-Language Pathologist (sometimes SLP) for SeaStar, prepared a Speech-Language Progress Report for Student. In his report, Mr. Horodyski reviewed Student's progress on communication goals in the February 2006 annual IEP. Under Pragmatics, Mr. Horodyski reported that Student did not meet the goal for releasing contact with her communication partner. Mr. Horodyski noted that Student continued to have difficulty making transitions from conversational topics and activities. Student also did not exit communication exchanges appropriately. Under Expressive Language, Mr. Horodyski reported that Student did not show the ability to construct complete sentences without significant prompting. Student also had difficulty locating particular icons on her Gemini AAC device. Student did meet and surpass the goal of participating in a conversation with two or more exchanges. Under Receptive Language, Mr. Horodyski reported that Student did not make progress on goals which required her to identify adverbs and adjectives and to answer "wh" questions. Mr. Horodyski noted that, when Student did respond to a "wh" question, the communication partner needed clarification. In conclusion, Mr. Horodyski recommended

a continuation of speech and language services for Student. He also recommended at least 240 minutes during the year for collaboration with ATEC as regards the set-up of Student's AAC device for efficiency and speed of icon selection.

#### The March and April 2007 Annual IEP

25. On March 19, 2007, the District convened Student's IEP team for the purpose of conducting an annual review. Sue McClellan, a Program Supervisor for the District, facilitated the meeting. Eleven team members attended this meeting, including Mother and her attorney. Several members of Student's IEP team did not attend the meeting, including a representative from ATEC. During this meeting, Mr. Horodyski, the SLP from SeaStar, reviewed his March 2007 report. The Adaptive Physical Education teacher reviewed Student's progress. The Director of SeaStar discussed the provision of physical therapy under Student's IEP. He reported to the team that SeaStar's Physical Therapist had terminated employment and that the school did not have another physical therapist to provide the service. The team agreed to discuss the issue of compensatory physical therapy time at a later date. The team discussed vision services for Student. The team also discussed proposed goals, which Mother accepted, proposed services and an Individual Transition Plan (sometimes ITP).

26. On April 17, 2007, Student's IEP team reconvened and completed the annual review. Sue McClellan again facilitated the meeting. The primary topic of discussion concerned assistive technology. Kevin Daugherty, a Rehabilitation Engineer at ATEC, and Leisa Salvo, a Speech and Language Pathologist from ATEC, attended the meeting. The team discussed Student's AAC device. The manufacturer of the Gemini was no longer making the product, and there was concern about what would happen when the device no longer worked. Mr. Daugherty informed the team that ATEC would start the search for a suitable replacement AAC device. Mother initiated a discussion concerning loaner devices in the event that the Gemini became non-functional. At the

time, both the District and ATEC had Gemini devices for loan, but the devices needed repair. The team also discussed the need for ATEC to provide training and ongoing consultation for the SeaStar staff working with Student and the Vision Impairment specialist from the District. The training and consultation concerned Student's AAC device, the classroom computer and software used on both the AAC device and computer. Mr. Daugherty stated that ATEC would perform an inventory of equipment and software in Student's classroom and then prepare a training schedule. The Director of SeaStar informed the team that the school was going to purchase Don Johnston "Start to Finish" books.

27. The March and April 2007 annual IEP described Student's primary disabling condition as Orthopedic Impairment and a secondary disability as Visual Impairment. The IEP indicated that both disabling conditions are low incidence disabilities. Regarding the manner in which Student's disabilities affected her involvement and progress in school, the IEP stated: "(Student's) physical, visual and cognitive abilities require a curriculum focusing on functional daily living skills not available in the general education program."

28. The March and April 2007 IEP contained the following goals to address Student's areas of need.

- a. English Language Arts – Functional Writing: Student needed practice learning descriptive words and locating such words in the Picture Word Power pages of her AAC device. In order to increase Student's functional use of the Gemini, the IEP team developed a goal that required Student to write sentences using descriptive adjectives. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: an AAC device and Picture Word Power software.



- b. English Language Arts – Functional Reading: Student needed to improve her ability to correctly spell high frequency words from the Edmark word list. The IEP team developed a goal to improve this ability. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: a classroom computer and Edmark software.
- c. English Language Arts – Functional Writing: Student had difficulty writing on her AAC device and in the classroom computer the initial and final letter of words that were read to her. The IEP team formulated a goal to improve this ability. The IEP designated that the Assistive Technology and/or Supplementary Aid necessary to support this goal was an AAC device.
- d. English Language Arts – Functional Reading: Student had difficulty responding to simple questions read by a person or computer. The IEP team formulated a goal to improve this ability. The IEP designated Don Johnston Start to Finish software as the Assistive Technology and/or Supplementary Aid necessary to support this goal.
- e. Mathematics – Purchasing: Student required a high level of assistance when shopping. The IEP team developed a goal designed to help Student become independent in purchasing goods and waiting for change. The IEP designated Money Management software as the Assistive Technology and/or Supplementary Aid necessary to support this goal.
- f. Mathematics – Time Management: Student had difficulty identifying the time associated with routine and scheduled activities. The IEP team formulated a goal to improve this ability. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: a schedule on the classroom computer or Student's AAC device, a digital or analog clock, and Timescales software.

- g. Prevocational: While showing an interest in many types of jobs, Student was not able to identify the duties and responsibilities of such endeavors. The IEP team developed a goal to increase Student's knowledge in this area. The IEP designated that the Assistive Technology and/or Supplementary Aid necessary to support this goal was an AAC device.
- h. Social Skills: Student did not consistently demonstrate an understanding of social boundaries. The IEP team formulated a goal to help Student during her social interactions.
- i. Fitness/Balance: Student required much prompting in order to participate in fitness and balance activities such as throwing a ball and riding a stationary bike. The IEP team developed a goal designed to reduce the level of prompting and increase the time that Student engaged in physical activities.
- j. Social Skills: Student perseverated on items in which she was engaged and had difficulty making transitions from one activity to another. The IEP team developed a goal to help Student with such transitions.
- k. Pragmatics: When communicating, Student often held hands or touched her communication partner, and needed cues to release such contact. Student also had difficulty with volunteering the appropriate closing of social contact. The IEP team formulated a goal to improve Student's pragmatic social skills in these matters.
- l. Expressive and Receptive Language: Often, the person with whom Student was communicating needed to guess or ask questions in order to understand Student's attempt at communication. The IEP team developed goals designed to improve Student's ability to communicate by writing in her AAC device sentences that asked questions or provided clarification, and by signaling the need for new vocabulary to be programmed into her AAC device. The IEP

designated that the Assistive Technology and/or Supplementary Aid necessary to support this goal was an AAC device.

29. At the conclusion of the March and April 2007 annual IEP, the District offered Student the following special education program for the time period from March 19, 2007 to March 19, 2008.

- a. Group specialized academic instruction in a moderate/severe classroom at an NPS (SeaStar) in the amount of 1,620 minutes each week.
- b. Individual language and speech services in the amount of two 30-minute sessions each week provided by SeaStar.
- c. Consultative language and speech services in the amount of 30 minutes each month, for a total of 240 minutes, provided by ATEC.
- d. Individual adapted physical education services in the amount of five 30-minute sessions each week provided by SeaStar.
- e. Individual physical therapy in the amount of two 30-minute sessions each week provided by an NPA at SeaStar.
- f. Consultative orientation and mobility services in the amount of four 60-minute sessions provided by District personnel at SeaStar.
- g. Consultative specialized vision services in the amount of one 30-minute session each month provided by District personnel at SeaStar.
- h. A full-time Independence Facilitator provided by SeaStar.
- i. Transportation services.

30. The March and April 2007 annual IEP offered Student the same special education program for the extended school year (ESY) which lasted from July 5, 2007 to August 17, 2007.

31. The March and April 2007 annual IEP also offered Student an Individual Transition Plan. The ITP referenced a Transition Assessment which reflected Student's

interest in working at the Regional Center, but which cautioned that Student “does not demonstrate a clear understanding of the responsibilities and expectations in the work place and does not demonstrate a clear understanding of job descriptions for careers she has expressed an interest in nor can she state a plan for acquiring those needed skills.”

32. The ITP contained goals in the areas of training/education, employment and independent living. The ITP also contained a section entitled “Transition Plan Services & Activities to Support Post-Secondary Goals.” Under this section, the ITP contained brief descriptions of services designed to help Student exit from special education. For example, under “Instruction,” the ITP stated that “(Student) will review college catalogs, visit college websites and visit community college campuses.” Under “Related Services,” the ITP stated that “(Student) will explore options through Department of Rehabilitation and supported employment.” Under “Employment,” the ITP stated that “(Student) will attend a job shadow in 4 or more areas of interest.”

33. On April 17, 2007, Mother provided written consent to the March and April 2007 annual IEP.

#### The April 17, 2007 Individual Assessment Plan

34. Also, on April 17, 2007, the District proposed and Mother signed an Individual Assessment Plan which concerned Student’s triennial evaluation. Under the assessment plan, the District agreed to evaluate Student in the following areas: (1) Academic/Pre-Academic Achievement; (2) Intellectual Development; (3) Language/Speech/Communication Development; (4) Psycho-Motor Development; (5) Health/Vision/Hearing; (6) Self-Help/Career/Vocational Abilities; (7) Social/Emotional Behaviors Status; (8) a Functional Vision Evaluation; and (9) an Orientation and Mobility Assessment.

## The May 2007 Triennial Psychoeducational Assessment

35. On May 2, 2007, Sashi Wasserman, on behalf of the District, prepared a Multidisciplinary Triennial Psychoeducational Summary Report (2007 Triennial Psychoeducational Assessment) for Student. Mother has challenged the appropriateness of this evaluation. Ms. Wasserman is a licensed Educational Psychologist and a credentialed School Psychologist. She has worked in the field of school psychology for 15 years. She testified at the due process hearing and presented as well-informed, competent and professional.

36. In preparing the 2007 Triennial Psychoeducational Assessment, Ms. Wasserman reviewed prior psychoeducational evaluations of Student, discussed Student with her Mother and teacher at SeaStar, and observed Student during the assessment. Student used her Gemini during the assessment and Mother was present to assist with the interpretation of Student's responses on the AAC device. To measure Student's cognitive abilities, Ms. Wasserman administered the Comprehensive Test of Non-Verbal Intelligence (CTONI). Ms. Wasserman is trained and knowledgeable in performing psychoeducational assessments, including administration of the CTONI. She testified that the CTONI is a valid and reliable instrument for measuring non-verbal intelligence. The CTONI consists of a battery of six subtests that measure different but interrelated non-verbal intellectual abilities. Ms. Wasserman administered the CTONI because Student is non-verbal and has disabling conditions that limit her mobility and vision. Student tested in the "very poor" range in the areas measured: non-verbal IQ (48), pictorial non-verbal IQ (55), and geometric non-verbal IQ (49). Such scores indicated a deficient level of cognition. Student's scores on the CTONI administered by Ms. Wasserman were consistent with results on the same test given by District assessors for Student's 2001 and 2004 triennial reassessments. This consistency in CTONI results over

the course of three triennial reevaluations underscores the validity of Ms. Wasserman's findings in the 2007 Triennial Psychoeducational Assessment.

37. For the 2007 Triennial Psychoeducational Assessment, Ms. Wasserman also utilized the Vineland Adaptive Behavior Scales: Interview Edition (Vineland). Ms. Wasserman has experience in the administration of this assessment scale and she testified that the Vineland is a valid and reliable instrument. The Vineland measures a child's adaptive behavior, which is the performance of daily activities required for personal and social sufficiency, through information concerning four domains: communication (receptive and expressive language skills), daily living (personal, domestic and community skills), socialization (interpersonal relationship skills), and motor (fine and gross motor skills). Ms. Wasserman gave the Vineland to Mother who reported scores that placed Student two or more standard deviations below the norm in each domain. From these scores, Ms. Wasserman determined that Mother's ratings were "an adequate representation of how (Student's) physical and cognitive abilities negatively affect her ability to function without assistance from adults, peers and adaptive equipment." Ms. Wasserman did not give the Vineland to Deborah Young, Student's teacher at SeaStar, because she had worked with Student for only a brief period. Later, in April 2008, Ms. Wasserman gave Ms. Young the Vineland for completion.

38. In the 2007 Triennial Psychoeducational Assessment, Ms. Wasserman also reported on the level of Student's academic achievement. She noted that, according to her March and April 2007 annual IEP, Student demonstrated performance in academics at approximately level three of the California Alternative Performance Assessment standards. She also reported that, according to her teacher, Student was listening to stories and answering questions at a second grade level. In terms of reading, Ms. Wasserman reported that Student "shows early reading skills by identifying letters and

letter sound relations and can read and write many high frequency words." In terms of mathematics, Ms. Wasserman reported that Student recognized numbers and "can count to ten and above with some assistance." Ms. Wasserman concluded her report with a determination that Student's primary disability category as a special education pupil was Traumatic Brain Injury.

#### The May 2007 District Speech and Language Evaluation

39. In May 2007, as part of the triennial evaluation, Helen Butchers, a Speech and Language Pathologist working for the District, conducted a speech and language assessment of Student. Ms. Butchers had previously provided speech and language therapy for Student when she was in elementary school. For the assessment, Ms. Butchers discussed Student's performance in school with Joseph Horodyski, the SLP at SeaStar. Mother was present for the assessment performed by Ms. Butchers.

40. During the evaluation, Student used her Gemini AAC device. Ms. Butchers observed that Student navigated well through the programmed response pages in the device. However, frequently, Student needed to touch the device multiple times to access the page, word or programmed response needed for communication. During the evaluation, Mother cued and encouraged Student to locate the page where the needed response was located, and interpreted her daughter's communicative intent. From these observations, Ms. Butchers concluded that "(Student) needs a dictionary of core vocabulary to be a more efficient communicator. Her use of 'programmed phrases' does not allow her to formulate her own meaningful expression."

41. Ms. Butchers administered several tests during her evaluation. On the Receptive One-Word Picture Vocabulary Test, Student scored at an age equivalent of three years and seven months. On the Expressive One-Word Picture Vocabulary Test, Student scored at an age equivalent of three years and two months. On a Listening subtest, Ms. Butchers was impressed with Student's effort to demonstrate knowledge

and comprehension “considering all the navigation required on her communication device.” Ms. Butchers also administered a Story Comprehension subtest by reading a story to Student who was not able to concentrate on a four sentence paragraph containing familiar vocabulary. In her report, Ms. Butchers noted that Student had recently experienced seizure activity which may have caused her inability to concentrate. From the test results, Ms. Butchers recommended that Student required direct instruction in vocabulary which would support the development of sentence formation skills.

42. Ms. Butchers also interviewed Mother as part of her speech and language evaluation. Mother reported that her daughter can accurately interpret the facial cues, body language and tone of voice of other persons. Mother also reported that Student uses several facial cues to clearly present her feelings. Mother concluded the interview by stating that she was very pleased with the SeaStar program and that Student had made “remarkable progress” at the school for the past two years.

#### The May 2007 Health Evaluation

43. On May 29, 2007, as part of the triennial evaluation, Celia Delacruz, a Registered Nurse working for the District, prepared a Health Information and an Individual Health Care Plan for Student. In the Health Information, Ms. Delacruz documented Student’s diagnosed disabling conditions, and noted that she has a seizure care plan. In the Individual Health Care Plan, Ms. Delacruz set forth the procedures that a person must follow in the event that Student suffers from a seizure.

#### The May 2007 APE Evaluation

44. On May 29, 2007, as part of the triennial evaluation, Dorothy Helfer, a teacher for the District, performed an Adaptive Physical Education assessment of Student. Ms. Helfer observed Student walking and her balance. Student walked with a



slow and steady gait. Student used a walker with help from a guide. Student was able to take a few steps independently. Student was able to stand independently for several seconds. Ms. Helfer also observed Student throwing and catching a ball. Ms. Helfer noted that Student has excellent core strength, as she was able to complete 38 sit-ups in 60 seconds. Ms. Helfer made several recommendations, including the suggestion that Student exercise by walking on a treadmill and stepping on a stair master.

#### The June 2007 Physical Therapy Evaluation

45. On June 1, 2007, Susan Rouleau, a licensed Physical Therapist working for Children's Therapy Center, prepared a School Physical Therapy Evaluation for Student. Ms. Rouleau based her report upon an observation of Student at SeaStar and information received from Mother and school staff. As part of her evaluation, Ms. Rouleau performed a school functional assessment. In this assessment, Ms. Rouleau observed that Student was able to move about the classroom with close supervision from an aide. Ms. Rouleau also observed that Student had the Gemini with her at all times, but that an aide needed to transport the device because Student was not able to hold her balance and carry the Gemini at the same time. Ms. Rouleau further noted that "(T)ravel within school grounds consist(s) of (a) one-on-one aide guiding (Student) with support at her elbow or forearm and carrying her communication device." The report proposed three annual goals and recommended that Student receive physical therapy services one time per week to increase balance skills and endurance. Ms. Rouleau also suggested that Student's Physical Therapist consult with her APE teacher in order to coordinate activities.

