BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>LUCIA MAR UNIFIED SCHOOL DISTRICT,<br><br>v.<br><br>PARENTS ON BEHALF OF STUDENT. | OAH CASE NO. 2011070196 |

# DECISION

Charles Marson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 2, 3, 8, 9, and 10, 2012, in Arroyo Grande, California, and on May 15 and 22, 2012, in Oakland, California, by telephone.

Charles L. Weatherly, attorney at law, represented the Lucia Mar Unified School District (District). Donald J. Dennison, the District's director of student services, and Tisha Quam, the District's coordinator of special education, were present throughout the hearing on behalf of the District.

Student's Mother represented Student. Student's Father was present for some of the hearing. Student was not present.

The District filed its request for a due process hearing (complaint) on July 7, 2011. The matter was continued on July 22, 2011. On September 16, 2011, Student filed a related complaint in OAH Case No. 2011090698, naming the District and the San Luis Obispo County Office of Education (SLOCOE). The cases were consolidated on September 22, 2011, and the statutory timeline conformed to that of the later-filed case. The consolidated cases were continued on November 8, 2011. On February 1, 2012, Student filed a First Amended Complaint. On March 8, 2012, Student filed a Second

Amended Complaint. On April 26, 2012, on Student's motion, OAH Case No. 2011090698 was dismissed. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to June 22, 2012, for the submission of declarations and closing briefs. On that day, the record was closed and the matter was submitted for decision.

## ISSUE

Does the individualized education program (IEP) offered to Student on June 6, 2011, offer her a free appropriate public education (FAPE) in the least restrictive environment (LRE)?

## CONTENTIONS

The District contends that the offered IEP was developed through 12 IEP team meetings that complied with procedural requirements in all respects and in which Parents fully participated. The District argues that Student had been attending school part-time since 2007 pursuant to a settlement agreement but, in June 2011, was ready to return to school full-time. It contends that its June 6, 2011, IEP offer, to place Student in a SLOCOE special day class (SDC) on the District's Mesa Middle School campus addressed her needs and was reasonably calculated to allow her to obtain educational benefit.

Parents argue that in June 2011, Student was not ready to return to school full-time, and could not learn amidst the noise and distractions of a classroom, at least until the District provided adequate goals for toileting and menstruation management, two, one-to-one instructional assistants (IA's) trained in Student's support, a more flexible transition plan, monthly provider meetings, an available pull-out room, and an extended school year (ESY) on a middle or high school campus, rather than an elementary school

campus, together with additional services after the end of the ESY and before the beginning of the next academic year.

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTION

1. Student is a 14-year-old girl who lives with Parents within the boundaries of the District. She is eligible for and has been receiving special education under the category of autistic-like behaviors. She is nonverbal and uses an assistive technology device and a keyboard to communicate, has significant academic delays and difficulties in regulating her behavior, and lacks social and functional skills. She is in the mid-range of cognitive capacity among autistic children and is capable of learning at a slow but steady rate.

2. In 2006, when Student was enrolled in a program operated by SLOCOE, Parents (who were then represented by counsel) filed a request for due process hearing alleging that the District and SLOCOE had denied Student a FAPE. The matter was resolved in a Settlement Agreement in 2007. Pursuant to the Settlement Agreement, Student was placed for part of the day in an SDC on the District's Ocean View Elementary School campus (Ocean View), and for the rest of the day at home, with services and supports from several providers who were selected and paid by Parents. Parents were then reimbursed by the District for the expenses of these providers.

3. Student's last agreed-upon and implemented IEP was written in May 2009, the end of her sixth grade year. That IEP essentially replicated the structure of the program set forth in the Settlement Agreement. Under that Agreement and the May 2009 IEP, the District continues to reimburse Parents for their expenditures in maintaining the home-based aspects of Student's home program, including a "home staff" of providers. Student's program is supervised at District expense by Autism

Partnership (AP), a non-public agency certified by the State that is based in Seal Beach, has offices in several countries, and supports autistic students and autism programs on behalf of districts.

4. In the Settlement Agreement the parties stated their shared intention that Student would, at some point, return full-time to public school, but the parties have been unable to reach agreement on accomplishing that goal.

5. At Student's annual IEP team meeting in May 2010, Parents and the District began a series of IEP team meetings in an attempt to fashion an IEP under which Student would return to school full-time. The meetings occurred on May 14 and 18, June 9, August 25 and 26, September 9 and 16, October 1 and 11, and November 9, 2010. At the end of the November 9, 2010, IEP team meeting, the District proposed an IEP that would have placed Student full-time in an SDC at Ocean View with services and supports. After a four-week transition period, the District's support of the home program would cease. Parents declined the offer.

