

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2011010530

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011030805

DECISION

On June 21, 22, and 23, 2011, Judith L. Pasewark, Administrative Law Judge (ALJ) from the Office of Administrative Hearings, Special Education Division (OAH), presided at the due process hearing in this case.

Student's parents (sometimes Mother, Father, or collectively Parents) appeared and represented Student (Student). Student appeared on June 22, 2011, to provide a physical demonstration of his gross motor skills, but did not attend the hearing in general.

Lauri LaFoe, Esq., represented Los Angeles Unified School District (District). District Due Process Specialist, Sue Talesnick, attended the hearing on behalf of the District. On June 22, 2011, District Due Process Specialist, Shari Robertson, attended the hearing in lieu of Ms. Talesnick. Zach Ulrich, a District Intern, also observed portions of the hearing.

STATEMENT OF PROCEDURE

On January 19, 2011, Parents on behalf of Student, filed a Request for Due Process Hearing (first or primary complaint), OAH Case No. 2011010530. On February 11, 2011, OAH continued the first due process hearing date. On March 16, 2011, Parents on behalf of Student filed a Request for Due Process Hearing (second complaint), OAH Case No. 2011030805. On April 8, 2011, OAH granted the District's request to consolidate both of Student's complaints, with OAH Case No. 2011010530 designated as the primary case. The order of consolidation further determined that the timeline in the primary case was controlling, and the timeline tolled as of the first continuance on February 11, 2011. The hearing took place on June 21, 22, and 23, 2011. The parties completed testimony and closing arguments, and submitted the matter on June 23, 2011.

TESTIMONY AND EVIDENCE

Yetta Harris, Dr. Steven Chen, Yolanda Ulan, Mother, Father, and Student testified on behalf of Student. Amanda Weintraub, Anne Petersen, Ann Christine Romesser-Flink, Lisa Cerra, Vicki McCree, Marion Klein, and Dr. Ashwini Veishampayan, testified on behalf of the District.

With the exception of that portion of Student's Exhibit 5, which was incomplete, (and also admitted in its complete form in the District's exhibits), the articles presented as Student's Exhibit 8, and the District's Exhibit 7 regarding Adaptive P.E., the ALJ admitted all other documents presented by the parties into evidence. Although not admitted into evidence, the ALJ agreed to give judicial notice to Student's Exhibit 8.

ISSUES

Student's complaints present the following issues based upon Student's October 25, 2010, and March 8, 2011 Individualized Education Programs (IEP). Specifically, for the

2010-2011 school year, did the District deny Student a free appropriate public education (FAPE) by:

1. failing to provide Student with sufficient physical therapy (PT), occupational therapy (OT) and occupational therapy clinic (OT clinic) services to meet his unique needs;
2. failing to provide transportation for OT clinic visits; and
3. failing to provide parents with frequent or sufficient progress reports in all areas of Student's IEP.

FACTUAL FINDINGS

1. Student is a four-year-old boy who resides within the District with his parents. To put it simply, Student is an amazing child. As Father has emphasized, in order to more fully understand Student and his disabilities, one must acknowledge his history, his set backs, and his achievements.

2. There is no disagreement between the parties regarding Student's medical history or current diagnoses. Upon his premature birth, Student initially spent 8-1/2 months in the Newborn Intensive Care Unit (NICU) due to many medical complications, including esophageal atresia, a tracheal pouch, an arachnoid cyst, and pneumonia. After six weeks he was re-admitted to the NICU for 2-1/2 months, for a total of 11 months in the NICU after his birth. Student has a diagnosis of VACTERL or VATER Association Syndrome. VACTERL Association specifically refers to the abnormalities in structure: V – vertebral anomalies; A – anal atresia; C – cardiovascular anomalies; T – tracheosophageal fistula; E – esophageal atresia; R – renal anomalies; and L – limb deformities. It is also undisputed that Student has additional medical conditions which affect his daily living and physical abilities, including, but not limited to, torticollis (an anomaly in the neck vertebrae), esotropia (a visual malfunction which causes the eyes to project inward), scoliosis, deformities of his limbs, which result in non-uniform length of his arms and

legs, and a right foot which projects outward, a missing left-thumb (to which his index finger has now been surgically attached to act as a thumb), cyclical abdominal migraines, delayed stomach digestion, and low muscle tone. Student has had three brain surgeries. Most all of Student's chronic ailments contribute to his delayed growth and development, as well as his fine motor and gross motor delays. Student is currently being treated by approximately 10 different doctors of varying specialties, and in his mere four years since birth, he has endured 100 surgeries and hospitalizations. Student requires 11 different medications each day, primarily to stabilize his pulmonary issues. Additionally, feeding can be difficult for Student, and he has a G-tube for supplementary feedings.