#### The June 2007 SeaStar Speech and Language Report

46. On June 11, 2007, Joseph Horodyski prepared a Speech and Language Report for Student's triennial IEP. In his evaluation, Mr. Horodyski utilized both formal

and informal assessment instruments. For the formal assessments, Mr. Horodyski tested Student with the Comprehensive Assessment of Spoken Language, the Clinical Evaluation of Language Fundamentals – 3rd Edition, and the Preschool Language Scale-3. For the informal assessment, Mr. Horodyski tested Student with the Clinical Assessment of Language Comprehension.

47. The Comprehensive Assessment of Spoken Language (CASL) is a norm-referenced oral language assessment battery. The CASL assesses the pupil's knowledge and performance in the lexical/semantic, syntactic, supralinguistic and pragmatic domains of language. Lexical/semantic refers to knowledge of the meaning of and ability to use single words and word combinations. Under lexical/semantic, Mr. Horodyski tested Student in the areas of synonyms and basic concepts. Student was better able to identify synonyms for nouns and adjectives than for verbs. For basic concepts, Student displayed much difficulty with the concepts of quantity, position/direction, time/sequence and comparisons. The syntactic domain of language refers to knowledge of and ability to use grammatical devices. Under syntactic, Mr. Horodyski tested Student in the areas of grammaticality judgment and sentence comprehension of syntax. Regarding grammaticality judgment, Student was able to correctly recognize the appropriateness or inappropriateness of certain forms such as the negative "not," objective and subjective cases for pronouns, and comparatives. She had difficulty with subject-verb agreement, indefinite pronouns, irregular verbs and nouns, and collective nouns. Regarding sentence comprehension of syntax, which is designed to measure meaning from syntactic structures, Student scored very low. The supralinguistic domain of language refers to the ability to understand language at a level beyond the lexical and grammatical elements. Under supralinguistic, Mr. Horodyski tested Student with the nonliteral language test which measures the ability to comprehend and explain the intended meaning of a spoken utterance when the literal

meaning does not convey the message. Student scored very poorly on this test as her responses were generally a literal interpretation of the non-literal meaning.

48. The Clinical Evaluation of Language Fundamentals – 3rd Edition (CELF-3) assesses a pupil's abilities in the areas of semantics, morphology and syntax, and memory. Mr. Horodyski tested Student with the Word Classes subtest of the CELF-3. This subtest assesses the ability to perceive relationships between words, such as fast/quick, big/little and whisker/cat. Following test protocol, Mr. Horodyski discontinued administering the Word Classes subtest after Student failed to correctly answer the first five items.

49. The Preschool Language Scale-3 (PLS-3) assesses a pupil's abilities of auditory and expressive communication in the areas of attention, semantics, syntax and integrative thinking skills. Mr. Horodyski tested Student with the Auditory Comprehension subtest of the PLS-3. Student demonstrated the ability to understand the use of various objects, part/whole relationships, pronouns, negatives, body parts, colors, complex directions, and descriptive, spatial and time concepts. She had difficulty identifying pictures for receptive vocabulary, making inferences, passive voice sentences, time/sequence concepts and adding/subtracting. Mr. Horodyski noted that the PLS-3 relies heavily upon pictures in order for the examinee to make receptive choices, and he qualified Student's failure to make passing scores on any of the tasks requiring her to identify pictures as probably due to her visual problems or failure to pay attention to the picture's detail.

50. The Clinical Assessment of Language Comprehension (CALC) provides methods to assess a pupil's language comprehension. Mr. Horodyski used materials from the CALC to perform an informal assessment of the syntactic forms that Student was capable of understanding. In particular, Mr. Horodyski attempted to assess Student's word order comprehension. He did not complete this test because Student

did not accurately identify any of the pretest items. For example, she identified "crawling" as "hugging," "kissing" as "hugging," "climbing" as "kissing," and "hugging" as "climbing" in the pictures. Mr. Horodyski attempted to assess Student's comprehension of passive sentences but he discontinued the test after Student perseverated on the same answer 20 times. Mr. Horodyski also tested Student's ability to recognize center-embedded relative clauses and Student responded to four of six questions with accuracy.

51. In his Speech and Language Report for Student's triennial IEP, Mr. Horodyski qualified his test findings by noting that Student did not have her AAC device during the evaluation. He further mentioned that time limitations and Student's visual impairment most likely affected the results on tests that used pictures. Mr. Horodyski concluded his report with a recommendation that ATEC perform a more in-depth assessment of Student's expressive communication abilities with her AAC device.

#### The June 2007 Orientation & Mobility Evaluation

52. On June 11, 2007, Maria Gerard, an Orientation and Mobility Specialist working for the District, prepared an Orientation & Mobility Triennial Evaluation for Student's triennial evaluation. Mother has challenged the appropriateness of this assessment. Ms. Gerard based her report upon an observation of Student at SeaStar and through discussions with school staff and Mother. In terms of orientation, Ms. Gerard reported that Student is a "visual traveler" who uses her vision efficiently while moving about the SeaStar campus. In terms of mobility, Ms. Gerard reported that Student travelled throughout the campus with the constant assistance of a guide. She observed that Student frequently lost her balance and required assistance from the guide to avoid falling. Ms. Gerard observed that, when Student walked independently, she walked with a wide gait and toes pointed out slightly. Ms. Gerard also noted that Student visually navigated through hallways and over doors and that she was able to locate her

classroom desk, reach for a chair and sit with no difficulty. Ms. Gerard recommended the continuation of consultative orientation and mobility services, but did not suggest the provision of direct services because Student was able to visually navigate her environment.

#### The June 2007 Triennial IEP

53. On June 11, 2007, the District convened an IEP meeting for the purpose of conducting Student's triennial review. Sue McClellan, Program Supervisor for the District, facilitated this meeting. Thirteen team members attended the meeting, including Mother and her attorney. Ms. Delacruz (Health Information and Individual Care Plan), Ms. Wasserman (2007 Triennial Psychoeducational Assessment), Ms. Butchers (May 2007 District Speech and Language Evaluation), Mr. Horodyski (June 2007 SeaStar Speech and Language Report), Ms. Helfer (May 2007 Adaptive Physical Education Evaluation), Mr. Winnick (March 2007 Functional Low Vision Assessment), and Ms. Gerard (June 2007 Orientation & Mobility Evaluation) reviewed their respective assessments. The Acting Director from SeaStar indicated that the school still did not have a Physical Therapist who could provide PT services under the March and April 2007 annual IEP.

54. The proposed June 2007 Triennial IEP described Student's primary disability category as Traumatic Brain Injury based upon Ms. Wasserman's 2007 Triennial Psychoeducational Assessment. During the meeting, Mother expressed her disagreement with this categorization. Representatives from California Children's Services informed the team that CCS was no longer able to get a loaner Gemini, and again expressed concern that Student's Gemini might become non-functional before the process of obtaining an appropriate replacement AAC device was completed. Ms. McClellan informed the team that CCS needed an assessment in order to fund a new device and that the District would contact ATEC to begin the assessment process for this

purpose. Mother expressed her preference that she wanted the replacement AAC device to operate on a Macintosh platform in order to remain compatible with her home computer and the programming on Student's Gemini. The meeting adjourned with the intention of reconvening to ensure the attendance of an ATEC representative and further discuss the subject of assistive technology for Student.

#### The June 2007 ATEC Assistive Technology Summary Report

55. On June 28, 2007, Kevin Daugherty prepared an Assistive Technology Summary Report which described the AAC consultations and assistive technology trainings provided by ATEC on behalf of Student at SeaStar during June 2007. Mr. Daugherty is a Rehabilitation Engineer who has worked at ATEC for 11 years evaluating individuals for AT needs and providing training and ongoing support in the field of assistive technology. Mr. Daugherty testified at the due process hearing. Mr. Daugherty presented as knowledgeable, well-informed and unbiased.

56. Mr. Daugherty testified that he and his colleagues at ATEC prepare reports to document training and consultation sessions. He emphasized that such ATEC reports are not evaluations of the needs of the individuals who are the subjects of the reports. His June 2007 report also contained an inventory of assistive technology and software in Student's class at SeaStar. The inventory listed a MacIntosh PowerMac G3 computer and accessories, but did not reference Student's Gemini AAC device. In the March and April 2007 annual IEP, several goals referenced the following software: Picture Word Power, Edmark Reading Series, Don Johnston "Start to Finish" books, Money Management, and Timescales. The inventory in Mr. Daugherty's report indicated that, except for the Don Johnston books, such software was installed and working on the classroom computer. Mr. Daugherty's report made recommendations, including the need to train new staff at SeaStar, the need to replace missing hardware in the classroom, and suggestions

regarding software to improve Student's functional writing, reading, math and money identification, and scheduling abilities.

#### The June 28, 2007 Continued Triennial IEP Meeting

57. On June 28, 2007, Student's IEP team reconvened and completed the triennial review. Sue McClellan again facilitated the meeting. The purpose of the meeting was to review and discuss matters relating to assistive technology in Student's special education program. Mr. Daugherty reviewed his Assistive Technology Summary Report. The team discussed different software to support Student's curriculum at school. Mother informed the team that she was reluctant to switch to a Windows-based computing system because she had spent much time and expense programming files for Student under a MacIntosh platform. Mr. Daugherty explained the process for obtaining a replacement AAC device, and informed the team that at that time ATEC was not preparing a report for a replacement device. Ms. McClellan informed Mother that she would inquire about repair of the District's Gemini AAC device as a loaner for Student. Upon the conclusion of the triennial IEP, Student's educational program remained the special education and related services set forth in her 2007 annual IEP.

#### THE 2007-2008 SCHOOL YEAR

58. For the 2007-2008 school year, Student continued in her attendance at SeaStar. Deborah Young remained her classroom teacher.

59. During the 2007-2008 school year, Student's Gemini required repair and became largely non-operational, at least in the school setting. As the Gemini became more obsolete and required more frequent repairs, Mother faced a number of dilemmas with regard to the selection of a replacement device for her daughter. Most of the hard choices concerned changing from a Macintosh to a Windows PC system. First, Mother had created communication displays on the Gemini using the Macintosh version of

Speaking Dynamically Pro. In that the Gemini was based upon a Macintosh platform that no longer existed, there was considerable doubt that the many custom files that Mother had created could convert to the PC version of Speaking Dynamically Pro. Second, Mother programmed new vocabulary and displays for Student on a desktop Macintosh at home, and downloaded the programs into the Gemini. If Student obtained a replacement AAC device with a Windows platform, Mother could not perform this activity without purchasing a new home computer. Third, Mother had created in the Gemini a significant number of custom displays which would require many hours to recreate on a new AAC device. Mother was concerned that, if the replacement device utilized a different symbol set, Student, in essence, would need to learn a completely new language system.

60. On December 3, 2007, a Physical Therapist from California Children's Services prepared a Physical Therapy MTU Summary which stated, in part, that Student's Gemini was in need of replacement and that ATEC was going to evaluate Student for a new AAC device. On December 12, 2007, an Occupational Therapist from CCS prepared an Occupational Therapy Summary Report which stated, in part, that during the June 2007 triennial IEP, the team recommended that ATEC perform an AAC evaluation as a prelude for obtaining a replacement device, but that "Parent stated this was not necessary, as Medi-Cal does not fund any devices with a Mac platform so (Student) will continue to use Gemini device." This statement reflected Mother's deep reservations in changing from a Macintosh based to a Windows-based AAC device.

61. During the 2007-2008 school year, the District possessed a Gemini AAC device which was available for loan to Student in the event that her Gemini needed repair or ceased operation. This loaner device was not always functional and needed repair. Starting in January 2008, a dispute arose between Mother and the District regarding the loaner Gemini. Mother wanted the loaned AAC device for full use in the



home, school and community. The District was willing to allow full use of the loaned device, provided that Mother sign an Equipment Loan Agreement under which Mother assumed financial responsibility if the device was lost or damaged. Otherwise, the District insisted that Student use the device only at SeaStar. Later, in late April 2008, the District agreed that Student could use the loaner AAC device on her bus ride to and from home and school. The stalemate regarding the loaner device continued until late July 2008, when Mr. Daugherty from ATEC took a Mercury AAC device to SeaStar for use by Student in her classroom. At the due process hearing, Mother testified that, between the need for repair of the Gemini, the dispute regarding a loaner device, and the unavailability of a loaner device that worked, Student was without use of an AAC device in the classroom. The touchscreen on Student's desktop computer also did not function during portions of this school year.

62. On January 8, 2008, Clark Osborne, a Program Supervisor for the District, sent a letter to Mother. The letter informed Mother that the District had determined that the amount of compensatory physical therapy services owed to Student was 43 hours. Mr. Osborne testified at the due process hearing and presented as an efficient, experienced and well-organized school administrator.

#### The March 2008 SeaStar Speech Language Progress Report

63. On March 7, 2008, Mr. Horodyski, the SLP at SeaStar, prepared a Speech-Language Progress Report for Student. In his report, Mr. Horodyski reviewed Student's progress on communication goals in her 2007 annual IEP. Under Pragmatics, Mr. Horodyski reported that Student had met the goal for both releasing contact and decreasing inappropriate tactile contact with her communication partners. However, Student did not meet the goal for volunteering an appropriate social closing without prompts. Under Expressive Language, Mr. Horodyski reported that Student had not met the goal that required her to formulate two complete simple sentences under different

circumstances. From his therapy sessions with Student, Mr. Horodyski observed that Student had difficulty formulating complete sentences and, instead, used idiosyncratic programmed responses in her communications. He attributed two reasons for this difficulty. First, as an external factor, Mr. Horodyski noted that Student's Gemini was broken and not available for use. Second, as an internal factor, Mr. Horodyski cited Student's perseverations, "brain freeze," and task avoidance. Additionally, he observed that, when attempting to create sentences, Student was often unaware of whether her AAC device contained a particular icon and the location of the icon. Further, even when Student knew the location of an icon, she often displayed trouble distinguishing one icon from another, possibly due to the size and label of the icon.

64. Mr. Horodyski reported that Student had not met the Expressive Language goal that required her to signal the need for the programming of new vocabulary on the Gemini. In this regard, he noted that "(Student) has used her device in a manner that reduces her opportunity to use the vocabulary that has been programmed into it." In addition, Mr. Horodyski reported that Student had not met the Receptive Language goal that required her to correctly respond to a request for information on her AAC device. He recommended that Student continue to receive individual speech and language therapy services and suggested communication goals for the upcoming 2008 annual IEP review.

#### The March 7, 2008 Annual IEP

65. On March 7, 2008, the District convened an IEP meeting for the purpose of conducting Student's annual review. Mr. Osborne prepared an agenda and facilitated the meeting. Fifteen team members attended this meeting, including Mother, her attorney and representatives from California Children's Services. The team discussed Student's needs as regards physical therapy, including the purchase of a walker that could accommodate her AAC device. Gallagher Pediatric was the nonpublic agency

providing Student with physical therapy and requested an opportunity to perform a PT assessment. Student's APE teacher reported upon Student's progress in the area of adaptive physical education and recommended several goals relating to walking independently and making better transitions between activities. Deborah Young, Student's teacher at SeaStar, discussed progress on the goals set forth in the March and April 2007 annual IEP, and presented goals for the 2008 annual IEP.

66. At the March 7, 2008 IEP meeting, the team also discussed the assistive technology supporting Student's special education program. Ms. Young made numerous recommendations for supplementary aids and assistive technology to support the goals in the proposed IEP. An ATEC representative reported that a printer power cable and two zip drives were missing in Student's classroom at SeaStar. The team discussed replacement of Student's Gemini and funding for the replacement AAC device. Ms. Young raised the need for ATEC to provide training in the use of Student's AAC device and the classroom computer. The team agreed to have ATEC perform an Assistive Technology Assessment.

67. At the conclusion of the March 7, 2008 annual IEP meeting, Mr. Osborne prepared an Individualized Assessment Plan for Student. The assessment plan proposed assessments of Student in the areas of Psycho-Motor Development and AT/AAC. Mother signed the assessment plan. The IEP team agreed to continue the 2008 annual meeting to April 29, 2008.