6. At subsequent IEP team meetings on April 19 and June 6, 2011, the parties made some modifications to the November 9, 2010 offer, but were still unable to agree on Student's placement. At the June 6, 2011 IEP team meeting the District restated its November 9, 2010 IEP offer, as modified on April 19 and June 6, 2011 (herein the offered IEP or the June 2011 IEP). The most significant of the June 2011 modifications was the proposal that Student attend an SDC at Mesa rather than at Ocean View. It is that June 6, 2011 IEP offer, which includes both the November 2010 offer and the April and June 2011 modifications, that is the subject of this dispute.

7. Student's program under the May 2009 IEP requires her to spend two or two and a half hours a day at school and the rest of the day at home. From the time the Settlement Agreement was first implemented to June 2011, Student's attendance at the school portion of her program was uneven. On many days she did not appear at school,

and when she did, it was for only part of the time required. Since the parties reached an impasse in June 2011, Parents have not allowed Student to attend school.

8. The parties agree that Student has made substantial progress in her home-based program since 2007. Their dispute concerns the conditions under which Student should return to school full-time.

PROCEDURAL VALIDITY OF THE IEP

9. A school district must afford the parents of a child with a disability the opportunity to participate meaningfully in the formulation of the child's IEP. It must notify parents of an IEP team meeting early enough to arrange a mutually convenient date and must ensure that they will have an opportunity to attend. It must take steps to ensure that all other required IEP team members attend the meeting, and that parents have an adequate opportunity to participate in the meeting and to present information to the IEP team. It may not arrive at the meeting with an offer that has been predetermined.

10. Parents, or at least one of them, attended each of the 12 IEP team meetings that led to the June 2011 IEP offer. Parents participated in the meetings extensively and without restriction, and presented all the information they desired to present. All required IEP team members were present at the meetings or were properly excused by Parents. The District members of the IEP team fully considered Parents' views. The draft IEP evolved substantially in the course of the meetings, during which the District agreed to many changes to accommodate Parents' concerns. The evidence showed that the District arrived at the offered IEP through procedures that complied in all respects with the IDEA and related laws. Parents do not argue otherwise; they make no contention that the procedures by which the offered IEP was created were unlawful in any way.

## SUBSTANTIVE VALIDITY OF THE IEP

11. An IEP must adequately address a student's unique needs and must be reasonably calculated to enable her to receive educational benefit.

12. The disputed IEP offered to place Student full-time in an SDC for the severely handicapped on the District's Mesa Middle School Campus. That SDC is operated by SLOCOE and taught by Ms. Julie Albano. The offer provided for an array of services and supports, including consultation services from an autism behavior specialist, a special circumstances IA as a one-to-one aide, transportation if needed, specialized academic instruction, occupational therapy, adapted physical education, an extended school year on an elementary school campus, and four days of extended autism services in August. The offered IEP was to be implemented during the regular school year in the SLOCOE SDC under the supervision of a non-public agency, which the parties understood would be AP.

## STUDENT'S NEEDS

13. The parties agree on the general nature of Student's needs related to her disability, if not on the location for addressing them. Because Student is nonverbal she needs other methods of communicating effectively. She also requires occupational therapy to address her fine motor needs (including writing), specialized academic instruction, and adapted physical education (PE). She needs training and experience in a wide range of adaptive functional skills, including but not limited to assistance in hygiene, toileting, managing her menstrual cycle, and many of the activities of daily living. She needs an intensive program of one-to-one teaching, primarily through the techniques and strategies of Applied Behavior Analysis (ABA). In a classroom, she requires the one-to-one assistance of at least one IA. She needs to acquire and build social skills, and to take interest in and develop relationships with others, particularly

those in her age group. Those implementing her program need related supervision and consultation for all these matters.

### PRESENT LEVELS OF PERFORMANCE AND ANNUAL GOALS AND OBJECTIVES

14. An annual IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects her involvement and progress in the general education curriculum. It must include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from her disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. For children with disabilities like Student who take alternate assessments aligned to alternate academic achievement standards, the IEP must also contain a description of benchmarks or short-term objectives. The present levels of performance (PLOP's) establish baselines for measuring the child's progress throughout the year so that new annual goals and objectives can be written.