3. Due to his significant medical needs, Student misses a substantial amount of school. He is hospitalized every few weeks for esophageal surgeries (repair and stricture dilations). He is unable to function at school when he is experiencing abdominal migraines, which occur approximately every six weeks.

4. Dr. Chen testified as Student's current primary physician. Dr. Chen provided medical descriptions of many of Student's diagnoses as reported above in Paragraph 2. Based upon his medical history, Dr. Chen reported that cognitively Student can stay on pace with typical peers. Given his motor skills deficits, Dr. Chen believes one hour per week of OT, PT and OT clinic therapy is reasonable. Dr. Chen, however, makes his recommendation from a medical standpoint only. He was unaware of what services the District had offered; he did not know the educational basis for providing special education DIS services, and he has not observed Student in his educational environment.

5. Yetta Harris is a pediatric nurse (LVN) who has worked with Student since 2008. She has continually observed Student during this time. Like most of the other witnesses, she describes Student as a very bright child with weaknesses in his mobility,

developmental skills and motor skills. Student is physically underdeveloped in many areas. She reports that Student cannot catch a ball. He can scribble, but cannot write. Due to his esotropia and resulting vision problems, Student has problems with safety and movement. He walks to school, but falls down frequently, often resulting in injuries. Ms. Harris notes that Student is often unwell and often hospitalized. She therefore opines that Student would benefit from extra DIS therapies during those periods of time he is feeling well.

6. Yolanda Ulan, Student's nanny, confirmed the description of Student provided by Ms. Harris. She added that Student has limited attention and requires constant cuing. Although he can make contact with a ball, Student cannot kick the ball with power. He cannot walk a balance beam without holding her hand. Further, Student cannot dress himself without assistance. Both Ms. Harris and Ms. Ulan present accurate descriptions of Student's physical abilities. Like Dr. Chen, however, their opinions are based on Student's medical conditions, rather than on his educational needs. Neither has observed Student at school or in OT clinic. Further, neither have any formal training in OT or PT.

7. Prior to transitioning into the District, Student received services from the Westside Regional Center. Student attend the UCLA Intervention Program four times a week and received Speech and Language Therapy two times a week, OT two times a week, and PT two times a week.

8. Student currently attends a pre-school mixed classroom at Beethoven Elementary School (Beethoven) from 8:20 a.m. to 10:40 a.m., Monday through Thursday. He currently receives 30 minutes a week of school-based PT, 30 minutes a week of school-based OT, and 50 minutes per week of OT clinic services (sometimes DIS

services)¹ based upon his initial implemented IEP dated March 4, 2010. Student's subsequent IEP's for the 2010-2011 school year, dated October 25, 2010 and March 8, 2011, offered the same amount of time for these DIS services. Parents did not consent to the DIS services, and requested that the services in each area be doubled.

INITIAL ASSESSMENTS

9. The District administered Student's initial assessment on February 18, 2010, to determine Student's eligibility for special education services through the District's Preschool Programs and to help determine an appropriate educational placement in the least restrictive environment (LRE). The District presented its written Multi-Disciplinary Assessment Report on February 22, 2010.

10. Student's cognitive abilities are undisputed. The District administered the Preschool Team Assessment III which evaluated Student's cognitive abilities and psychological processing in verbal and nonverbal areas. Student's general abilities were estimated in the average range, with Student demonstrating a relative strength in verbal areas. Student scored below average in nonverbal areas. This is not surprising, as nonverbal and visual tasks utilize skills in visual motor coordination, visual imitation, visual spatial skills and visual memory, which are all impacted by Student's esotropia and motor skills deficits.

11. Student's school readiness skills are also undisputed. According to the Preschool Team Assessment III-School Readiness Tests, Student performed in the well above average range overall.

¹ Student also receives 20 minutes a week of adaptive physical education (APE); however, Parents inadvertently failed to include a request to increase APE in their complaints.

12. Assessment of Student in social and emotional areas indicated that Student's attention span was variable. When structured tasks were presented, Student performed better on the auditory or verbal tasks than on the visual or nonverbal ones. On non-preferred tasks, such as blocks and puzzles, Student easily became frustrated and, in turn, became distracted. With encouragement and positive reinforcements for his efforts, however, Student was able to complete all of the tasks presented to him. Student also related better with adults than with children. He showed some social awareness, but preferred to play alone or parallel with peers.