#### The April 2008 District Vision Impairment & Blindness Report

68. On April 17, 2008, Mark Winnick prepared a Vision Impairment & Blindness Yearly Summary Report for Student. Mother has challenged the appropriateness of this report. Mr. Winnick based his report upon observations of Student in her classroom at SeaStar and upon discussions with Student's teacher and aides. From an observation that occurred on April 15, 2008, Mr. Winnick determined that

Student “worked exceptionally well on her desktop computer programs.” He noted that, when using a mouse cursor, Student accessed two inch numbers on the computer monitor with her head 10 inches from the screen, but needed to lean forward in order to access numbers and words one-half inch in size. He determined from staff that Student was able to access all of her current software programs except a money program that was too visually confusing. Mr. Winnick determined that Student’s “visual needs are being met in her current classroom environment,” and he made recommendations, including the continuation of vision impairment consultative services and the provision of books on tape for Student.

#### The April 2008 Gallagher Pediatric Physical Therapy Report

69. On April 21, 2008, Gallagher Pediatric, through Christy Marilo, prepared a Physical Therapy Report for Student. Mother has challenged the appropriateness of this report. Ms. Marilo testified at the due process hearing. Ms. Marilo is a licensed Physical Therapist in California and has 15 years of experience in the field and presented as knowledgeable and quite competent.

70. Ms. Marilo based her Physical Therapy Report upon an observation of Student at SeaStar and upon review of pertinent records, including the June 2007 School Physical Therapy Evaluation completed by Children’s Therapy Center and the 2007 annual IEP for Student. Ms. Marilo’s report noted that Gallagher Pediatric had been providing Student with physical therapy services in the amount of two times a week for 30 minute sessions since February 2008. Ms. Marilo’s observation of Student occurred on April 9, 2008. In the observation, Ms. Marilo viewed Student in different school settings, including the classroom, a play room, hallways and boarding a bus. Ms. Marilo’s observation also included activities in which she evaluated Student’s movement and balance. In this regard, Ms. Marilo assessed Student’s abilities to make transitions such as from a sitting position in her wheelchair to a standing position.

71. In her assessment, Ms. Marilo found that Student “was able to access her bus transport to and from school using two railings on the stairs, ambulate with supervision in the hallways and in the classroom, as well as ambulate outside on uneven surfaces without an assistive device.” Based upon this assessment, Ms. Marilo determined that Student was functional in her educational environment. Ms. Marilo also determined that Student’s aide and APE teacher were providing assistance otherwise provided by a Physical Therapist. Ms. Marilo had observed that the APE teacher was assisting Student in gross motor activities and the aide provided support as Student moved about the school. Based upon these determinations, Ms. Marilo recommended the discontinuance of school-based physical therapy services after the provision of compensatory services that SeaStar had failed to provide under Student’s 2006 annual IEP. Ms. Marilo recommended that Gallagher Pediatric provide such compensatory services one time a week in direct treatment and one time a week in collaboration with Student’s teacher, aide, APE instructor and the Physical Therapist from California Children’s Services.

#### The 2007 Triennial Psychoeducational Assessment Update

72. On April 25, 2008, Sashi Wasserman, the District School Psychologist who prepared the 2007 Triennial Psychoeducational Assessment, gave to Student’s teacher at SeaStar the Vineland Adaptive Behavior Scales: Classroom Edition. Ms. Young reported scores which placed Student three or more standard deviations below the norm in the domains covered by the Vineland. Ms. Wasserman concluded that such scores were an adequate representation of the manner in which Student’s disabling conditions affected her ability to function without assistance from adults, peers and adaptive equipment.

### The April 2008 Orientation & Mobility Report

73. On April 29, 2008, Maria Gerard, an Orientation & Mobility Specialist working for the District, prepared an Orientation & Mobility Report for Student. Mother has challenged the appropriateness of this report. Ms. Gerard based her report upon an observation of Student at SeaStar and through discussions with school staff. In terms of orientation, Ms. Gerard determined that Student was oriented to both the school campus and her classroom. In this regard, Ms. Gerard noted that "(Student) uses her vision very efficiently when traveling and continues to be a visual traveler." In terms of mobility, Ms. Gerard reported that Student's "primary mode of travel continues to be sighted guide." Her report recommended the continuation of consultative orientation and mobility services. As with her previous June 2007 report, Ms. Gerard concluded that Student did not require direct vision services "because she is able to visually navigate her environment."

### The April 29, 2008 Continued Annual IEP Meeting

74. On April 29, 2008, Student's IEP team reconvened for further discussion of the annual review. Clark Osborne prepared an agenda and facilitated the meeting. Twenty team members attended this continuation meeting. A Speech and Language Pathologist from SeaStar reviewed Student's progress on certain communication goals and presented new goals in this area. Ms. Wasserman discussed the results of the recent Vineland Adaptive Behavior Scale completed by Student's teacher. Ms. Carilo discussed her Physical Therapy evaluation and the recommendation that the team discontinue physical therapy services for Student. Mr. Winnick discussed his Vision Impairment & Blindness Report.

75. The team also discussed assistive technology and supplementary aides relating to Student's special education program. The SeaStar SLP stated that she recommended certain hardware and software to support proposed goals relating to

communication. Mr. Osborne stated that, under the contract between SeaStar and the District, SeaStar had the responsibility of providing such materials. Mother requested the team to add the hardware and software necessary to support IEP goals under that part of the IEP relating to Assistive Technologies and/or Supplementary Aids. Mother informed the meeting that Student's Gemini was broken and the team discussed the responsibility for repairing the device and the need to provide Student with a loaner AAC device. Mr. Osborne informed Mother that, since she refused to sign a financial responsibility statement, the loaner AAC device was for school only. An IEP member from California Children's Services informed the team that Student's Gemini could not be repaired. Mr. Osborne asked the representative whether CCS would recommend a replacement AAC device. The CCS representative replied that the agency would follow an evaluation made by ATEC and fund the recommended device. Mother raised the point that, if ATEC recommended replacement of the Gemini with a Mercury, then the PowerMac G3 computer in Student's classroom at SeaStar would not be compatible with the new device. The team agreed to continue the 2008 annual IEP review in order to allow ATEC the opportunity to complete an AT evaluation.

#### The June 2008 ATEC Report

76. On June 23, 2008, Joseph Swingle prepared an Augmentative and Alternative Communication Evaluation Report (AAC Report) for Student. Mother has challenged the appropriateness of the AAC Report. Mr. Swingle prepared the AAC Report with the assistance of Kevin Daugherty, his colleague at ATEC. Mr. Swingle is a licensed Speech and Language Pathologist with a speciality of working with individuals who have assistive technology needs. He has been an Augmentative Communication specialist with ATEC for the last two and one-half years. Mr. Swingle testified at the due process hearing. He presented as knowledgeable, well-informed and unbiased.

77. According to Mr. Swingle, the purpose of the AAC Report was to determine a voice output device to replace Student's Gemini which was non-functional. For the AAC Report, Mr. Swingle reviewed documents provided by the District to ATEC, including IEP and assessment information concerning Student. Mr. Swingle also had discussions regarding Student with her Mother, her teacher and aide at SeaStar, Mr. Daugherty, and Leisa Salvo, the Speech and Language Pathologist at ATEC who had previously worked with Student.

78. In preparing the AAC Report, Mr. Swingle evaluated Student in her classroom at SeaStar. Student's teacher, her aide and Vicky Vu, an Occupational Therapist from California Children's Services, were present for the assessment. During the evaluation, Mr. Swingle presented Student with different AAC devices. He observed that, with a 12 inch computer screen, Student accurately activated buttons that were part of a display of 20 to 30 buttons on the screen, but that she was less accurate when the layouts increased to 60 buttons. Mr. Swingle also observed Student utilizing the BoardMaker with Speaking Dynamically Pro communication pages on the classroom desktop computer. He noted that Student was very functional in using such communication pages. She navigated through many pages of vocabulary to answer questions about people and activities at school, home and in the community. Mr. Swingle also noted that Student used Picture Word Power on the desktop computer to create simple sentences like "I would like to play," but that she had difficulty using the computer to spell words. As a further aspect of his evaluation, Mr. Swingle tested Student with informal language tasks. For example, in order to test Student's picture identification and vocabulary skills, Mr. Swingle presented her with pictures of common objects which were named and appeared in different sized layouts, and asked Student to identify the pictures.



79. In order to determine an appropriate replacement AAC device, Mr. Swingle evaluated Student with the following systems.

- a. The Vmax, from DynaVox Systems, Inc., is an AAC device with a 12.1 inch color screen. The Vmax is Windows-based, allows for both text to speech and picture-based communication, and uses synthesized speech. The Vmax comes with Gateway Language software. Mr. Swingle observed Student using a previous but comparable version of the Vmax system. She created simple sentences such as "I drink juice" and "I go outside."
- b. The Mercury II, from Tobii-ATI, is an AAC device with a 12 inch dynamic display. The Mercury II comes with the option of using either BoardMaker with Speaking Dynamically Pro or VS Communicator software. The Mercury II is Windows-based. Mr. Swingle observed Student using the Mercury II and the BoardMaker with Speaking Dynamically Pro with a 30 button layout. She created simple sentences such as "I want to go home" and "What is that?"
- c. Mr. Swingle also observed Student using the Mercury II with the VS Communicator software. This software utilizes different symbols than BoardMaker with Speaking Dynamically Pro. Nevertheless, with verbal prompts, Student was able to create messages such as "I don't like to use the computer" and "I like to watch TV."
- d. Mr. Swingle was aware of Mother's preference to replace the Gemini with a MacIntosh-based device. He evaluated Student using several systems that are comparable to Mac-based products. The Modbook is a Mac notebook computer modified to be a tablet computer. The Modbook requires input through a tablet pen rather than through touch screen access. The Modbook was not available for trial or evaluation, so Mr. Swingle had Student attempt to use a tablet notebook which contained the BoardMaker with Speaking

Dynamically Pro software. Mr. Swingle observed that Student had difficulty holding the tablet pen and activating the screen on the notebook computer. He also observed that, while attempting to create two simple sentences, Student made numerous mistakes touching the intended button on the screen.

- e. The Troll Touch MacBook is another Mac notebook that allows for touch screen access to the device. Likewise, the Troll Touchbook was not available for trial or evaluation, so Mr. Swingle had Student use a touch screen notebook which contained the BoardMaker with Speaking Dynamically Pro software. Mr. Swingle observed that, in order to use this system, Student needed to reach across the keyboard to access the touch screen, and that, when she activated the screen, it moved further from her hand. On occasion, after Student touched the device, the notebook lifted and fell over.

80. Upon consideration of these systems, Mr. Swingle recommended the Mercury II, running BoardMaker with Speaking Dynamically Pro and Picture Word Power software, as the replacement AAC device for Student. Mr. Swingle made this recommendation based upon Student's success in using the Mercury II during his evaluation, her ability to easily formulate messages while using the BoardMaker with Speaking Dynamically Pro software, and the expected ease of transition to the newer version of such software on the Mercury II. He did not recommend the Vmax because, in his opinion, Student would need to spend much time and energy learning a new and different language system. He did not recommend the Modbook because Student had difficulty using the tablet pen in accessing the system. He did not recommend the Mac Troll Touchbook because Student would require the assistance of an aide to adjust the touch screen after every activation. Mr. Swingle did not recommend performing a trial of the Mercury II. On this subject, his report stated: "The Mercury and the Gemini are

significantly comparable in features so that for (Student), the use of the Mercury is expected to be similar to her use of the Gemini once her current pages have been added. Thus, a device trial for the purpose of determining its effectiveness is not deemed necessary.”

81. Mr. Swingle further recommended transfer of the communication pages from Student’s Gemini to the Mercury II AAC device. In his AAC Report, Mr. Swingle noted that Tobii-ATI, the manufacturer of the Mercury II, had informed him that transfer of the communication pages was possible but that there was no guarantee that the transfer would be error free.

82. Finally, Mr. Swingle recommended that ATEC provide services, training and support with respect to the proposed new AAC device. With regard to the Mercury II, he recommended that ATEC provide 12 hours of service time to set-up, program and transfer files from the Gemini. He also recommended that, during the coming school year, ATEC provide for school staff 24 hours of consultation and training services to promote communication development and the effective use of the Mercury II.

83. Mr. Swingle’s AAC Report contained an addendum entitled “Specific Information Requested by CCS for Purchase of AAC Device.” The purpose of the addendum was to provide a recommendation that would support a decision by the California Children’s Center to purchase an AAC device to replace the Gemini. In the addendum, Mr. Swingle repeated the recommendations in his AAC Report. On the matter of performing trials of different AAC devices, the addendum stated: “ATEC was informed by CCS that no trial period would be necessary to move forward with the purchase as (Student) has a demonstrated history of being able to use previous AAC devices. In addition, CCS was present at the evaluation session and observed (Student) using the software being recommended.”

84. In conjunction with Mr. Swingle's AAC Report, on July 7, 2008, Kevin Daugherty prepared an Assistive Technology Summary Report which contained an inventory of the computer equipment and software in Student's classroom at SeaStar. In his report, Mr. Daugherty noted that Student continued to use the PowerMac G3, a MacIntosh computer, that was outdated and no longer supported by the manufacturer. Regarding the classroom computer, Mr. Daugherty noted that "(T)he staff report that the Magic Touch touchscreen works but frequently needs calibration." Aware of Mr. Swingle's AAC Report and the recommendation regarding the Mercury II, Mr. Daugherty recommended that, if a new computer was purchased for Student, the District should acquire a Windows-based computer. Mr. Daugherty suggested the purchase and installation of educational software programs on the new computer, including the Edmark Reading System Level 2, the IntelliTools Classroom Suite 3 with Overlay Maker 3, and Don Johnston Start to Finish books. Mr. Daugherty also recommended that ATEC provide AT training in the amount of 90 minutes once a month for eight months.

#### The July 8, 2008 Continued Annual IEP Meeting

85. On July 8, 2008, Student's IEP team reconvened and completed the annual review. Clark Osborne again prepared an agenda and facilitated the meeting. Thirteen team members attended this meeting. At the outset, Mother stated that she thought that Student's special education program and placement were appropriate, but that she was not satisfied with the lack of assistive technologies and supports available in the program. Mother also expressed her disagreement with Ms. Wasserman's assessment regarding Student's intelligence, stating that research has shown that with intensive instruction a person's intelligence and abilities can improve. The team reviewed the proposed Individual Transition Plan and discussed Student's eligibility categories.

86. The recent ATEC reports were the primary focus of the continued IEP meeting. Joseph Swingle attended and discussed his AAC Report dated June 23, 2008.

Kevin Daugherty attended and discussed his Assistive Technology Summary Report dated July 7, 2008. Mr. Osborne informed the team that the District supported Mr. Swingle's recommendations. Several representatives from California Children's Services attended the meeting and stated that upon approval by Mother the agency would provide funding to purchase the Mercury II AAC device and the software recommended in Mr. Swingle's report. The CCS representatives informed the team that the new device was intended for use in home, school and community. The same representatives stated that the agency would pay for repairs to the new device and could provide a loaner device in the event that the Mercury II needed repairs. Mother expressed reservations about Mr. Swingle's evaluation and recommendations. Mother was concerned that the version of the software BoardMaker with Speaking Dynamically Pro on the desktop computer in Student's classroom would be different than the version of the same software on the Mercury II AAC device. Mother was concerned that without a new desktop computer in the classroom, the proposed new AAC device could not be supported. Mother also expressed concern about the transfer of communication files that she had created on Student's Gemini to the Mercury II. Mother asked whether ATEC had a Mercury AAC device available in its loan library for use by Student during her summer program. The ATEC representatives replied that such a device was available.

#### The 2008 Annual IEP

87. The March, April and July 2008 annual IEP continued to describe Student's primary disabling condition as Traumatic Brain Injury and a secondary disability as Orthopedic Impairment. This IEP also provided that Student qualified for special education under the disabling conditions of Vision Impairment and Speech and Language Impairment. Regarding the manner in which Student's disabilities affected her involvement and progress in school, this IEP repeated previous IEP documents with the

statement that “(Student’s) physical, visual and cognitive abilities requires a curriculum focusing on functional daily living skills not available in a general education program.”

88. The 2008 annual IEP contained the following goals to address Student’s areas of need.

- a. English Language Arts – Functional Writing: Student’s teacher at SeaStar informed the IEP team that Student had met the English Language Arts – Functional Writing goal from her 2007 annual IEP. Student was able to use descriptive adjectives to describe a familiar person, place or thing. Student needed practice using action words in such descriptions. In order to increase Student’s functional use of her AAC device, the IEP team developed a goal that required Student to write sentences using both a descriptive adjective and an action word. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: Desktop Computer; Touch Screen; Intellikeys keyboard; portable AAC device; printer; Edmark Functional Word Series; Edmark Reading Program – Software Level 2; Speaking Dynamically Pro with Picture Word Power; Mayer-Johnson BoardMaker; Overlay maker; and Intellitools Classroom Suite.
- b. English Language Arts – Functional Reading: Student’s teacher reported to the IEP team that Student had mastered recognition of the Edmark Reading Level 1 Program which consists of 120 common sight words. The IEP team developed a goal to further improve Student’s ability in this regard by requiring Student to demonstrate recognition and understanding of 60 new sight words from the Edmark Reading Level 2 Program. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1 relating to English Language Arts – Functional Writing.