15. The offered IEP contains 30 annual goals, which address the following areas of need: learning to learn (6 goals); emotional regulation (2); imitation (2); matching and sorting (1); receptive communication (2); expressive communication (4); social skills and activities (2); self-help and independence (3); mobility (1); academics (2); listening comprehension (1); fine and gross motor needs (1); personal health and physical activities (2); and safety in the community (1).

16. Student's PLOP's on which the offered goals were based were derived from assessments conducted in April 2010, supplemented by information from Parents and home staff. Like the entire 140-page IEP offer, the PLOP's and the goals based on them are unusually detailed. For example, in the area of writing, Student's PLOP at the time the goals were offered was:

> ... [Student] is able to make an "X" in a medium size box with visual and verbal prompting. [Student] is able to write a functional signature with prompting. Her letter formation is not consistent, the size of her letters is large (<1") and she is not able to rest letters on a line or maintain a horizontal signature. [Student] requires visual prompts (a few dots that outline the letter to be written) to successfully form her letters, but she is usually able to draw her lines without prompts. Her letter "F" is less consistent than her letter "C."

The District offered the following annual goal based on that PLOP:

> [Student] will demonstrate functional grasp prehension and improved visual-motor skills as demonstrated by marking boxes with an "X" and by producing a functional signature (1/2" letter size and including her initials with lines), 80% of the time.

Two similarly precise short-term objectives are added to this goal as benchmarks to measure Student's progress toward the goal during the year. This level and goal are representative of the clarity and detail with which all the PLOP's and goals are presented. Some are slightly less or more detailed, but all of the PLOP's are clear and all of the goals are measurable.

17. The drafting and refinement of the PLOP's and goals in the offered IEP were the primary subjects of most of the 12 IEP meetings that led to the offered IEP. Many of the goals were inserted at the request of Parents. All of them were carefully reviewed by Parents, and almost all were modified at Parents' request.

18. Parents do not argue that there are any flaws in the PLOP's and goals contained in the offered IEP, although they contend two more were necessary (see below). At hearing Parents expressly disclaimed any contention that the goals actually contained in the offered IEP did not comply with law. Independent examination of the PLOP's and goals in the offered IEP reveals that they comply with legal requirements in all respects. Several of the District's experts, whose testimony is discussed in detail below, testified that the goals and objectives were appropriate and could be implemented in Ms. Albano's SDC. There was no evidence to the contrary.

ACCOMMODATIONS AND MODIFICATIONS

19. An annual IEP is required to contain a statement of supplementary aids and program modifications that will be provided to enable the child to advance appropriately toward attaining her annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities.

20. The disputed IEP offers APE and specialized individual and group academic instruction. Parents do not challenge those portions of the offer. The evidence did not show, and Parents do not argue, that Student needed any other accommodation or modification in the offered IEP.

RELATED SERVICES

21. An annual IEP is required to contain a statement of related services that will be provided to enable the child to advance appropriately toward attaining her annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. Related services (or designated instruction and services) include such matters as transportation, occupational therapy, counseling, and the like.

22. The disputed IEP offered transportation to and from school and 180 minutes a month of occupational therapy, and Parents do not contest those parts of the offer.

23. The parties agree that Student requires assistive technology to facilitate her speech. In 2009, the District first equipped her with a Proloquo2Go, an application used with Student's iTouch or iPad that produces speech in response to her touches on an on-screen keyboard. The parties agree that the application has been very successful in advancing Student's communications capacity, and the offered IEP continues its use.

24. Student needs a one-to-one IA, and the IEP offered one. Parents' challenges to the adequacy of that offer are discussed below.

### ASSESSMENTS, STARTING AND ENDING TIMES, FREQUENCY, LOCATION AND DURATION

5. As the IDEA requires, the offered IEP contains a statement of appropriate accommodations necessary to measure Student's academic achievement and functional performance on State and district-wide assessments (tests). The IEP team determined that Student must take an alternative assessment instead of regular State or district-wide assessments. As required by law, the IEP includes a statement of why she cannot participate in the regular assessment and the particular alternate assessment that is appropriate for her, the California Alternate Performance Assessment (CAPA).

26. As the IDEA also requires, the offered IEP contains the projected date for the beginning of the offered services and modifications, and the anticipated frequency, location, and duration of those services and modifications. Parents do not argue that the offered IEP violates these requirements.