13. According to the Developmental Profile-3 (DP-3), Student's self-help or adaptive skills are in the delayed range. Student continues to have feeding difficulties and is primarily fed through a G-tube. Student's willingness to eat is improving and the variety of foods he will eat is expanding. While at the hearing, Student munched on Chex Mix which he held in his hand. Student can drink from a straw and an open cup with assistance. He cannot open a juice box and insert the straw. Student can cooperate with dressing, but needs assistance with fasteners, and putting on clothing. Student is not yet toilet trained.

14. Student's motor abilities are below average. On the Preschool Team Assessment III-Fine Motor Skills, Student displayed below average fine motor skills. He could scribble circularly, and imitate horizontal and vertical lines, but could not appropriately draw a circle. Student could turn pages in a book. Although Student could make a "snip" with scissors, he could not yet cut with scissors. Student's gross motor skills were also below average. Student could walk and run, but had a wide based, immature gate. He was beginning to jump. He was not yet interested in ball skills, and could not appropriately catch a ball. He could get up and down stairs, taking two feet to a step.

15. Vicki McCree, a licensed physical therapist employed by the District, prepared Student's initial informal PT assessment report, dated February 26, 2010, which resulted in Student's eligibility for PT services. The report noted parental concerns as (1) decreased fine motor skills; (2) decreased ability to eat due to medical problems; (3) physical developmental delays; and (4) decreased attention span. The District staff expressed concerns regarding (1) physical skills when the terrain changes; (2) decreased attention and visual attention; and (3) decreased visual perception skills.

16. While Ms. McCree administered the Peabody Developmental Motor Scales Tests, Student's results were inconclusive due to Student's interest level and his lack of a thumb on his left hand. As a result, she used part of the items on the test, and discussed the results through clinical observations rather than through standardized scores.

17. Ms. McCree's report is informal, and therefore is not as detailed as Student's subsequent PT assessment of October 13, 2010. Suffice it to say, Student's areas of need, and parental/staff concerns remain the same; however, Student's progress and development had advanced in all areas by the time of the October 13, 2010 assessment. Accordingly, starting at paragraph 21 below, the October 13, 2010 PT assessment report is described in far more detail.

18. Anne Peterson is Student's current preschool teacher at Beethoven Elementary School. She describes Student as a sweet, talkative child who likes to interact with adults. Academically, he is similar to typical peers. He is verbal, carries on conversations, follows directions, knows his letters and can count to 10. Socially, Student is friendly but doesn't interact with other children without encouragement; he prefers adults. He has a short attention span. Physically, Student has grown in size. He can climb, get into a chair and navigate the school campus. Ms. Peterson notes that Student is more cautious (than other students) and takes his time. He appears to know his limitations.

19. Student exhibits weaknesses in fine motor skills, such as properly holding a pencil and cutting with scissors. Much of this is attributable to Student's lack of a thumb, and is improving since his hand surgery. Student can string beads. Ms. Peterson reports that Student has made progress since October 2010. He has, however, missed approximately 25% of his classes due to hospitalizations and illness. Further, Student's fine motor skills, social skills, and limited attention span, continue to impact his progress.

20. In addition to the DIS services offered by the District, Ms. Peterson described activities which are embedded in Student's educational program. PT activities in the classroom include working on balance, walking, climbing stairs, using the playground apparatus and getting onto and sitting in chairs. Classroom activities also involve gross motor exercises, such as jumping, dancing, and moving to music. Further, there are lots of opportunities for Student to work on his fine motor skills, with activities such as coloring, singing, and tracing. Student participates in all of these classroom activities

PHYSICAL THERAPY SERVICES

21. Ann Christine Romesser-Flink is employed by the District as a licensed physical therapist. She previously provided Student's school-based PT at Beethoven, and conducted Student's formal PT assessment on October 13, 2010. Ms. Romesser-Flink utilized the *Ecological Model of Student Performance*,² which is an educational model

² This model is the best practice according to the Guidelines for Occupational Therapy and Physical Therapy in California Public Schools (published by the Department of Education), The American Physical Therapy Association's Guide to Physical Therapist Practice, 2nd Edition, and The World Health Organization's International Classification of Function (ICF).

that takes into account the curriculum, the educational environment, and the student's abilities to determine the student's present level of performance. Further, the report indicated that the purpose of her PT assessment was to identify activity demands and factors supporting or hindering Student's participation in daily life activities to access state standards at school.