- c. English Language Arts – Functional Reading: Student had recently received stories on CD from the Don Johnston Start to Finish series, and needed verbal prompts in order to answer questions about stories that she had heard. The IEP team formulated a goal to improve Student's abilities in this regard by requiring Student to write descriptive paragraphs about stories that she has read and heard. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1, and, in addition, listed Don Johnston Start to Finish Reading Series Software – "Tales from Mexico" and "Women Heroes of the American Revolution."
- d. English Language Arts: While Student demonstrated the ability to identify on her AAC device and on the desktop classroom computer the initial and final letter of a word, she continued to have difficulty recognizing vowel sounds. The IEP team developed a goal to improve Student's communication abilities through the identification of vowel sounds in short words. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated in Goal No. 1.
- e. Mathematics – Counting and Money: Student's teacher at SeaStar informed the IEP team that Student had met the Mathematics – Purchasing goal from her 2007 annual IEP. Student demonstrated the ability to pay for goods and wait for change with a minimal level of assistance. However, Student had difficulty sorting coins and identifying the value of coins. The IEP team developed a goal to further improve Student's ability to use hard money to purchase items. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1, and, in addition, listed Marblesoft Math, Dollars and Cents and Timescales software programs.

- f. Mathematics – Time Management: Ms. Young also reported that Student had met the Mathematics – Time Management goal from the March and April 2007 annual IEP. To further improve this ability, the IEP team formulated a goal requiring Student to match scheduled classroom activities with the time of day on the clock in her AAC device and on her visual activity board. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1, and, in addition, listed a Multi-User Appointment Dairy/Alarm System.
- g. Science – Life Science: In order to increase her self-confidence and develop responsibility, the IEP team developed a goal requiring Student to start from seed and care for a small plant. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1, and, in addition, listed the Marblesoft Math Learning Suite and Timescales software programs.
- h. H/SS – Vocational Skills: Ms. Young informed the IEP team that Student had met the Prevocational goal relating to career investigation in her 2007 annual IEP. At the time of the 2008 annual IEP, Student was participating in an off-campus community based activity one day a week with school staff assistance. In order to improve Student's vocational skills, the IEP team developed a goal that required Student to complete her work assignments through reminders in a visual work schedule and on her AAC device. To support this goal, the IEP contained much of the same Assistive Technology and/or Supplementary Aids designated under Goal No. 1.
- i. Receptive Language: An SLP from SeaStar reported that, rather than use word icons, Student relied upon preprogrammed responses in the Gemini in order to convey her communicative intent. This reliance gave the impression that



Student did not have a complete understanding of the word icons programmed in her AAC device. In order to improve Student's ability in this regard, the IEP team developed a goal requiring her to locate a minimum of 100 single word icons.

- j. Expressive Language: Student also relied upon idiosyncratic responses to convey her communicative intent. This type of response reinforced the impression that Student was unfamiliar with the location of icons and labels in the Gemini which would allow her to create simple sentences. In order to improve Student's ability in this regard, the IEP team formulated a goal that required Student to write in her communication device complete simple sentences that asked questions or provided clarification to her communication partner.
- k. Pragmatic Language: The SLP from SeaStar informed the IEP team that Student had met part of the Pragmatics goal from her 2007 annual IEP. However, Student continued to need improvement in the area of closing a social contact. The IEP team formulated a goal to help Student by teaching her to volunteer an appropriate social closing when leaving or terminating a conversation. The IEP did not specify Assistive Technology and/or Supplementary Aids, but referenced the "use of appropriate hardware and software to achieve this goal."
- l. Receptive Language: The SLP from SeaStar also reported that Student had difficulty responding to requests for information which was a further indication that she had trouble locating icons programmed in the Gemini. The IEP team developed a goal to help Student use her AAC device more effectively in responding to such requests. Again, the IEP did not specify

Assistive Technology and/or Supplementary Aides, but did reference “appropriate hardware and software” in connection with this goal.

- m. Physical Education – Fitness and Balance: Upon a recommendation from Student’s APE teacher, in order to improve Student’s mobility, the IEP team developed a goal that required Student to walk with standby assistance for up to 20 steps, and to walk continuously with minimal assistance from a guide for 30 minutes.
- n. Physical Education – Social Skills: The APE teacher also reported to the IEP team that Student tended to stay on a piece of equipment and that she had difficulty with transitions to new activities. The IEP team developed a goal to help Student with such transitions.

89. At the conclusion of the March, April and July 2008 annual IEP, the District offered Student the following special education program for the period from March 7, 2008 to March 7, 2009.

- a. Group specialized academic instruction in a moderate/severe classroom at an NPS (SeaStar) in the amount of 1,620 minutes each week.
- b. Individual language and speech services in the amount of two 30-minute sessions each week provided by SeaStar.
- c. Individual adaptive physical education services in the amount of five 30-minute sessions each week provided by SeaStar.
- d. A discontinuance of individual physical therapy services. In accord with Mr. Osborne’s January 2008 letter to Mother, the IEP notes stated that the District would provide Student with 43 hours of compensatory physical therapy services, 50 minutes direct weekly and 50 minutes collaboration with SeaStar staff, provided by an NPA.

- e. Consultative orientation and mobility services in the amount of four 60-minute sessions provided by District personnel at SeaStar.
- f. Consultative specialized vision services in the amount of six 30-minute sessions provided by District personnel at SeaStar.
- g. A full-time Independence Facilitator provided by SeaStar.
- h. Consultative assistive technology services in the amount of 24 hours over a 10-month period, provided by ATEC. The IEP designated such services as "ATEC/AAC consult services for the team (including parent) to continue to promote communication development and effective use of the device for educational goals."
- i. Consultative assistive technology services in the amount of 90 minutes each month for nine months, provided by ATEC. The IEP designated such services as "ATEC/AT monthly consultation. . . to address assistive technology training for support team (including parent)." The purpose of both consultative assistive technology services was to promote the effective use of hardware and software in Student's special education program.
- j. Transportation services.

90. The 2008 annual IEP offered Student the same special education program for the 2008 ESY which lasted from July 7, 2008 to August 19, 2008.

91. The 2008 annual IEP also contained an Individualized Transition Plan. The ITP informed Student that her projected exit date from special education is December 31, 2010. The ITP referenced a Transition Assessment which reflected Student's interest in working at the Institute for Applied Behavioral Analysis, and noted that Student requires a high level of support in every activity. The ITP contained goals in the areas of training/education, employment and independent living. The ITP also contained a section denominated "Transition Plan Services & Activities to Support Post-Secondary

Goals.” Under this section, the ITP contained brief descriptions of services designed to help Student after she exits from special education. For example, under “Instruction,” the ITP referenced “Vocational Training Exploration” and stated that “(Student) will research the Internet and find appropriate vocational training software to purchase for training.”

#### Mother’s Response to the 2008 Annual IEP

92. On July 22, 2008, through a letter written by her attorney to Clark Osborne, Mother provided consent, dissent, and qualification to the 2008 annual IEP, and expressed her areas of concern with this IEP. Mother consented to the following provisions in the 2008 annual IEP: (1) placement of Student at SeaStar; (2) the related service of transportation of Student to and from home and SeaStar; (3) the related service of individual speech and language therapy; (4) the full-time Independence Facilitator; (5) the related service of orientation and mobility consultations; (6) the related service of vision impairment consultations; (7) the related service of individual adapted physical education; (8) all of the goals set forth in the IEP; (9) all of the assistive technology devices set forth in the IEP; (10) all of the consultation and training services listed in the IEP; (11) the special education program for the 2008 ESY; (12) the Individualized Transition Plan in the IEP; and (13) the provision of 43 hours of compensatory physical therapy services.

93. Mother dissented from the offer to discontinue the related service of physical therapy, and objected that the District intended to provide half of the compensatory hours of physical therapy on a consultative or collaborative basis. As regards qualifications, the letter requested Mr. Osborne to make numerous corrections and amendments in the 2008 annual IEP. The letter also listed seven parental concerns, including the fact that there continued to be a lack of a functional AAC device in Student’s educational program.

94. Although, in the July 22, 2008 letter, Mother consented to the provision of all assistive technology devices contained in Student's 2008 annual IEP, she did not provide approval for Mr. Swingle's recommendation that California Children's Services purchase a Mercury II as a replacement AAC device. In addition to her concerns regarding a change from a Mac-based to a Windows-based communication system, Mother wanted the District to conduct trials of different AAC devices in order to arrive at the best choice for her daughter. Mother had concerns that Student's special education team at school did not have the ability to support Student's use of an AAC device. Mother also had concerns that Tobii-ATI was in the process of converting to a new AAC device called the C12, and that the Mercury II would become obsolete like the Gemini.

95. On July 31, 2008, Mr. Daugherty delivered a Mercury AAC device to Student's classroom at SeaStar. At the time, Student was attending SeaStar as part of her ESY 2008 program. The District arranged for the provision of this Mercury as a loan through ATEC for use by Student in the classroom while the parties attempted to resolve the issue of the proper replacement AAC device. On August 1, 2008, Mother sent an email to Mr. Daugherty which stated, in part, that "(Student) was excited to have the loaner Mercury, she says the Functionally Speaking files are easy to understand and use."

96. On September 4, 2008, Clark Osborne sent a "prior written notice" letter to Mother's attorney. The letter informed Mother that, with regard to the compensatory physical education hours owed to Student, the District agreed to provide 43 hours of direct service as opposed to half of such time in the form of consultative or collaborative services.

#### THE 2008-2009 SCHOOL YEAR

97. The 2008-2009 school year was tumultuous for Student, her Mother and the District administrators responsible for Student's special education program. Student

started this school year at SeaStar. However, during October 2008, SeaStar notified the District that, effective October 31, 2008, it was closing. Consequently, the District, through Clark Osborne, scrambled to make arrangements for Student to attend another NPS called Grace Education School (Grace Education). Still later in the school year, in March 2009, the District cancelled its agreement with Grace and made arrangements for Student to attend yet another non-public school called Buena Park Speech and Language Development Center (Buena Park SLDC) where Student started attending in early June 2009.

98. On October 21, 2008, Joseph Swingle went to SeaStar to perform an on-site consultation regarding Student's AT devices. At that time, Mr. Swingle met with Mother, the school's Speech and Language Pathologist, and Student's teacher and aide. He observed that Student was using the Mercury AAC device on loan from ATEC. The loaned device had Speaking Dynamically Pro with a default page set, but the SeaStar staff noted concern that the Mercury contained only core vocabulary and did not have custom displays. Staff also informed Mr. Swingle that the touchscreen on the Mercury did not remain calibrated. During this meeting, Mother voiced her concerns about changing augmentative communication systems and the level of support from Student's special education team. Mother also told Mr. Swingle that she thought that she was the only person who could support her daughter's use of AAC.

99. On October 28, 2008, Clark Osborne prepared an Addendum IEP for the purpose of changing Student's placement from SeaStar to Grace Education. Mr. Osborne testified that he had discussed a change in placement with Mother prior to this date and that Mother had expressed a preference for Grace Education. The Addendum IEP did not involve a formal IEP meeting. On October 30, 2008, Mother provided consent that the District place Student at Grace Education under the special education program set forth in her 2008 annual IEP. Mother, however, noted several ongoing

objections, including her opinion that the Orientation & Mobility and Vision specialists for the District should be providing Student with direct services.

#### Problems at Grace Education

100. On November 3, 2008, Student started attending Grace Education under her March, April and July 2008 annual IEP. Deborah Young and other personnel from SeaStar moved to Grace Education and Student remained in Ms. Young's classroom. Previously, Kevin Daugherty from ATEC had packed and moved Student's assistive technology from SeaStar to Grace Education. Initially, Mr. Daugherty reported that, on Student's first day at Grace Education, the loaned Mercury AAC device, the classroom computer and other accessories were functioning properly. Later, during the due process hearing, Mr. Daugherty qualified this report by stating that the loaned Mercury device was not fully functional.

101. Under the NPS contract with the District, Grace Education was required to provide transportation for Student to and from home and the school. However, on November 24, 2008, Grace Education informed an Assistant Superintendent of the District that the private school could not provide transportation services for Student. In response, according to her testimony at the due process hearing, Mother was required to transport her daughter to and from Grace Education for about four or five weeks. The District has not reimbursed Mother for providing this service.

102. On December 3, 2008, Mother informed Mr. Daugherty that the loaned Mercury ACC device was not working. The LCD display on the AAC device had failed. On the same day, Mr. Daugherty took another Mercury from the ATEC inventory to Grace Education for use by Student in her classroom. This second loaner did not hold the updated pages contained in the first loaned device, but several days later, with the assistance of Mother, Mr. Daugherty restored the Functionally Speaking boards onto the second loaned device and continued training staff at Grace Education in AT matters.

103. On January 30, 2009, Kevin Daugherty from ATEC replaced Student's classroom desktop computer, the PowerMac G3, with a Windows XP computer. This replacement was a loan from ATEC to Grace Education and satisfied the recommendation made by Mr. Daugherty in his July 2008 AT Summary Report which suggested a Windows computer for Student. Previously, the Magic Touch touch screen on the PowerMac G3 had not been working. Also, previously, on January 22, 2009, Mr. Daugherty reported that "ATEC looked in the classroom to see what assistive technology equipment is in place from the last IEP. The only thing that has arrived is the Edmark Reading Level 2 software." In March 2009, Student's aide reported to Mr. Daugherty that the replacement Windows XP computer did not contain software programs designated in Student's 2008 annual IEP, including Picture Word Power, Timescales and the Early Learning Suite.

#### The February 18, 2009 Emergency IEP

104. In January 2009, Grace Education notified the District that it did not have an Adaptive Physical Education teacher and could not provide the APE related service under Student's 2008 annual IEP. In response to this notice, on February 19, 2009, the District convened an IEP meeting for the purpose of conducting an emergency review of placement. Eleven team members attending the meeting, including Mother and Charles Logan, a Director at Grace Education. Mr. Logan explained that he called the meeting to inform the team about the circumstances relating to the provision of adaptive physical education services for Student. In response, Mr. Osborne informed the team that the District would consider available options in light of the fact that Grace Education was not fully implementing Student's IEP. A representative from Gallagher Pediatric informed the team that she had been going to Grace Education to provide Student with the compensatory physical therapy required under the 2008 annual IEP, but that Mother had directed Grace Education not to allow the provision of such services.



105. The team also discussed matters relating to assistive technology. Mother stated that Student's progress in her special education program was limited due to the failure to implement the AT recommendations set forth in the June 2008 ATEC reports by Mr. Swingle and Mr. Daugherty. Mr. Swingle repeated the recommendations from his June 2008 AAC Report, and attempted to reassure Mother that, in the event that communication files from Student's Gemini did not transfer successfully to the recommended Mercury II AAC device, then he would work to recreate the files. The matter relating to a replacement AAC device remained unresolved.

#### The February 2009 ATEC AAC Consultation Summary Report

106. On February 20, 2009, Joseph Swingle prepared an ATEC Augmentative/Alternative Communication Consultation Summary Report. Mother has challenged the appropriateness of this report. Mr. Swingle's report referenced previous recommendations made by ATEC. The report chronicled events relating to Student's AT devices, including the need to provide a second loaned Mercury AAC device and Mother's continuing concerns over a change in communication systems. Regarding the loaner device, Mr. Swingle reported: "(S)ome problems with the loaned Mercury device were encountered during this period and ATEC's Rehabilitation Engineer has worked with the team attempting to facilitate the continued loan process via use of a separate device since the first loaned system needed to be repaired by the manufacturer." The report repeated the recommendation for purchase of a Mercury II as a replacement of Student's Gemini, and noted that "(T)he current system that (Student) has available on-loan from ATEC does not have customized vocabulary so she is limited in her ability to effectively and functionally communicate during her normal routines and in her normal environments."