22. In preparing the assessment report, Ms. Romesser-Flink interviewed both Father and Student's teacher, Ms. Peterson, and reported their concerns. Father expressed concern that (1) Student's torticollis was still impacting Student; (2) Student's right foot extended outward (as a result Student could not properly ride a tricycle); (3) Student's growth and development was behind his typical peers; (4) due to his esotropia and other visual impairments, Student did not use his eyes when walking; (5) Student had balance problems; (6) Student had attention issues; and (7) Student often missed class school due to medical appointments, hospitalizations, and illness. Ms. Peterson indicated that Student was doing well; however, she expressed concern with his balance and his ability to access the playground apparatus secondary to his decreased safety awareness. Ms. Romesser-Flink indicated that she considered their concerns in developing her report. At the time of the assessment, Student was making good progress on his goals.

23. Based upon her observations, Ms. Romesser-Flink reported that, in the classroom, Student was able to ambulate independently around the classroom and maneuver around furniture, staff and peers. He was able to follow the simple one to two step directions and was able to sit in both a cube chair and regular classroom chair independently. He was able to scoot himself on a scooter board in a prone position and transition to and from the floor independently. Student could step over two to three small objects on the floor without tripping or requiring verbal cues. He could independently feed himself during snack breaks.

24. Ms. Romesser-Flink also observed Student navigate the school campus. Student could ambulate around the campus independently, and could ascend and descend the ramp that leads to the classroom door. On the playground, Student could ambulate over the blacktop and rubber top areas independently. Student could climb in and out of the sandbox independently and was able to walk in the sandbox with fair balance. Although Student was supervised on the playground due to his decreased safety awareness, he could climb on the playground apparatus independently. He used the safety rail to assist in ascending and descending the stairs. He could independently crawl through the tunnel and slide down the slide on the apparatus. Student could catch a ball thrown from 3-5 feet away, and was able to kick a stationary ball.

25. During snack breaks, Student could climb on and off of the chair independently and could feed himself. Although Student is not toilet trained, he presented with no activity limitations or participation limitations which prevented his accessing his educational environment.

26. The assessment report indicated that Student's primary reflexes are adequately integrated and do not dominate his movement patterns. Student presented with decreased muscle tone in his trunk. While Student's muscle tone is impaired, it remains functional. As explained by Ms. Romesser-Flink, a child may have impaired abilities due to physical problems, but remain functional. A child is functional when he can access the classroom for novel tasks. Student's coordination is functional. He can reach table top activities.

27. Ms. Romesser-Flink assessed Student's balance. Equilibrium reactions maintain or regain control over the body's center of gravity to avoid falls. Righting reactions keep the head in a normal position, right the body to a normal position and adjust the body parts in relation to the head and vice versa. Student's righting and equilibrium reactions are present in sitting and standing. In an educational model,

balance or postural control is the ability to maintain a position and react to functional challenges within the educational environment. Ms. Romesser-Flink found Student's balance intact, and he is able to maintain reach outside his base of support with good balance. He has good ambulation balance on even terrain and fair balance on uneven terrain. His running is challenged or immature.

28. Student's motor planning is functional to access his educational curriculum. This was evident in his ability to think through what is required of him to perform a new task.

29. Student's structural alignment is functional as he suffers from scoliosis and torticollis, as well as uneven limb lengths. He presented with a functional range of motion in his neck, trunk and lower extremities. Student's strength is weak, but functional, as evidenced by his ability to ambulate and run independently, transition to and from the ground independently, squat to pick up objects, wheelbarrow walk with support at his lower thighs/knees, climb on the playground apparatus, walk backwards and on his toes, and jump with his two feet together. Accordingly, Ms. Romesser-Flink determined that none of these disabilities impacted Student's ability to access his educational curriculum.

30. Ms. Romesser-Flink also assessed Student's gross motor skills. In an educational setting, gross motor skills involve movement of the large muscles in the arms or legs in a coordinated manner for functional school related accessibility. The assessment report supports Parents' contentions that Student's gross motor skills remain markedly delayed when compared with typical peers. Ms. Romesser-Flink concludes that Student's developmental and gross motor delays result from his limited exposure secondary to his diagnosis and multiple surgeries. He requires no adaptive equipment nor modifications or accommodations at school to access his educational curriculum.