### Termination of Agreement with Grace Education

107. On February 25, 2009, a District Assistant Superintendent sent a letter to the Director of Grace Education informing that, effective March 23, 2009, the District was terminating the NPS Master Contract with the private school. At the due process hearing, Clark Osborne testified that the District took this step because Grace Education was not providing adaptive physical education services under Student's 2008 annual IEP, and the District did not want to repeat the same problems encountered through the previous failure by SeaStar to provide physical therapy services. On February 27, 2009, the Assistant Superintendent sent a letter to Mother, informing her of the decision to cancel the contract with Grace Education, and stating that the District had identified two non-public schools as potential replacements for Student: Buena Park SLDC and the Cleta Harder Development Center in La Habra, California. On March 3, 2009, Mother sent a response letter which stated, in part, that she expected Student's placement to remain at Grace Education. On March 9, 2009, Grace Education sent a letter to the Assistant Superintendent confirming termination of the Master Contract with the District.

### The February 2009 District Vision Impairment & Blindness Report

108. On February 27, 2009, Mark Winnick prepared a Vision Impairment & Blindness Yearly Summary Report for Student. Mother has challenged the appropriateness of this report. Mr. Winnick's 2009 report is an update of his April 2008 report of the same nature. For the update, Mr. Winnick observed Student in the classroom at Grace Education and discussed her visual needs with the teacher and aide. He noted that Student was using the Mercury AAC device loaned from ATEC and that she had access to the Edmark Reading Level 2 software program. He also noted that Student continued to experience difficulty seeing the Dollars & Cents software program.

Overall, he concluded that Student's "visual needs continue to be met in her current classroom environment at Grace Education."

#### The March 2009 Grace Education Speech Language Progress Report

109. On March 3, 2009, Joseph Horodyski, the SLP now working at Grace Education, prepared a Speech-Language Progress Report for Student. In his report, Mr. Horodyski noted that Student had failed to meet goals relating to pragmatics, expressive language and receptive language in her 2008 annual IEP. Each goal concerned Student's use of her AAC device, and Mr. Horodyski attributed her failure to meet the goals on the fact that Student had been able to use the Mercury loaned by ATEC for only a short period of time. He also observed that "(B)ecause the communication device has not yet been fully programmed for (Student's) communication needs, it is difficult for simple sentences to be created without the need to use the online keyboard to spell words." In this vein, Mr. Horodyski recommended the provision of sufficient programming time so that Student's new communication device could be functional for her needs.

#### The March 2009 Annual IEP

110. On March 3, 2009, the District convened an IEP meeting for the purpose of conducting Student's annual review. Clark Osborne prepared an agenda and facilitated the meeting. Seventeen team members attended the meeting, including Mother and representatives from California Children's Services. An Orientation & Mobility Specialist for the District reported to the team that Student's mobility needs had not changed. Mr. Winnick presented his February 2009 Vision Impairment & Blindness Report. A representative from Gallagher Pediatric reviewed the June 2008 Physical Therapy Evaluation by Christy Marilo, and continued in the recommendation that the District discontinue the provision of physical therapy services, except for the 43 hours of

compensatory time owed Student. The team discussed the fact that the District had terminated the NPS contract with Grace Education.

111. At the March 3, 2009 IEP meeting, the team discussed the assistive technology supporting Student's special education program. The team noted that Student did not have an AAC device for much of the 2008 ESY. Mr. Horodyski reported that the Mercury loaned from ATEC needed programming. Mr. Swingle reported that the Mercury did not have specific vocabulary for Student. Mr. Swingle also continued in his recommendation that California Children's Services purchase a Mercury II as the replacement AAC device for Student's Gemini. Representatives from CCS informed the team that the agency would purchase the Mercury II upon approval by Mother who continued to express reservations about changing to a Windows-based system. Mother stated that she thought that trials of both devices and software were necessary in order to select an appropriate AAC system for Student. Mother presented information on several newer AAC devices, including the C12 from Tobii-ATI.

112. At the March 3, 2009 IEP meeting, Mother presented the team with a list of requests relating to Student's 2009 annual IEP. The list included requests that Student participate in age and skill appropriate general curriculum instruction and activities; that Student receive a wide array of related services; that the District assess Student to determine if she has a specific learning disability; that the District assess Student according to California Alternative Performance Achievement standards, scientific interventions and peer-reviewed testing materials; that the District locate and identify specifically enumerated curriculum materials for use by Student's teachers and service providers; that the District provide Student with a personal attendant while she rides the bus to and from school; that the District fund physical therapy services provided by a PT from Grace Education; and that the District ensure that all AT provided to Student is available for home use.

113. The proposed March 2009 IEP described Student's primary eligibility category as Multiple Disabilities and contained the following goals to address Student's areas of need.

- a. English Language Arts – Functional Reading: Deborah Young reported that Student had met the English Language Arts – Functional Writing and Reading goals in her 2008 annual IEP. She also reported that Student had started to master 20 words from the Edmark Reading Level II software program. The IEP team developed a goal to improve this ability by requiring Student to demonstrate recognition of 90 new words on her AAC device and the classroom computer. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: personal AAC, desktop computer and the Edmark Reading Level II series.
- b. Expressive Language – Pragmatics: With a new AAC device, the Mercury loaned by ATEC, Student needed assistance through prompts in making appropriate greetings and closings. The IEP team formulated a goal that required Student to improve her skills in making such social greetings and closings on the AAC device.
- c. Receptive Language: An informal assessment determined that Student had difficulty understanding whether a sentence contained the correct agreement between subject and verb. The IEP team developed a goal designed to improve Student's receptive language skills by requiring her to correctly identify whether or not a sentence contained the proper agreement between subject and verb.
- d. Life Science: Ms. Young reported to the team that Student had met the Science – Life Science goal in her 2008 annual IEP as regards the planting and caring of plants. She noted that Student required assistance from staff, but

participated in the planting, fertilizing and watering of tomatoes and flowers.

To continue this growth process, the IEP team formulated a goal that required Student to care and feed a fish with help from a feeding schedule on her AAC device. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: personal AAC device, desktop computer and printer, fish, fish bowl and fish food.

- e. Vocational: Ms. Young reported to the team that Student had met the Mathematics – Counting and Money goal in her 2008 annual IEP. Student had the ability to purchase items from the school store with the use of proper coins. However, Student required incentives to complete various daily tasks such as matters relating to personal hygiene and academics. She also needed to learn more about expectations from holding a job. The IEP team developed a goal designed to improve Student's organizational skills by requiring her to submit a completed work chart after she completed assignments. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: personal AAC device, desktop computer and printer.
- f. English Language Arts: The team noted that Student enjoyed communicating with classmates and that she demonstrated the desire to engage in educational group settings. To improve Student's abilities to engage in such settings, the IEP team formulated a goal that required Student, using her AAC device, to participate in a cooperative learning group by responding accurately to 20 yes/no questions with a minimum of verbal prompts. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: personal AAC device, desktop computer and printer.
- g. Health Skill: Student's school schedule included a time for physical education. The IEP team developed a goal to assist Student during this period by

- requiring her to use recreation equipment on a regular basis or walk the perimeter of the playground with a minimum of verbal encouragement.
- h. Mathematics: Ms. Young reported to the team that Student was able to count and identify numbers up to 40 on her AAC device with 55% accuracy. Student performed this task by pointing to numbers on a board or on the AAC device. Ms. Young reported that Student did not demonstrate the ability to type a number when requested. The IEP team developed a goal to improve Student's skills in this regard by requiring her to produce the correct numeral up to 50 when requested on her AAC device. The IEP designated the following Assistive Technology and/or Supplementary Aids to support this goal: personal AAC device, desktop computer with printer, and Marblesoft Math software.
  - i. History – Social Science - Vocational: Ms. Young informed the team that Student had met the Vocational Skills goal from her 2008 annual IEP. She reported that Student performed errands at school such as delivering attendance to the office and cleaning cafeteria tables. She also reported that Student always willingly participated in school fundraisers. To further improve Student's social and vocational skills, the IEP team developed a goal that required Student to participate in a service project that benefits the school and community.
  - j. Expressive Language: Mr. Horodyski informed the team that Student was not familiar with the new AAC device, the Mercury on loan from ATEC. He also noted that the Mercury was not yet fully programmed. With this in mind, the IEP team developed a goal to help Student gain mastery of the new AAC device by formulating at least three simple sentences on the device with a minimum of prompts. The team also developed a goal that required Student to locate a minimum of 100 single word icons on the new AAC device.

114. The proposed March 2009 IEP offered Student the following special education program for the period from March 3, 2009 to March 3, 2010.

- a. Group specialized academic instruction in a moderate/severe classroom at an NPS in the amount of 1,620 minutes each week.
- b. Individual language and speech services in the amount of two 30-minute sessions each week provided by the NPS.
- c. Individual adaptive physical education services in the amount of five 30-minute sessions each week provided by the NPS.
- d. A discontinuance of physical therapy services, but the provision of PT in the amount of 43 compensatory hours.
- e. Consultative orientation and mobility services in the amount of four 60-minute sessions provided by District personnel at the NPS.
- f. Consultative specialized vision services in the amount of six 30-minute sessions provided by District personnel at the NPS.
- g. A full-time Independence Facilitator provided by the NPS.
- h. Consultative assistive technology services in the amount of 24 hours over a 10-month period, provided by ATEC. Regarding this service, the IEP stated, in part: "The purpose of the consultation includes the effective use of hardware and software."
- i. Consultative assistive technology services in the amount of 90 minutes each month for eight months, from March 3, 2009 to November 3, 2009, provided by ATEC. Regarding this service, the IEP stated, in part: "This consultation is to address assistive technology training for support team (including parent)."

115. The proposed March 2009 annual IEP offered Student the same special education program for the 2009 ESY which covered the period from July 6 to 31, 2009.



116. The proposed March 2009 annual IEP also contained an Individualized Transition Plan. The ITP again informed Student that her projected exit date from special education is December 31, 2010. The ITP referenced the same Transition Assessment set forth in Student's 2008 annual IEP, and stated that the District will consider performing a Functional Vocational Evaluation in the near future. The ITP contained a new goal for training and education. Under the heading of "Transition Plan Activities," the ITP contained further goals requiring Student to research and prepare for life after school.

117. Mother has not provided consent to the proposed March 2009 annual IEP for Student.

#### Decision to Place Student at Buena Park SLDC

118. On March 11, 2009, Clark Osborne sent a "prior written notice" letter to Mother. The letter informed Mother that, in light of the fact that the District had cancelled the NPS contract with Grace Education, Student's new placement was Buena Park SLDC with the related services described in both the 2008 and 2009 annual IEPs. The letter further informed Mother that the start date at Buena Park SLDC was Monday, March 23, 2009. The letter invited Mother to make arrangements for a visit to the school prior to the start date. The letter also responded to the list of requests that Mother had provided the IEP team at the March 3, 2009 annual IEP meeting. The letter denied the requests, including the request for a personal attendant on the bus ride to and from school.

119. On March 20, 2009, Mother sent a response letter to Mr. Osborne. The response letter covered a number of topics relating to Student's special education program. Regarding the continuing dispute over the appropriate replacement AAC device, the letter stated: "As I am the sole individual responsible for meeting and supporting my child's AAC needs, by denying my request to receive trials on comparable AAC devices – so that I may assist in determining which of the three

comparable AAC devices available will appropriately meet my child's needs, and my responsibility and ability to provide necessary support – the District is denying my right to be an effective, participatory, member of the IEP team." Regarding Mother's response to the change in placement from Grace Education to Buena Park SLDC, the letter stated: "My child has been enrolled at Grace for just over four (4) months and is meeting and/or making adequate progress towards the goals and objectives delineated in the 2008 IEP. I do not agree with the District's proposed change in placement from Grace to Buena Park Speech Language Development at this time."

#### The Stay Put Order

120. In the meantime, on March 19, 2009, Mother filed with OAH the initial Due Process Complaint in this matter. In the Due Process Complaint, Mother made a stay put request that Student remain at Grace Education during the pendency of the case. On March 24, 2009, the District filed with OAH an Opposition to Motion for Stay Put which contended that the District had acted properly in terminating the NPS agreement with Grace Education and that Buena Park SLDC replicated as closely as possible Student's last implemented IEP.

121. On March 26, 2009, OAH issued an Order Denying Motion for Stay Put. Under the Order, OAH denied Student's request for stay put at Grace Education, and ruled as follows: "Student's placement pending resolution of Student's due process hearing request shall be Buena Park Speech and Language Development Center, using the goals, and type, frequency, and duration of related services set forth in the IEP dated March 7, 2008."

#### The Transportation Dispute

122. Thereafter, a dispute ensued over the appropriate method of transporting Student to and from home and Buena Park SLDC. The dispute lasted from March 26,

2009, the date of the OAH stay put order, to June 1, 2009, the date that Student started attending Buena Park SLDC. Although the school is not located a great distance from Student's home, the bus route takes a lengthy amount of time. Mother was concerned that Student might suffer a seizure on the bus ride. She was also concerned that Student would arrive to school in a drowsy condition. Mother requested that the District or the NPS provide Student with a personal attendant on the bus. The District refused this request on the basis that Student had not demonstrated a need for a personal aide during her transportation to and from school.

123. On April 21, 2009, an abbreviated IEP team convened at Buena Park SLDC in continuation of the 2009 annual IEP for Student. The team discussed the ongoing transportation issue. The District had offered Mother the option of reimbursing her if she transported Student to and from Buena Park SLDC, but Mother informed the team that her work schedule did not permit this arrangement. The District offered to change Student's primary eligibility category from Traumatic Brain Injury to Multiple Disabilities. Mother and Student observed class settings at the school. At the conclusion of this IEP, Mother provided the following written consent: "Parent participated in program review at Buena Park Speech Language Development Center and agrees with placement at Speech Language Center as ordered by State of California Office of Administrative Hearings." Despite such consent, Mother did not permit Student to attend Buena Park SLDC based upon the ongoing dispute over appropriate transportation services.

124. On April 29, 2009, the District sent a letter to Mother regarding the ongoing transportation issue. The letter informed Mother that the District had contacted a private service called Durham School Services, and that the company had informed the District that the pick-up time for Student would be earlier than the schedule proposed by Buena Park SLDC.

125. Dawn O'Connor is the Chief Executive Officer and Principal at Buena Park SLDC. She has spent 43 years in the field of education as a teacher, principal and administrator, all at Buena Park SLDC. Ms. O'Connor testified at the due process hearing and presented as experienced, professional and unbiased. Ms. O'Connor stated that Clark Osborne had first contacted her about Student in October 2008, when SeaStar announced that it was closing. She stated that Mr. Osborne next contacted her in March 2009 in connection with problems that the District was experiencing with Grace Education. Ms. O'Connor testified that she informed Mr. Osborne that Buena Park SLDC could implement Student's 2008 annual IEP, which included the provision of transportation services. She stated that she has observed Student many times during the current school year, and that, in her opinion, Student is making progress in the school's adult transition program which is based upon a functional curriculum teaching actual life activity skills.

126. Regarding transportation services, Ms. O'Connor testified that Buena Park SLDC has 15 bus routes that serve about 200 pupils who have an IEP and who reside throughout Southern California. She stated that she considered and selected the most optimal bus route for Student. On this route, the bus transports 13 pupils who are supervised by two adult aides not including the bus driver. On school days, during the morning, the bus picks-up Student at 6:40 a.m. and delivers her to school by 8:30 a.m. In the afternoon, the bus picks-up Student at 2:35 p.m. and delivers her at home by 3:15 p.m. Ms. O'Connor testified that she met with Mother and Student at Buena Park SLDC on April 9, 2009, during spring break at the school. She recalled that Mother expressed her concerns that the lengthy bus ride posed a potential health risk for her daughter. In response to this concern, Ms. O'Connor stated that she made arrangements for one of the bus aides to either sit with Student or across from her during bus rides. Ms. O'Connor also stated that she arranged Student's transportation schedule such that she

was "first-on" in the morning and "first-off" in the afternoon. She stated that, after making these arrangements, Mother permitted Student to start attending the school. Ms. O'Connor further testified that, in her opinion, the transportation services provided by Buena Park SLDC for Student is appropriate.

#### 2009-2010 SCHOOL YEAR – ACQUISITION OF A NEW AAC DEVICE

127. For the 2009-2010 school year, Student has attended the Buena Park SLDC under the March and April annual 2008 IEP by order of OAH.

128. Marilyn Eldridge is a Therapy Consultant who works at the California Children's Services office in Orange County, California. Ms. Eldridge testified at the due process hearing. She stated that she has known Student since the 1990s and that she has attended IEP meetings for Student. Ms. Eldridge testified that, in November 2009, her CCS office received a report regarding Student from a Speech and Language Pathologist working at Buena Park SLDC. She stated that, at the same time, Mother gave her consent that CCS provide funding for the purchase of a new AAC device for Student. Ms. Eldridge testified that CCS then purchased for Student a C12 AAC device manufactured by Tobii-ATI. She stated that the new device is intended for use by Student in all settings, including the education environment. Ms. Eldridge stated that CCS funds the purchase of augmentative communication devices with the understanding and expectation that the school district responsible for an individual's special education program will provide the services necessary for proper and effective use of the device. She stated that the Speech and Language Pathologist report received by CCS indicated that the District would provide such assistive technology services.