31. Ms. Romesser-Flink initially recommended that Student receive 60 minutes per month of PT services, to address his challenged running and decreased balance on uneven terrain. The IEP team, however, agreed to maintain the 30 minutes per week to maintain consistency due to Student's frequent absences. (Student had missed 10 of 35 sessions during the school year). Soundly, Ms. Romesser-Flink concluded that 30 minutes per week of PT services is appropriate to provide Student functional access to his education.

32. Ms. McCree provided Student's school-based PT services until March 2011, and assisted in crafting the PT goals for the March 2011 IEP. Ms. McCree reported that Student is functional in all PT areas. Like Ms. Romesser-Flink, she explained that functional denotes that Student can keep up with his peers in an educational setting. It does not mean that Student does not have disabilities. As example, Student has uneven limbs, a disability. This, however, does not prevent Student from being functional, as the unevenness does not impact his movement or his ability to access his educational environment.

33. While Parents may not have seen the more advanced level of Student's physical abilities at home, i.e., balance and standing on one foot, Ms. McCree emphasized these abilities accurately represent Student's present level of performance as reported in the March 2011 IEP. Student's gross motor skills presented as functional in all areas. His areas of need, being decreased challenged ambulation, running balance, and higher level gross motor skill (hopping and jumping), could be addressed by his classroom curriculum and his adaptive physical education program. Further, Student's prior PT goals had been met within the 30 minutes per week framework, despite his many absences. Based upon these factors, Ms. McCree did not recommend further PT services for Student, because Student could access his educational environment. Parents

disagreed. As a result, the IEP team as a whole, agreed to include goals to address parental concern, and continue PT services for 30 minutes per week.

34. The opinions of Ms. Romesser-Flink and Ms. McCree are further supported by Marion Klein, Student's current physical therapist at school. Ms. Klein has been a licensed physical therapist employed by the District for 14 years. She was assigned to Student in March 2011. Ms. Klein's testimony was untainted and succinct. Ms. Klein is responsible for implementing Student's PT goals. Student can perform all of the foundational components, i.e., walking, going from sitting to standing, etc., without assistance. His functional status has improved from "fair" (which means he can perform functions without assistance), to "good." She has not seen Student fall. Ms. Klein defines PT as a support service. She believes Student has full access to his educational program, and further indicates that Student doesn't need PT support, because he can "do" everything. If continuing with PT services, Ms. Klein would reduce his services to 60 minutes per month, as none of Student's disabilities currently prevent him from accessing his education. Based upon the testimony of the three, licensed and qualified physical therapists, the District's offer of 30 minutes per week of physical therapy is both generous and appropriate to support Student's educational needs.

OCCUPATIONAL THERAPY SERVICES

35. Lisa Cerra is a school-based occupational therapist and supervisor contracted with the District. She is licensed as an occupational therapist in both California and New York, and has 11 years of experience in OT, providing both school-based therapy and home-based feeding therapy. Ms. Cerra administered Student's OT assessment, and provided a written report on February 18, 2010.

36. As part of the assessment, Ms. Cerra spoke with Parents and the classroom staff. Parents again reported Student's (1) decreased fine motor skills; (2) decreased ability to eat due to his medical problems; (3) physical delays; and (4) decreased

attention span. District staff expressed concern over Student's (1) physical skills with changes in terrain; (2) decreased attention; and (3) decreased visual attention and visual perception skills.

37. Standardized testing was inconclusive due to Student's interest level and lack of a left thumb. In the alternative, Ms. Cerra administered some of the items on the test, and the results were discussed through clinical observations rather than by standardized scores.

38. Ms. Cerra reported that Student had some good skills for his physical limitations. Student has a good range of motion, strength, postural stability and endurance to negotiate the classroom and participate in classroom activities. He can assume and maintain all of the positions required of a classroom program. He is able to transition from sit to stand independently, and can climb on and off chairs independently. He also exhibited several weaknesses. Student was observed to stumble frequently and has to catch his balance. He often bumps into things. Much of his balance issues may be related to his estropia. Ms. Cerra also noted that some of Student's medical issues impact his visual perception. Consequently, he has decreased oculomotor controls and has difficulty with visual tracking and convergence.

39. Student has decreased fine motor skills.³ Testing of Student's left hand was difficult due to Student's lack of a left thumb; however, he performed well with his right hand. Student can use a pincer grasp to pick up objects. He can pick up a crayon and orient to paper. Student can take off his socks, but cannot yet complete putting on his

³ Fine motor skills refer to functional hand use.

socks or his shoes without assistance. Student has decreased visual motor skills, and shows decreased bilateral coordination due to his left hand.⁴

40. Ms. Cerra also assessed Student's sensory modulation. Sensory modulation refers to the ability to regulate sensory input to maintain an optimal level of arousal to participate in the environment. It also refers to the ability to alter the state of alertness and react to changes within the environment in order to initiate, attend, share, anticipate, delay gratification of needs, and participate in goal directed activities. Student has difficulty with initiation and termination of activities, and will frequently try to walk away from non-preferred activities. Student is impulsive and distractible at times. He can follow one-step directions consistently, and can be self-directed. He can follow familiar two-step directions if interested and comfortable. He performs best with routines and is most compliant when routines are in place. He cries when upset or to avoid tasks. He has a great attention span with familiar books, but has a short attention span with novel ones. He requires cues to initiate and maintain participation with non-preferred tasks, and does not participate in non-preferred activities without maximal encouragement.

41. With regard to sensory processing, Student can attend for approximately three minutes to preferred adult-directed activities.⁵ Student's tactile processing is inconsistent. His proprioceptive processing is delayed. Student has decreased body

⁴ Visual motor skills require the interaction of visual information with body movement during performance.

⁵ Sensory processing includes sensory integration which refers to the process in which sensory experiences are processed and organized for use. This information is interpreted by the visual, auditory, tactile (touch), vestibular (movement information) and proprioceptive processing (information obtained from muscles and joints) systems.

awareness and runs into objects. This decreased body awareness, however, does not negatively impact his social skills or proximity to peers. Ms. Cerra also reported that Student has visual processing issues related to his estropia, as well as feeding issues. According to Ms. Cerra, these are medical issues and are not relevant to educational or school-related OT.

42. Student also had deficits with praxis, which is comprised of four components. Ideation is the ability to have a developed plan of action to complete an activity. Initiation is the ability to begin the desired activity. Motor planning involves integrating sensory information to move the body smoothly and rhythmically and control movements to complete the desired activity. Adaption involves changing movements in response to changes in a given task, such as balance, appropriate pressure or catching a moving target. Within the school environment, Student shows visual inattention due to decreased vision, decreased visual attention, and decreased body awareness. He has a difficult time with novel tasks, however after he is exposed to an activity or a tactile medium over and over, he trusts that it is okay.

43. Ms. Cerra's report concluded that Student required OT services to assist him to benefit from his specially designed instruction. Student, however, does not require any supports in order to participate in the general education setting.

44. When questioned by Father, Ms. Cerra addressed the Every Child Achieves, Inc., OT progress report dated January 5, 2010, written by Lisa Hickey, OT.⁶ The observations of the report do not vary greatly from those of the District. It remains undisputed that Student's motor skills remain delayed in comparison to those of typical peers. The goals contained in the report were similar to those created by the District. The report as written, however, recommends "*continue* OT at a frequency of *ten hours per week* to address feeding, sensory, and developmental deficits." (Emphasis added.)

45. Ms. Cerra responded that, in her opinion, 10 hours per *week* was a typographical error, and the assessor meant 10 hours per *month*. Ms. Cerra supported her opinion by stating that 10 hours per week was unheard of in educationally-based OT therapy. The function of educationally-based OT is to *assist* in education. Further, more is not always better. The sheer number of hours given will not change a child's progress, as a child will develop at his own rate. Student would not become a different kid with additional therapy. Lastly, the report elsewhere indicates that Student received OT services nine hours per *month* beginning in March 2008.

46. Ms. Cerra's report and testimony was supplemented by Dr. Ashwini Veishampayan⁷ (Dr. V), who has provided school-based OT services to Student since September 2010. In addition to providing Student with 30 minutes per week of direct

⁶ Every Child Achieves provided Student's home OT services obtained from the Regional Center. The Regional Center terminated home services based upon a determination that Student was not developmentally disabled and therefore did not qualify for Regional Center services beyond age three. Parents filed an appeal with OAH, Case No. 2010060524, which was denied on November 1, 2010. Ms. Hickey did not testify at hearing.

⁷ Dr. Veishampayan has been an OT for 12 years, and has a Ph.D. in OT.