129. The Garden Grove Unified School District was not aware of the activity leading to Student's acquisition of the C12 AAC device. The District learned for the first time about this acquisition at the due process hearing in this matter.

## STUDENT'S EXPERT WITNESSES

130. Mother presented three expert witnesses in support of her case: Cynthia Cottier, Dr. Laurie Brodeske and Nancy Brady.

### Cynthia Cottier's Augmentative Communication Evaluation Report

131. On April 30, 2009, Mother and Student presented to Cynthia Cottier for assistance in making a decision on finding an appropriate AAC device to replace the Gemini. On this date, Ms. Cottier conducted an assessment of Student and produced an Augmentative Communication Evaluation Report (Cottier Report). Ms. Cottier is a licensed Speech and Language Pathologist and an Augmentative Communication/Assistive Technology Specialist with a private practice in Pasadena, California. Ms. Cottier has extensive experience in the field of augmentative communication and assistive technology and is highly regarded by her peers. Ms. Cottier testified at the due process hearing and made an excellent witness.

132. Ms. Cottier testified that her evaluation of Student lasted about 90 minutes. For the evaluation, Mother provided Student's 2008 annual IEP and Mr. Swingle's June 2008 AAC Report, and she gave Ms. Cottier a history of Student's use of AAC devices. Student brought and used her Gemini AAC device for the evaluation. In her report of the evaluation, Ms. Cottier described the Gemini as follows: "The device currently works only intermittently and does not consistently provide voice output capabilities for which it is needed."

133. Regarding Student's AAC device, Ms. Cottier observed that the Gemini had numerous custom screens, Speaking Dynamically Pro software, and Picture Word Power software which Mother had modified from a 60 to a 35 location display. Ms. Cottier noted that Student was able to see on the displays messages that are approximately 1 ¼ by 1 ¼ inch in size. She also noted that Student was able to distinguish picture/word

symbols on a 35 location display and demonstrated increased accuracy with displays that contained fewer buttons. Ms. Cottier observed that the Gemini had a significant number of custom displays, and that, while Student was adept in the use of the device, "at times she demonstrates difficulty locating the symbols and vocabulary until she is specifically taught where the item is located." Ms. Cottier also observed that Student was able to spell some words on the Gemini, "but the process is so laborious and time consuming that it is not a functional means of communication."

134. In her report, Ms. Cottier listed several factors which complicated the search for an appropriate replacement AAC device for Student. One of the factors was the number of custom displays in the Gemini. Ms. Cottier opined that the process of recreating such displays in the new AAC device would take 70 to 80 hours. Another related factor was that "(T)here are so many displays contained within (Student's) communication device that to completely change the retrieval system (Student) uses would be like learning a completely new language and require a significant amount of learning and intervention which appears unadvisable at this time."

135. In her report, Ms. Cottier made recommendations regarding a new AAC device for Student. Like Mr. Swingle in his June 2008 AAC Report, Ms. Cottier believed that the replacement device should require the least amount of change for Student. Like Mr. Swingle, Ms. Cottier advised that Student should change from a Macintosh-based to a Windows-based augmentative communication system. Like her ATEC counterpart, Ms. Cottier found that the Mercury II by Tobii-ATI was a good choice as a replacement. In this regard, the Cottier Report stated: "On the surface, it appears that the simplest method of converting (Student's) current communication system to a PC based system will be through the use of a Mercury II communication system because it is able to utilize the PC version of Speaking Dynamically Pro with Picture Word Power software which is essentially the same as the software on (Student's) current Gemini." Ms. Cottier

stopped short of recommending the Mercury II, because she learned that the manufacturer was in the process of converting the Mercury II to the C12. However, Ms. Cottier confirmed that, by custom and practice, AAC device manufacturers like Tobii-ATI will service discontinued products for five years. She also confirmed Mr. Daugherty's testimony that the C12 was not ready for purchase on the market until August 2009.

136. Rather than the Mercury II, the Cottier Report suggested three different products as replacement AAC devices: (1) the C12 by Tobii-ATI, (2) Words+ 13" Toughbook, and (3) the Prentke Romich Eco-14. Each system had a screen large enough for efficient use by Student. Several systems operated software programs that Student had used. Of the C12, Ms. Cottier reported that she "is not certain if this will be the best possible solution for (Student) because the device will be using different communication software that utilizes a different symbol set." Regarding the three recommended systems, Ms. Cottier also reported that Student required "an extended trial period" in order to determine the device best suited to her needs. On this point, Ms. Cottier testified that the trial period should last six months, but that the manufacturers typically permit a trial of four weeks.

#### The Psychoeducation Evaluation of Dr. Laurie Brodeske

137. On June 2, 2009, Mother and Student presented to Dr. Laurie Brodeske, a licensed Psychologist with a private practice in Santa Ana, California. Mother requested Dr. Brodeske to perform an assessment of Student's current level of cognitive functioning, academic achievement, and adaptive functioning. In particular, Mother requested Dr. Brodeske to assess Student's potential to learn academic curriculum and her current level of receptive vocabulary, reading comprehension and mathematics. Dr. Brodeske testified at the due process hearing. Like her District counterpart, she presented as well-informed, competent and professional.



138. On August 24, 2009, Dr. Brodeske produced a written Psychoeducation Evaluation (Brodeske Evaluation) of Student. For her evaluation, Dr. Brodeske observed Student at her home and in her classroom at the Buena Park SLDC. Dr. Brodeske also reviewed written materials concerning Student, including IEP documents and Ms. Wasserman's 2007 Triennial Psychoeducational Assessment. Dr. Brodeske also interviewed Mother and observed Student in her office. Dr. Brodeske observed that Student used her Gemini AAC device both at home and in her office. She observed that Student used the Mercury II AAC device in her classroom at Buena Park SLDC.

139. Dr. Brodeske attempted to measure Student's cognitive abilities by administering the Comprehensive Test of Non-Verbal Intelligence – Second Edition (CTONI-2). With the CTONI-2, and other test instruments utilized in her evaluation, Dr. Brodeske noted that she needed to accommodate Student's visual impairments such as by pointing-out and magnifying visual targets on the tests. On the pictorial scale of the CTONI-2, Student scored in the "very poor" range which was consistent with the results obtained by Ms. Wasserman in the 2007 Triennial Psychoeducational Assessment. However, on the geometric scale of the CTONI-2, Student scored in the "below average" range. In her evaluation, Dr. Brodeske emphasized that "(Student's) Geometric Score is not considered to be in the mentally retarded range, but is below average." (emphasis in original.) Regarding District evaluations of Student's intelligence, Dr. Brodeske estimated that District assessors did not provide Student with necessary accommodations, hence, the results from prior CTONI tests provided an insufficient basis for making educational decisions and setting goals for Student.

140. Dr. Brodeske also attempted to measure Student's present level of vocabulary, spelling, arithmetic and written comprehension through the use of multiple assessment methods. Dr. Brodeske administered several subtests from the Wechsler Individual Achievement Test – Second Edition, and determined that Student operated at

the first grade to kindergarten level in numerical operations, math reasoning and spelling. Dr. Brodeske administered several portions of the Wide Range Achievement Test – Third Edition, and found that Student operated in the same grade range for spelling and arithmetic. Dr. Brodeske administered the Peabody Picture Vocabulary Test – Fourth Edition, to measure Student’s comprehension of the spoken word, and determined that Student operated at the second grade level. Dr. Brodeske performed an informal assessment of Student’s comprehension of single written words and found that Student matched roughly half of the words with appropriate pictures. In conclusion, as regards Student’s level of academic achievement, Dr. Brodeske found that “it is hypothesized that (Student) may not have been exposed to curriculum with the appropriate accommodations necessary for her to learn material above the kindergarten and early primary grade levels.”

141. Dr. Brodeske also evaluated Student’s adaptive behavior through administration of the Adaptive Behavior Assessment System – II (ABAS II). Mother’s responses to the ABAS II placed Student in the extremely low range of functioning, and were consistent with the Vineland ratings measured by Sashi Wasserman in May 2007 and April 2008. In conclusion, the Brodeske Evaluation noted that “it is difficult to estimate (Student’s) true overall cognitive ability,” a point that Dr. Brodeske reiterated during her testimony at the due process hearing. Dr. Brodeske recommended the exposure of Student to academic curriculum “so that she is better able to communicate with others via the written word.”

#### NANCY BRADY

142. For the June 2, 2009 evaluation of Student conducted in her office, Dr. Brodeske requested the assistance of Nancy Brady who attended the assessment. Ms. Brady has a Masters in Special Education and she is a certified AT specialist. Starting in June 2009, Ms. Brady formed a company called Supported Typing and Autism Services

which provides support to individuals who use assistive technology to access state educational standards and participate in the general education classroom. Ms. Brady testified at the due process hearing and presented as honest and straightforward.

143. After the June 2, 2009 session, Ms. Brady produced a written report entitled "Initial Impressions." In preparing this report, Ms. Brady testified that she relied upon observations of Student in Dr. Brodeske's office and in her classroom at Buena Park SLDC. Student had her Gemini with Dr. Brodeske and the loaned Mercury in her classroom. Ms. Brady noted that, while Student was very skilled in her use of the Gemini, she demonstrated a much lesser ability to communicate with the Mercury AAC device. For example, Ms. Brady reported that with the Mercury, Student could not share simple information such as what she had eaten for dinner, and she could not explain the cause of a sore on her neck. Ms. Brady concluded that Student had reading skills at the fifth grade level, but she reached this conclusion solely through a simple test of showing Student four fifth grade spelling words and watching Student point correctly to three of the four words. Ms. Brady also observed that Student has great difficulty with the spelling of simple words. For her report, Ms. Brady did not review Student's IEPs or assessments performed by the District. In her report, Ms. Brady suggested goals, in the areas of communication, literacy skills and math, that are remarkably similar to the goals found in Student's 2007, 2008 and 2009 annual IEPs.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

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

## OAH JURISDICTION

2. Under special education law, the parent of a disabled child has the right to present an administrative complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education (FAPE). (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006); Ed. Code, § 56501, subd. (a)(1)-(4).) OAH has the authority to hear and decide the Amended Due Process Complaint in this matter because the amended pleading contends that the Garden Grove Unified School District failed to properly assess Student and denied her a FAPE through the failure to provide stay put and the failure to provide appropriate and sufficient related services. (*Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026, 1029.)

## STATUTE OF LIMITATIONS

3. On March 19, 2009, Mother filed the initial Due Process Complaint in this matter. Special education administrative due process proceedings are governed by a two year statute of limitations. (20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e)(2006); Ed. Code, § 56505, subd. (l).) Under this two year statute, the applicable time period for this case runs from March 19, 2007, to the present.

## AGE OF MAJORITY

4. On December 7, 2009, Student turned 21 years of age. A child with a disability is entitled to receive a FAPE from ages three through 21. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a)(2006); Ed. Code, § 56040, subd. (a).) Student has not graduated from high school with a regular high school diploma and continues to need a special education program. (See 20 U.S.C. § 1412(a)(1)(B); 34 C.F.R. § 300.102(a)(3)(i)(2006); Ed. Code, §§ 56026, subd. (c)(4), 56026.2, subd. (a).) Although Student holds her educational rights, at the due process hearing, she indicated consent

to allow her Mother to represent her. (See Ed. Code, § 56041.5.) Student exits from special education on December 31, 2010. (Ed. Code, § 56026, subd. (c)(4)(C).)

#### RELATED SERVICE AGENCIES

5. In this case, Student has received equipment and services from California Children's Services which is a state and county program that provides medically necessary benefits to otherwise eligible handicapped individuals under the age of 21. (Health & Saf. Code, §§ 123800, 123805; Cal. Code Regs., tit. 22, § 41410.) Student was an individual who qualified for such medically necessary benefits with her disabling condition of cerebral palsy. (Health & Saf. Code, § 123800; Cal. Code Regs., tit. 22, §§ 41415.1, 41517.3, subd. (a)(2)(A).) Under the CCS program, Student was entitled to receive medically necessary occupational and physical therapy which the agency provided in conjunction with an Interagency Agreement with the California Department of Education. (Health & Saf. Code, §§ 123840, 123875; Gov. Code, § 7575, subd. (a)(1).) Under the CCS program, Student was also entitled to receive equipment necessary to meet her medical needs. (Health & Saf. Code, § 123840; Cal. Code Regs., tit. 22, § 41452.) Such medical equipment included an AAC device. (Dept. of Health Services, Numbered Letter 09-0703, Table p. 7 (Aug. 8, 2003).)

#### ASSISTIVE TECHNOLOGY

6. This case concerns in large part the assistive technology devices and services utilized by Student in her special education program. An assistive technology device means any item, piece of equipment or product system that is used to increase the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); 34 C.F.R. § 300.5 (2006); Ed. Code, § 56020.5.) An augmentative alternative communication device is an assistive technology device if the AAC equipment is used to increase, maintain, or improve the functional capabilities of a child with a disability, and if the child's IEP team

determines that the child needs the device in order to receive a FAPE. (71 Fed.Reg. 46547 (Aug. 14, 2006).) In this case, Student's AAC devices are AT devices according to this standard. In addition, Student's classroom computer and the software for both her AAC devices and the computer are AT devices.

7. An assistive technology service is any service that helps a disabled child select an appropriate assistive technology device, obtain the device, or train the child to use the device. (20 U.S.C. § 1401(2); 34 C.F.R. § 300.6 (2006); 71 Fed.Reg. 46548 (Aug. 14, 2006).) Assistive technology services include the evaluation of the AT needs of the disabled child, the customization, maintenance, repair and replacement of AT devices, and training and technical assistance for the child, the child's family and professionals serving the child. (20 U.S.C. § 1401(2)(A)-(F); 34 C.F.R. § 300.6 (a)-(f)(2006).) In this case, the consultative services provided by ATEC for the District qualify as AT services.

8. An individualized education program is a written statement for each child with a disability that is developed, reviewed and revised according to a set of procedures that includes the requirement that the IEP team "consider whether the child needs assistive technology and services." (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v) (2006); Ed. Code, § 56341.1, subd. (b)(5).) A disabled child's IEP must "include a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. This would include any assistive technology devices and services determined by the IEP Team to be needed by the child in order for the child to receive FAPE." (71 Fed.Reg. 46685 (Aug. 14, 2006).)

9. In providing a special education program to a disabled child, the educational agency must ensure that assistive technology devices and assistive technology services are made available to the child if required as part of the pupil's

special education, related services or supplementary aides and services. (34 C.F.R. § 300.105(a)(2006).)

#### FRAMEWORK FOR DECISION IN IDEA CASES

10. This special education administrative due process proceeding is brought under the authority of the Individuals with Disabilities Education Act (sometimes IDEA). (See 20 U.S.C. § 1400 et seq.) The primary goal of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services.” (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1033 (*Mercer Island*).)

11. The term “free appropriate public education” means special education and related services that the local educational agency provides at public expense, under public supervision and without charge, that meets the standards of the state educational agency, that includes an appropriate preschool, elementary school or secondary school, and that is provided in conformity with the disabled child’s individualized education program. (20 U.S.C. § 1401(8); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

12. The term “special education” means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) “Specially designed instruction” means the adaptation, as appropriate to the needs of the disabled child, the content, methodology or delivery of instruction to address the unique needs of the child that result from the child’s disability. (34 C.F.R. § 300.39(b)(3)(2006).) In the context of the IDEA, “special education” refers to the highly individualized educational needs of the particular student. (*San Rafael Elementary v. California Education Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.)

13. The term “related services” means transportation and developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a)(2006).) In California, “related services” are called “designated instruction and services.” (Ed. Code, § 56363, subd. (a).) Related services include services relating to language and speech, orientation and mobility, and adaptive physical education.

14. In 1982, the United States Supreme Court rendered the seminal and guiding decision in special education law. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) In the decision, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the disabled child’s IEP, then the assumption is that the child’s program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a “basic floor of opportunity.” (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a “potential-maximizing education.” (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that “confers some educational benefit upon the handicapped child.” (*Id.* at p. 200.)

15. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 575 F.3d at p. 1034.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized



education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

16. In short, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

17. In this case, Student's Amended Due Process Complaint presents issues of both procedure and substance. The issues of procedure concern the alleged failure by the District to timely implement Student's stay put placement at Buena Park SLDC, and the contentions regarding various assessments performed by the District. The issues of substance concern the alleged failure by the District to provide Student with an appropriate level of related services. In keeping with the directive from *Rowley*, this tribunal will first determine if the District acted in accordance with the contested procedures, and then decide the issues of substance.