OT, she also facilitates activities in the classroom for all students approximately two days per week. These classroom activities primarily address motor skills in a group. Dr. V reports that Student has partially completed his goals. With many new activities, Student requires a demonstration, then he can participate; he requires verbal prompts to move to the next step. Dr. V. reports that new goals were created in March 2011, and those goals are appropriate for Student. Student enjoys his OT sessions and is motivated. He can maintain most postures independently, and can walk, stand, sit, and climb with minimal assistance. He is working on his fine motor skills to improve control of his hand muscles by attempting to cut with scissors, and maturely hold a crayon. He is working on visual motor skills by drawing lines and circles. Since Student is right hand dominant, his reconstructed left thumb/hand is not a big issue in his fine motor skills. Dr. V. notes that Student may fatigue easily when he has missed OT sessions due to illness. Accordingly, Dr. V has reduced Student's sessions to two, 15-minute sessions, rather than one, 60-minute session per week.

47. Dr. V concurs with Ms. Cerra that 30 minutes per week is a sufficient amount of time for OT. Student has made slow but steady progress and his motor skills are reinforced each day in the classroom. She opines that Student needs to develop group skills, not one-to-one skills. He will benefit more from in-class academics, rather than pull-out OT. Further, OT sessions will not necessarily remedy Student's attention span.

48. Amanda Weintraub, an OT for the District, is a licensed OT and has 15 years experience. She has provided Student with one hour per week of one-to-one clinic based OT services since May 2010. She reports that Student has goals directed at motor planning and balance control, and Student is making steady progress toward those goals. Although she did not attend Student's March 2011 IEP meeting, she did observe Student at school to provide input for the IEP meeting. During her observation, she

noted that Student could pick things up in class activities and he performed well, but needed cues when off task. Student did not fall, although he tripped but caught himself. She indicated that in clinic, Student will still fall if he is not looking. Ms. Weintraub confirmed that Student missed a lot of clinic sessions due to medical issues. She noted, however, that Student did not lose function or regress while he was out of school. She also explained that Student must attend school to receive school related OT services.

49. In response to questions regarding feeding issues, Ms. Weintraub explained that educationally-based OT doesn't deal with food or any issues inside the mouth. The school OT is working on opening and closing food containers during snack time, and this is part of Student's goals. She acknowledges that Student cannot yet independently place a straw in a juice box. She further explained that OT is based upon function. One cannot compare Student's progress to that of other children. Student's progress is measured against the IEP (Student's starting point), not against other children or typical peers. Based upon the testimony and reports of the three, licensed and qualified occupational therapists, the District's offer of 30 minutes per week of school-based OT, and 50 minutes per week of clinic-based OT is appropriate and is appropriate to support Student's educational needs.

TRANSPORTATION AND INCREASED COMMUNICATION

50. No enlightening information was presented regarding the issues of transportation or increased communication, as Parent's had apparently added the issues as somewhat of a "wish list" to be discussed at hearing. As part of the District's response to these issues, Ms. Weintraub addressed Father's requests for transportation and increased communication. The March 2011 IEP provides Student with OT clinic transportation pursuant to Parent's request. Parents, however, have not consented to the IEP; therefore the transportation has yet to be provided. Parents also requested consistent email communications from the service providers, especially when Student is

unable to attend school, to follow up with his therapies at home. Each provider indicated a willingness to speak “face to face” with Parents, and to provide them with session notes. Ms. Weintraub explained that departmental policy does not allow e-mail communication. Student failed to support his contentions regarding DIS transportation. He also failed to support a legal basis for his request to increase communication between Parents and the District.⁸

LEGAL CONCLUSIONS

1. As the petitioning party, Parents have the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)
2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction that meet the state’s educational standards and that conform to the student’s IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of a child with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as physical therapy or occupational therapy services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

⁸ While Parents have not fulfilled their burden of proof on the issue of increased communication, their request is nevertheless reasonable and should be considered by the District.

3. Local educational agencies such as school districts are not required to provide special education students with the best education available or to provide instruction or services that maximize or optimize a student's abilities. The seminal case explaining this principle is *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 which the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The Court also stated school districts are only required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (*Id.* at pp. 198-201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 949-951.)

4. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably

calculated to provide the pupil with educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

5. There are two parts to the legal analysis of whether a local educational agency (LEA), such as a school district, offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Id.* at p. 207.) In the matter at hand, Student has not alleged procedural violations regarding the DIS services, but has only averred that the DIS services are substantively inadequate to meet Student's educational needs.

6. Student's allegations regarding insufficient communication with Parents asserts a procedural violation. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).)

7. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the

provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a)(2006);⁹ Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered “(A)mong the most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

8. Under these guidelines, an educational agency must permit a child’s parents “meaningful participation” in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

9. An IEP is an educational package that must target all of a student’s unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term “unique educational needs” is broadly construed and includes the student’s academic, social, emotional,

⁹ All references to the Code of Federal Regulations are to the 2006 version.

communicative, physical, and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

10. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).)

11. Whether a student was denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed rather than in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Tracy N. v. Department of Educ., Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) Under this "snapshot rule," the only issue in the instant case is whether the District's IEP's were appropriate based on information known to it at the time the IEP team developed the IEP's. Therefore, evidence of events that occurred after the last IEP meeting held on March 8, 2011, is largely irrelevant in evaluating the appropriateness of the IEP's at issue in this case.

DETERMINATION OF ISSUES

12. Parents are seeking increased DIS services to "close the gap" between Student and his typical peers. As indicated by Father, Parents want Student to be effective in life, not just in school. To accomplish this goal, Parents contend that 30 minutes of school-based PT, 30 minutes of school-based OT, and 50 minutes of OT clinic is not enough, and request that Student be provided 60 minutes per week of school-based PT, 60 minutes per week of school-based OT, and 100 minutes per week of OT clinic. Parents have stressed that Student misses a lot of school due to his medical issues, and therefore he needs to, in essence, "double down" with DIS services during

those periods he is feeling well. Without additional services, Parents do not believe that Student will catch up or develop physical skills on the same level as his typical peers.

13. In this matter, Parents have merged or confused Student's medical needs with his educational needs. While Student's medical diagnoses and treatments may present the need for educational supports and assistance, the medical model and educational model for determination of therapies are not the same. Clearly, these parents have acted in a laudable manner in response to their child's many medical issues, deficits, and delays, and they have steadfastly sought what they feel is needed to allow Student to advance and succeed. In that sense, he is a lucky little boy. School districts, however, are not responsible for providing OT, PT or any other support service as medical treatment. The District is responsible for DIS services only to the extent the service is necessary to support Student's educational needs and allow him to benefit from his education. (Legal Conclusions 2, 3, and 4.) Student's skills in the areas of PT and OT are functional. (Factual Findings 25-30, 32, 34, and 46.) The OT and PT services offered in the October 25, 2010, and March 8, 2011 IEP's are sufficient to assist Student to benefit from his education. (Factual Findings 18, 23-30, 34, 38, and 46.) Student has failed to carry his burden of proof to establish his need for additional DIS services. (Legal Conclusion 1.)

14. The provision of DIS services may include transportation (Legal Conclusion 2), and the District's proposed IEP includes transportation to the clinic OT sessions. (Factual Finding 50.) Parents, however, have not consented to the IEP, and therefore, on that technicality, transportation has not been implemented. (Factual Finding 50.) While it is noted that the District failed to include clinic transportation in its initial IEP, which is currently implemented, Parents did not raise the issue, nor did they request a remedy or reimbursement for out-of-pocket transportation expenses, based upon the earlier IEP.

As a result, Student has failed to establish a factual basis to support his requests regarding the transportation issue. (Legal Conclusion 1.)

15. Student has also failed in his burden of proof regarding his request for increased communication from the District and its service providers. (Legal Conclusion 1.) While increasing the dialog between the parents and District would be nice, or even advisable, it does not rise to the level of a denial of FAPE. (Legal Conclusions 3-8.) Clearly the District has been receptive to the involvement and requests of the parents as is evidenced by the IEP team determination to continue PT services. (Factual Finding 33.) Although the District staff is precluded from using email as to communicate with parents, the District staff has evidenced a continued willingness to speak with Parents on a face-to-face basis. The law requires nothing more. (Legal Conclusions 4 and 5).

ORDER

1. Student's requested relief is denied.

PREVAILING PARTY

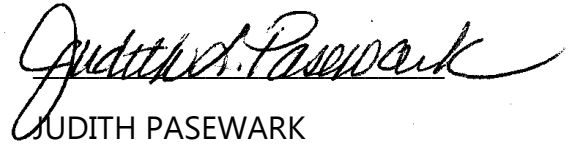
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

1. The District prevailed on the sole issue of this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 29, 2011

A handwritten signature in black ink, reading "Judith A. Pasewark". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

JUDITH PASEWARK

Administrative Law Judge

Office of Administrative Hearings