#### STAY PUT

18. Student contends that the District denied her a free appropriate public education through the failure to timely implement a stay put placement. An important Procedural Safeguard in the Individuals with Disabilities Education Act provides that, during the pendency of any proceeding under the Act, "the child shall remain in the then-current educational placement of the child." (20 U.S.C. § 1415(j); see also 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505, subd. (d).) This Procedural Safeguard is commonly known as "stay put." (*Honig v. Doe* (1988) 484 U.S. 305, 308 [108 S.Ct. 592, 98 L.Ed.2d

686].) The purpose of stay put is to act “as a powerful protective measure to prevent disruption of the child’s education through the dispute process.” (*Joshua A. v. Rocklin Unified School District* (9th Cir. 2009) 559 F.3d 1036, 1040.) Typically, stay put is the placement set forth in the disabled child’s last implemented IEP. (*L.M. v. Capistrano Unified School District* (9th Cir. 2009) 556 F.3d 900, 911.) However, when circumstances have changed the last implemented placement, “(T)he stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.” (*Van Scoy v. San Luis Coastal Unified School District* (C.D.Cal. 2005) 353 F.Supp.2d 1083, 1086.) In this case, OAH denied Mother’s request for stay put because changed circumstances required Student’s placement in a comparable program at Buena Park SLDC.

19. The Garden Grove Unified School District did not violate Student’s procedural right for a timely stay put placement at Buena Park SLDC. Starting with Mr. Osborne’s March 11, 2009 letter to Mother, the District was ready and willing to provide Student a placement at this non-public school. The timely placement did not occur for several reasons. First, Mother initially did not accept the change in placement from Grace Education to Buena Park SLDC. Second, Mother raised an issue relating to the appropriate transportation of Student. Mother had genuine concerns about Student’s health during the bus ride to and from home and the new school. However, these concerns do not overcome the fact that the District had arranged transportation services and reserved a space for Student at Buena Park SLDC. (Findings of Fact, ¶¶ 107, 118-126.)

## ASSESSMENT AND REASSESSMENT OF STUDENT

### The Contested Assessments

20. Student contends that the District either performed inappropriate assessments or failed to perform certain evaluations. Student directly contests the following assessments: (1) the June 2007 Triennial Psychoeducational Assessment performed by Sashi Wasserman; (2) the June 2008 AAC Report prepared by Joseph Swingle, together with Mr. Swingle's February 2009 AAC Consultation Summary Report; (3) the April 2008 Gallagher Pediatric Therapy Report prepared by Christy Marilo; (4) the March 2007, April 2008 and February 2009 Vision Impairment & Blindness Reports prepared by Mark Winnick; (5) and the June 2007 and April 2008 Orientation & Mobility Evaluations prepared by Maria Gerard. In addition, Student contests the failure by the District to perform assessments relating to occupational therapy and evaluations concerning Student's continuing education and vocational desires, abilities, needs and opportunities. For the following reasons, Student's contentions regarding the performance or lack of performance of assessments lack merit. (Findings of Fact, ¶¶ 1-10, 12-16, 18-91, 106, 108-117, 131-143.)

### Assessment and Reassessment Standards

21. An educational agency determines whether a child has a disability and the educational needs of the child through the evaluation process. "Evaluation" means prescribed procedures "to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. § 300.15 (2006).) California law uses the term "assessment" to describe such procedures. (Ed. Code, § 56302.5.)

22. As regards the assessment process, special education law references "initial evaluations" (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301 (2006); Ed. Code, §

56320), and "reevaluations." (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (a)(1).) "An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the Act, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of a child would constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).) By this standard, all of the assessments in this case constitute reevaluations of Student.

23. An educational agency must conduct a reassessment of a special needs pupil who is under an IEP if the agency determines that the educational or related service needs of the pupil warrant a reassessment, or if the pupil's parents request an assessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a) (2006); Ed. Code, § 56381, subd. (a)(1).)

24. An educational agency must not conduct a reassessment more frequently than once a year, unless the student's parent and the agency agree otherwise. But, at the very least, the agency must conduct the reassessment once every three years, unless the parties agree in writing that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) In this case, the term "triennial" refers to the complete assessment performed by an educational agency every third year for a disabled pupil.

25. In conducting a reassessment, an educational agency must follow the procedures for assessments set forth in Education Code sections 56320-56331. (Ed. Code, § 56381, subd. (e).)

26. For the purpose of assessment and placement of pupils with exceptional needs, an educational agency must use testing and assessment materials and procedures that are not racially, culturally or sexually discriminatory. (Ed. Code, § 56320, subd. (a); see also 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(i) (2006).)

27. When conducting an assessment, an educational agency must provide the pupil with materials and procedures in the pupil's native tongue, unless it is clearly not feasible to do so. (Ed. Code, § 56320, subd. (a); see also 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii) (2006).)

28. In performing an assessment, an educational agency must provide and administer tests and other assessment materials in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally and functionally, unless not feasible. (Ed. Code, § 56320, subd. (b)(1); see also 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii) (2006).)

29. In performing an assessment, an educational agency must use tests and other assessment materials for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(2); see also 20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii) (2006).)

30. In performing an assessment, an educational agency must have trained and knowledgeable personnel administer tests and other assessment materials in accordance with any instructions provided by the producer of the assessments. (Ed. Code, §§ 56320, subd. (b)(3), 56322; see also 20 U.S.C. § 1414(b)(3)(A)(iv)-(v); 34 C.F.R. § 300.304(c)(1)(iv)-(v) (2006).)

31. In California, an educational agency must have a credentialed school psychologist administer individual tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).) Also, in California, a credentialed school psychologist must conduct a psychological assessment of a pupil. (Ed. Code, § 56324, subd. (a).)

32. In performing an assessment, an educational agency must include evaluation materials that are tailored to assess specific areas of educational need and not merely evaluation materials designed to provide a single intelligence quotient. (Ed. Code, § 56320, subd. (c); see also 34 C.F.R. § 300.304(c)(2) (2006).)

33. In performing an assessment of a child with impaired sensory, manual or speaking skills, an educational agency must select and administer tests that best ensure that the test results accurately reflect the child's aptitude, achievement level or whatever other factor the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills. (Ed. Code, § 56320, subd. (d); see also 34 C.F.R. § 300.304(c)(3) (2006).)

34. In performing an assessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2) (2006).)

35. In performing an assessment, an educational agency must assess the special needs child in all areas of suspected disability. (Ed. Code, § 56320, subd. (f); see also 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2006).)

36. As part of any reassessment, the IEP team, and other qualified professionals as appropriate, must review existing evaluation data on the pupil, including (1) evaluations and information provided by the parent of the child; (2) current classroom-based, local or state assessments, and classroom-based observations, and (3) observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1)(A)(i)-(iii); 34 C.F.R. § 300.305(a)(1)(i)-(iii) (2006); Ed. Code, § 56381, subd. (b)(1).)

37. Based upon such review and input from the parent, the IEP team must identify what additional data, if any, are needed to determine (1) whether the pupil continues to have a disability that warrants special education, (2) the educational needs of the pupil, (3) the present levels of academic achievement and related developmental needs of the pupil, and (4) whether any additions or modifications to the program of special education and related services are necessary to enable the pupil to meet the

measurable annual goals in the IEP. (20 U.S.C. § 1414(c)(1)(B)(i)-(iv); 34 C.F.R. § 300.305(a)(2)(i)-(iv) (2006); Ed. Code, § 56381, subd. (b)(2)(A)-(D).)

#### The June 2007 Triennial Evaluation

38. Student contends that Ms. Wasserman's 2007 Triennial Psychoeducational Assessment was inappropriate for the following reasons: (1) Ms. Wasserman utilized a single test, the CTONI, to measure Student's intelligence; (2) the assessment incorrectly listed Student's primary eligibility category as Traumatic Brain Injury; (3) the assessment failed to identify specific strengths and areas of need; and (4) the assessment did not fully measure Student's aptitude, achievement level or educational need.

39. The contention concerning Student's eligibility category does not require extended treatment. During the last three school years, Student's primary eligibility category has changed from Orthopedic Impairment to Traumatic Brain Injury to Multiple Disabilities. During this period, Student's IEP documents also have found her eligible for special education under the disabling conditions of Vision Impairment and Speech and Language Impairment. Nevertheless, the disability category does not define a disabled child's educational program. "Special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified." (71 Fed.Reg. 46549 (Aug. 14, 2006).) In this case, the District has identified the needs resulting from Student's multiple disabling conditions.

40. Beyond the eligibility contention, Ms. Wasserman's 2007 Triennial Psychoeducational Assessment satisfied the procedural requirements necessary for an appropriate reevaluation of Student. There is no issue that the testing and assessment materials utilized by Ms. Wasserman discriminated against Student on a racial, cultural or sexual basis. (Ed. Code, § 56320, subd. (a).) Ms. Wasserman used tests and assessment materials most likely to yield accurate information on Student's academic, developmental and functional abilities. (Ed. Code, § 56320, subd. (b)(1).) For her

assessment, Ms. Wasserman administered two tests: the CTONI and the Vineland Adaptive Behavior Scales. She used such tests because Student is non-verbal. In fact, Dr. Brodeske also utilized the CTONI-2 and the Adaptive Behavior Assessment System for the same reason. In addition, other test results associated with Student's June 2007 triennial IEP confirmed Ms. Wasserman's findings that Student scored "very low" in the tested areas of non-verbal intelligence. For example, for her May 2007 Speech and Language Evaluation, Helen Butchers administered several vocabulary tests and found that Student scored at an age equivalency of three years and some months.

41. For her 2007 Triennial Psychoeducational Assessment, Ms. Wasserman used test materials for which such instruments are valid and reliable. (Ed. Code, § 56320, subd. (b)(2).) The CTONI is valid and reliable for measuring non-verbal intelligence, and the Vineland is valid and reliable for measuring adaptive behavior. Ms. Wasserman is a licensed Educational Psychologist who is trained and knowledgeable in performing psychoeducational assessments in general, and in administering the CTONI and Vineland tests in particular. (Ed. Code, §§ 56320, subd. (b)(3), 56322, 56324, subd. (a).) Ms. Wasserman's assessment, in conjunction with other evaluations performed as part of Student's June 2007 triennial IEP, was tailored to assess specific areas of educational need, and not merely Student's intelligence quotient. (Ed. Code, § 56320, subd. (c).) The assessment reviewed Student's academic performance and noted her needs in the areas of reading and math. The assessment also referred to the May 2007 Speech and Language Report prepared by Helen Butchers, which identified Student's need to build a greater core vocabulary, the May 2007 Adaptive Physical Education Evaluation by Dorothy Helfer, the June 2007 Physical Therapy Evaluation by Susan Rouleau, and the June 2007 Speech and Language Report by Joseph Horodyski.

42. The tests selected and administered by Ms. Wasserman also best ensured results that accurately reflected Student's aptitude and achievement level. (Ed. Code, §



56320, subd. (d).) As stated, Ms. Wasserman utilized the CTONI and Vineland because Student is non-verbal. Student's low intelligence scores were consistent with previous District psychoeducational assessments with the same test instrument. Ms. Wasserman's results were also largely consistent with the findings of Dr. Brodeske when she administered the CTONI-2. In addition, Ms. Wasserman and Dr. Brodeske reached the same conclusions regarding Student's level of adaptive behavior. This tribunal did not give weight to Nancy Brady's determination that Student had reading skills at the fifth grade level because Ms. Brady reached this conclusion after conducting the most informal of tests. In addition, without consulting Student's IEP team, Ms. Brady suggested goals that were remarkable similar to the rudimentary goals set forth in Student's individualized education programs for the last three years.

43. For her 2007 Triennial Psychoeducational Assessment, Ms. Wasserman did not utilize a single measure or evaluation to help Student's IEP team determine an appropriate educational program. (Ed. Code, § 56320, subd. (e).) In performing her assessment, Ms. Wasserman utilized two standard test instruments (the CTONI and Vineland), discussed Student with Mother and her teacher, and observed Student during the evaluation. In addition, Ms. Wasserman's assessment was part of a triennial reevaluation that included Mr. Winnick's March 2007 Functional Low Vision Assessment and the above-described reports and evaluations in the areas of speech and language, physical therapy, orientation and mobility, and adaptive physical education. In this manner, for her June 2007 triennial, the District assessed Student in all areas of suspected disability. (Ed. Code, § 56320, subd. (f).) Finally, Student's IEP team met and reviewed the evaluations connected with the triennial reevaluation, including the 2007 Triennial Psychoeducational Assessment performed by Ms. Wasserman. (Ed. Code, § 56381, subd. (b)(1).)

## The ATEC AAC Reports

44. Student contends that Mr. Swingle's June 2008 AAC Report, together with his February 2009 AAC Consultation Summary Report, were inappropriate assessments. Notably, none of Student's objections regarding these two reports touch upon the procedures that an educational agency must follow in order to perform a proper evaluation or reevaluation of a disabled child.

45. Student first objects that Mr. Swingle's reports recommended replacement of Student's Gemini with a Mercury II AAC device without conducting trials to determine the appropriate replacement device. Student's contention in this regard gains support from Cynthia Cottier who advised that Student should have a trial period of six months on three comparable devices. However, this objection lacks merit. The Individuals with Disabilities Education Act does not require a school district to provide a disabled child with an educational program designed in accordance with the desires of the child's parent. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) In this case, a representative from California Children's Services, the agency that planned to fund the purchase of the replacement AAC device, attended Mr. Swingle's AAC evaluation of Student and concurred that a trial of devices was not necessary. Also, Ms. Cottier testified that device manufacturers typically allow a trial period of four weeks, making her recommendation of a six month trial somewhat unrealistic. Finally, Mr. Swingle's recommendation that Student replace the Gemini with a Mercury II, a recommendation adopted by Student's IEP team, was reasonable and designed to provide Student with educational benefit. Mr. Swingle made his recommendation after watching Student use different AAC devices. His recommendation sought to transition Student as best as possible from the Gemini to a new device. His recommendation ensured that the District would provide sufficient support through ATEC to help both Student and her educational team adjust to the new AAC device.

46. Student contends that the District committed a procedural violation by not including an AAC assessment as part of her June 2007 triennial IEP. However, in April 2007, the District and Mother agreed upon an assessment plan which did not include a proposed evaluation of Student's augmentative communication needs. Furthermore, at the time of the June 2007 triennial reevaluation, while the IEP team discussed the need to begin a search for an AAC device to replace the Gemini, the parties agreed to defer the matter partly because Mother was reluctant to switch from a Macintosh-based to a Windows-based AAC system.

47. Student's remaining objections regarding Mr. Swingle's AAC reports do not require extended treatment. Student objects that the reports recommended a different operating system. This objection reflects Mother's concern about changing computer platforms from Macintosh to Windows. In fact, the experts, including Ms. Cottier, agreed that such change was both inevitable and advisable. Student objects that Mr. Swingle's report did not guarantee that the transfer of files from the Gemini to the recommended Mercury II would be entirely accurate. This is not a reason to find an assessment inappropriate. Furthermore, Mr. Swingle also recommended that ATEC provide services in order to assist with the transfer of communication files. He also attempted to reassure Mother that he would attempt, as best as possible, to recreate files that did not transfer. Student objects that Mr. Swingle's reports failed to identify the number of communication files used by Student in the Gemini and the person responsible for programming the replacement device. Again, the procedural requirements relating to assessments do not require such specificity. In fact, Mr. Swingle's reports recommended that ATEC provide services both to transfer communication files from the Gemini to the replacement AAC device, to set-up the new device, and to train Student's special education team as regards the use of the device.

### The April 2008 Physical Therapy Report

48. Student's contention regarding the April 2008 Gallagher Pediatric Physical Therapy Report is a disagreement with Ms. Marilo's recommendation that the District discontinue the provision of physical therapy services for Student. However, there are no procedural flaws with this report. Ms. Marilo's report was the written account of an observation made by a related service provider and later reviewed by Student's IEP team during the 2008 and 2009 annual IEP meetings. (See Ed. Code, § 56381, subd. (b)(1).) The report reasonably concludes that, because she received similar assistance from aides and her APE teacher, Student no longer needed overlapping physical therapy services. Mother did not present expert testimony to refute this conclusion.

### The Vision Impairment & Blindness Reports

49. Student's contentions regarding the 2007, 2008 and 2009 Vision Impairment & Blindness Reports prepared by teacher Mark Winnick is a disagreement about lack of content. Student objects that Mr. Winnick's reports "do not recommend any direct services for the identification or provision of appropriate, specially designed, scientifically based, instructional materials or the evaluation of the effectiveness of specially designed instructional materials." (Amended Due Process Complaint, p. 2.) Through this contention, Student attempts to hold the District accountable to standards that are not applicable to assessments, much less observations by school personnel. In fact, Mr. Winnick's reports are written accounts of observations that he made of Student in her classroom and discussions with Student's teachers. (See Ed. Code, § 56381, subd. (b)(1).) Moreover, an educational agency is not required to set forth teaching methodologies in assessments and individualized education programs. As stated by the United States Supreme Court, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." (*Rowley, supra*, 458 U.S. at p. 207; see also *Mercer Island, supra*, 575 F.3d at p. 1039.) Student also objects that Mr. Winnick's

reports did not assess her reading and writing skills. Mr. Winnick was concerned about Student's ability to see objects in her educational environment; Student's reading and writing skills were assessed by other members of the team, including her teacher and the Speech and Language Pathologists that provided language and speech services for Student.

#### The Orientation & Mobility Evaluations

50. Student's contentions regarding the 2007 and 2008 Orientation and Mobility Evaluations prepared by Maria Gerard is another disagreement about lack of content. Student objects that Ms. Gerard's evaluations did not identify any of Student's needs outside the classroom environment and did not recommend any direct services to identify instructional materials or methods to assist Student with regard to safety matters and community resources. Once again, through this contention, Student attempts to establish standards that do not apply to assessments of disabled children performed by educational agencies. Ms. Gerard's evaluations were written accounts of observations made of Student in her educational environment. Student's IEP team reviewed these observations during the annual and triennial IEP meetings. (See Ed. Code, § 56381, subd. (b)(1).) In this manner, Ms. Gerard's evaluation accorded with the procedures required for appropriate reevaluations of a child with a disability.

#### The Need to Perform Additional Assessments

51. Student contends that the District has failed to perform assessments in the areas of occupational therapy and "continuing education and vocational desires, abilities, needs and/or opportunities." (Amended Due Process Complaint, p. 2.) Mother did not present expert testimony on the need to perform such assessments. In fact, the District has performed a transition assessment of Student, and indicated in Student's 2008 annual IEP that a Functional Vocational Evaluation is forthcoming. The District did

not commit a procedural violation by not performing the assessments listed in the amended pleading.

## THE PROVISION OF RELATED SERVICES

52. Student contends that the District has denied her a free appropriate public education through “the lack of direct, supportive, services provided by Related Service Providers.” (Amended Due Process Complaint, p. 3.) In this case, for the applicable time period, the District provided Student with the following related services as part of her special education program: (1) transportation; (2) individual language and speech services; (3) individual adaptive physical education services; (4) individual physical therapy services; (5) consultative orientation and mobility services; (6) consultative vision impairment services; and (7) consultative assistive technology services. In addition, the District provided Student with both assistive technology devices and assistive technology services which the parties have treated as the provision of related services. These AT devices and AT services are set forth under the goals in Student’s 2007, 2008 and 2009 annual individualized education programs, and include an AAC device, a classroom desktop computer with accessories, and various educational software.

53. In terms of special education law, a “related service” is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) Related services typically consist of individualized services tailored to address a disabled pupil’s particular needs. (*C.G. v. Five Town Community School* (1st Cir. 2008) 513 F.3d 279, 285 (*Five Town*).) An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School*

(9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*).) The adequacy of such related services is measured by whether the disabled pupil will gain educational benefit through the assistance provided by such services. (*Mercer Island, supra*, 575 F.3d at p. 1038, fn. 10.)

54. In this case, the Garden Grove Unified School District has met the foregoing standard for providing Student with an adequate amount of related services, including AT devices and AT services. The related services, AT devices and AT services set forth in Student's 2007, 2008 and 2009 annual IEP documents are tailored to address her many unique needs. Such related services, AT devices and AT services also provided adequate support which permitted Student to take advantage of her special education program, as demonstrated by her progress in school. At each annual IEP meeting, team members reported that Student had progressed on particular goals. In particular, Deborah Young and Joseph Horodyski, the teacher and Speech Language Pathologist who served Student at SeaStar and Grace Education, noted Student's progress on different communication goals in her individualized education program. Granted that Student's progress is slow due to her multiple disabling conditions, nevertheless, the appropriateness of an IEP is measured in part by "whether the child makes progress toward the goals set forth in [his or] her IEP." (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) Progress on IEP goals is an important benchmark for determining whether a disabled child is receiving educational benefit. (*Park, supra*, 464 F.3d at p. 1153.) Moreover, at different points, Mother has stated that Student was making progress in school. During the May 2007 Speech and Language evaluation, Mother told Helen Butchers that her daughter was making "remarkable progress" in her educational program. Later, in a March 20, 2009 letter to Clark Osborne, Mother stated that Student was making "adequate progress" at Grace Education.

55. Beyond the related services, AT devices and AT services provided by the District, Student contends that she needs Occupational Therapists, Resource Specialists and Related Service Providers who identify and design scientifically based instructional material and methods of access to such materials in order to allow her to progress in core content and subject areas of state requirements, and to provide her with vocational assistance. In this regard, Student is requesting that the District provide a special education program that exceeds the standard required by the IDEA as explained by the Supreme Court in the *Rowley* opinion. To repeat, the Individuals with Disabilities Education Act does not require an educational agency to provide a disabled child with an ideal or optimal education. (*Five Towns, supra*, 513 F.3d at p. 284.) Nor does the Act require an educational agency to design an IEP according to the desires of the parent. (*Anderson v. District of Columbia* (D.D.C. 2009) 606 F.Supp.2d 86, 93.) Instead, the IDEA requires that the educational agency develop a program which provides the disabled child with a basic floor of opportunity and which is reasonably calculated to provide educational benefit. (*Mercer Island, supra*, 575 F.3d at pp. 1037-1038.) Here, the evidence established that, except for several lapses in the implementation of Student's individualized education programs, the District has undertaken and sustained a large scale effort that meets this standard. (Findings of Fact, ¶¶ 1-10, 25-33, 42, 65-67, 74-75, 85-94, 99, 104-105, 110-117, 119, 125.)

#### MATERIAL FAILURE TO IMPLEMENT STUDENT'S IEP

56. The FAPE standard also requires a school district to provide the program of special education and related services in conformity with the disabled child's IEP. (20 U.S.C. § 1401(8)(A); see also *Rowley, supra*, 458 U.S. at pp. 188-189; *Park, supra*, 464 F.3d at p. 1033.) In terms of this requirement, a material failure to implement a disabled pupil's individualized education program constitutes a violation of the IDEA. (*Van Duyn v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822.) "A material failure occurs



when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid.*) While the materiality standard does not require a showing that the child suffered educational harm, nevertheless, "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Ibid.*) A material failure to implement an IEP can include the failure to provide related services. (*Id.* at p. 821, fn. 3.)

57. In this case, during the applicable time period, the District committed a material failure to implement Student's IEP as regards the provision of related services in several respects. First, the District did not provide Student with the 43 hours of compensatory physical therapy services designated in her 2008 annual IEP. In a letter dated September 4, 2008, Clark Osborne informed Mother that the District agreed to provide such compensatory hours in the form of direct physical therapy services for Student. This tribunal recognizes that the District attempted to provide the compensatory services through Gallagher Pediatric while Student attended Grace Education, and that Mother refused to permit Gallagher to provide such services. Nevertheless, Student is owed the provision of physical therapy services as outlined in Mr. Osborne's letter. (Findings of Fact, ¶¶ 20-21, 25, 29, 53, 57, 62, 89, 93, 96, 104.)

58. Second, the District failed to provide Student with the related service of transportation for about the first month that Student attended Grace Education. In November 2008, even though Grace Education notified the District that it could not provide transportation, Mother was required to transport Student for four or five weeks before the District assumed responsibility for this service. The FAPE standard requires that an educational agency provide a program of special education and related services "at public expense." (20 U.S.C. § 1401(8)(A).) The District has not reimbursed Mother for

transporting Student to and from Grace Education for the above-described period. (Findings of Fact, ¶¶ 89, 92, 101.)

59. Third, the District failed to provide Student with the related service of adaptive physical education designated in her 2008 annual IEP. In fact, the failure by Grace Education to provide APE services under Student's IEP was the reason that the District cancelled the NPS agreement with Grace and moved Student to Buena Park SLDC. This material failure lasted from early January to March 20, 2009. (Findings of Fact, ¶¶ 89, 92, 104, 107, 114, 118.)

60. Finally, during both the 2007-2008 and 2008-2009 school years, the District materially failed to implement Student's individualized education programs with regard to the provision of AT devices and AT services specified in such IEP documents. While relying upon California Children's Services and the non-public schools with regard to such items, ultimately the District had the responsibility for providing and maintaining the AT devices and AT services designated in Student's IEP. (34 C.F.R. § 300.105(a) (2006); see also 20 U.S.C. § 1412(a)(12)(B)(ii) [the local educational agency must provide and pay for special education and related services not provided by another agency].) During the 2007-2008 and 2008-2009 school years, Student did not have at all times an AAC device in the classroom when her Gemini was not working. During the 2008-2009 school year, likewise, Student did not have an AAC device that contained the full amount of software designated in her 2008 annual IEP. In addition, during the same school year, at least at Grace Education, Student's classroom computer was not always functional. Student's 2007 and 2008 annual individualized education programs designated both AT devices and AT services necessary to help her achieve goals, most especially goals designed to improve her abilities to communicate and use numbers. While Student achieved many goals from these IEP documents, Joseph Horodyski, in his March 2009 Speech and Language Progress Report, noted that Student

did not achieve several communication goals in her 2008 annual IEP based upon factors relating to her loaned AAC device. (Findings of Fact, ¶¶ 12-16, 20, 26, 28-29, 55-61, 65-66, 74-89, 92, 94-95, 98, 100, 102-103, 105-106, 109-111, 113-114.)

#### EQUITABLE RELIEF – COMPENSATORY EDUCATION AND REIMBURSEMENT

61. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing “shall grant such relief as the court deems appropriate.” (20 U.S.C. § 1415(i)(2)(c)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) The United States Supreme Court has held that this authority “confers broad discretion on the court” to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996; 85 L.Ed.2d 385].) The broad authority to grant such relief extends to the Administrative Law Judges and Hearing Officers who preside at special education administrative due process proceedings. (*Forest Grove School District v. T.A.* (2009) 557 U.S. \_\_\_\_ [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168] (*Forest Grove*).)

62. Appropriate equitable relief can include compensatory education. (*Park, supra*, 464 F.3d at p. 1033.) Appropriate compensatory education is relief designed to ensure that the disabled child is educated within the meaning of the IDEA. (*Parents of Student W. v. Puyallup School District 3* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*).) Proper relief can include reimbursement for transportation expenses. (*Ojai Unified School District v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1479.)

63. When granting relief in IDEA cases, the decision maker “must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284].) In considering all factors, the tribunal must review the conduct of both parties. (*J.G. v. Douglas County School District* (9th Cir. 2008) 552 F.3d 786, 794.) The fashioning of relief in IDEA cases requires a “fact-specific” analysis.

(*Puyallup, supra*, 31 F.3d at p. 1497.) Courts and ALJs “retain discretion to reduce the amount of a reimbursement award if the equities so warrant.” (*Forest Grove, supra*, 129 S.Ct. at p. 2496.)

64. In this case, appropriate equitable relief for the District’s material failures to implement Student’s individualized education programs is as follows. For the failure to provide 43 hours of compensatory physical therapy services, the District shall provide this amount in the school setting before Student exits special education on December 31, 2010. Mother did not present any evidence to rebut the conclusion by Christy Marilo that Student no longer requires educationally related PT services, or deserves a greater amount of compensatory time. For the failure to provide transportation services during the months of November and December 2008, the District shall reimburse Mother in the amount of 55 cents per mile. Mother shall provide the District with a log showing the dates that she drove Student to and from Grace Education, and the mileage for such trips. For the failure to provide Student with the related service of adaptive physical education during the period from early January 2009 to March 20, 2009, the District shall provide hour-for-hour compensatory services. This tribunal recognizes that the appropriate award of compensatory education does not necessarily require day-for-day compensation for time missed. (*Puyallup, supra*, 31 F.3d at p. 1497.) Nevertheless, the APE services required under Student’s IEP were important, especially because such services were overcoming the need for the provision of physical therapy services. Under Student’s 2008 annual IEP, the District agreed to provide individual APE services in the amount of five 30 minute sessions per week. Student missed 11 weeks of this service at Grace Education. Therefore, the District must provide compensatory APE services in the amount of 1,650 minutes in the school setting before Student exits special education on December 31, 2010.

65. For the compensatory education required from the District's material failure to implement Student's IEP as regards AT devices and AT services, this tribunal must factor Mother's conduct on the subject. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1486.) Despite her best intentions, Mother has contributed to the difficulties encountered by the District in fully providing the AT devices and AT services in Student's individualized education programs. With few exceptions, Mother did not share customized communication files that she created for Student's Gemini with either AAC devices loaned by the District and ATEC or Student's classroom computer. This refusal to share such files meant that Student was not able to communicate as effectively in the classroom. During the 2007-2008 school year, when the Gemini needed repair, the District attempted to have Mother sign an Equipment Loan Agreement which provided that Mother would be responsible for a loaned AAC device outside of the school setting. This proposal was reasonable since the District was not responsible for providing Student with an AAC device for use in the home and community. Mother's refusal to accept this division of responsibility contributed to the delay in providing Student with a loaned replacement device after the Gemini became non-useable at school. Finally, Mother did not act reasonably in refusing to approve Mr. Swingle's June 2008 recommendation that California Children's Services purchase a Mercury II to replace the aging Gemini. Mother did not approve this recommendation largely for personal reasons, including the fact that she had created the custom files in the Gemini, that the Gemini operated on a Macintosh platform which would make difficult the transfer of files to a PC-based AAC device, and that her home computer was a Macintosh which would not be compatible for downloading files to the recommended Mercury II. Significantly, none of these personal reasons detract from fact that, by proposing the AAC system recommended by Mr. Swingle, the 2008 annual IEP offered

Student a free appropriate public education as regards AT devices and AT services.

(Findings of Fact, ¶¶ 12-16, 58-61, 74-86, 88-89, 92, 94, 98, 105-106, 109, 111.)

66. Given the foregoing circumstances, this tribunal determines that an appropriate amount of compensatory education, as regards AT devices and AT services, is the provision by the District in the school setting of an extra hour per month of consultative assistive technology services for each month that Student attends school until she exits special education on December 31, 2010. The extra hour per month of consultative assistive technology services shall be provided in addition to the consultative AT services set forth in Student's last implemented IEP, and shall be for the promotion of communication development, effective use of the AAC device utilized by Student in her classroom, and the effective use of hardware and software in Student's special education program.

#### DETERMINATION OF ISSUES

67. The following determinations are based upon Findings of Fact, paragraphs 1 through 143, and Conclusions of Law, paragraphs 1 through 66.

68. *Issue 1:* The District did not deny Student a free appropriate public education by failing to timely provide Student a stay put placement at Buena Park SLDC.

69. *Issue 2:* The District did not deny Student a FAPE by performing inappropriate assessments or failing to perform certain assessments.

70. *Issue 3:* The District did not deny Student a FAPE by failing to provide a sufficient amount of direct, supportive related services. The District did deny Student a FAPE through the material failure to implement aspects of Student's individualized education programs with respect to the provision of certain related services, including the provision of assistive technology devices and assistive technology services.

## ORDER

1. The Garden Grove Unified School District shall provide Student with individual physical therapy services in the amount of 43 hours. The District shall provide such services during normal school hours on or before December 31, 2010.

2. The Garden Grove Unified School District shall provide Student with individual adaptive physical education services in the amount of 1,650 minutes. The District shall provide such services during normal school hours on or before December 31, 2010.

3. The Garden Grove Unified School District shall provide Student with consultative assistive technology services in the amount of one extra hour per month in addition to the consultative assistive technology services set forth in Student's last implemented individualized education program. The District shall provide such services during normal school hours for each month that Student attends school, including the extended school year, until December 31, 2010.

4 The Garden Grove Unified School District shall reimburse Student's parent in the amount of 55 cents per mile for the cost of transporting Student to and from Grace Education during the months of November and December 2008. To obtain such reimbursement, Student's parent shall submit to the District a request that contains the dates that she provided such transportation and the amount of mileage for such trips.

5. Student's remaining requests for relief are denied.

## PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).)

The District prevailed on Issues 1 and 2 in the Amended Due Process Complaint. Student and the District partially prevailed on Issue 3 in the amended pleading.

## RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: January 11, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
Timothy I. Newlove  
Administrative Law Judge  
Office of Administrative Hearings