## PLACEMENT IN THE SLOCOE SDC

27. The National Professional Development Center on Autism Spectrum Disorder (NPDCASD) has designated some special education classes around the country as model classrooms in recognition of the fidelity with which they use evidence-based practices in teaching autistic students. NPDCASD has designated Ms. Albano's severely handicapped SDC on the District's Mesa campus as a model classroom. Ms. Albano has a master's degree in special education and extensive training in the education of autistic children. She has taught the SLOCOE SDC since 2007. Before that, she was a behavioral health specialist for SLOCOE and a child development consultant for the Braille Institute in Santa Barbara. The testimony of several witnesses from the local educational community showed that Ms. Albano enjoys a reputation as an exceptionally skilled teacher, and Parents do not dispute that fact. Ms. Albano testified at length about the nature of her classroom in clear and practical terms. She was an impressive witness who was direct, thoughtful and careful in her answers, and whose testimony revealed no significant weakness in cross-examination. Accordingly, her testimony is given substantial weight here.

28. At present Ms. Albano's class serves eight students in Grades 7 through 9. She is assisted with the students by three adult aides. The class is very structured. Physically it has areas for small groups and work stations, a large area containing desks, and a private bathroom. ABA is the foundation of its methodologies and practices.

29. On a typical day, Ms. Albano's students arrive by bus or car and start the day by opening "morning folders" of dates and personal information; and, then have morning group time, in which they work on their calendars and practice greeting each other and the adults in the class. One child takes attendance. (The students are encouraged to lead classroom activities as much as possible.) These morning activities are followed by a one hour walk on campus led by a physical education (PE) teacher and

involving a certain number of laps around a track as well as some core exercises to break up the walk.

30. Returning to the classroom, the students form a large group and then smaller groups for instruction in math. They have a break in the cafeteria, return to the class for large group instruction, and then go to work stations for functional academics. After a larger movement group, the students have lunch out on the campus, then return and read aloud in a large group. After that, some receive academic lessons, while others concentrate on individual tasks. Then there is a large group exercise in social skills, and at the end of the day, the staff determine how well each student did that day as part of administering a system of rewards and reinforcements.

31. Ms. Albano emphasizes observational learning, and teaches socialization and appropriate behavior through role-playing exercises. She exposes her students to typically developing peers by bringing students from a general education student government class into her classroom for 90 minutes twice a week to interact with her students. Sometimes these nondisabled students also attend PE with Ms. Albano's students. This practice is successful in exposing her students to role models for acceptable behavior. The class also goes out as a group onto the campus for the same purpose.

32. Ms. Albano's overriding goal is to have her students leave her class far more independent than when they arrive. She stresses the teaching of foundational skills that will serve her students in any later placements they have. The class has a life skills area where students learn such everyday tasks as dealing with groceries, drawers, and laundries. They fold and hang up clothes and open and close containers. They use mock quarters and dollars in a token economy. The students work on these life skills every school day. Typically these skills are taught one-to-one or in a small group, and then generalized gradually by practicing them with adults and in other situations.

THE DISTRICT'S EXPERTS

33. The District presented the testimony of several well-credentialed experts in support of the offered IEP. Perhaps the most prominent was Dr. Betty Jo Freeman, who is internationally recognized in the field of the treatment of autistic children. Dr. Freeman is a licensed clinical psychologist who received her doctoral degree from Southern Illinois University in 1969. Dr. Freeman recently retired from a full professorship at the University of California at Los Angeles (UCLA) Medical School, where she began work in 1973 as an assistant professor in residence. Throughout her career at UCLA she specialized in the study and treatment of the autistic, particularly autistic children. While at UCLA she worked with the late Dr. O. Ivar Lovaas, a leading researcher in the field; assessed thousands of autistic children; and set up an inpatient service and a preschool for them. She taught undergraduates the techniques of ABA, ran an autism evaluation and training clinic, and taught assessment techniques. She was instrumental in drafting the first definition of autism in the Third Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-III). She has published many peer-reviewed books and articles, lectured extensively in this country and abroad, and is the recipient of many awards and other recognitions. Her current practice focuses on the hands-on treatment of autistic children. She is widely considered an advocate for autistic children and their parents.

34. Parents hired Dr. Freeman to assess Student in 2002, and again in 2006 and 2009. On each occasion Dr. Freeman conducted an extensive assessment including standardized and other testing, personal examination and observation. After each assessment she wrote a detailed report that made recommendations for Student's treatment.

35. Parents profess high regard for Dr. Freeman but suggest her testimony should be discounted because she has not seen Student personally since 2009.

However, in preparation for her testimony at hearing, Dr. Freeman studied Student's more recent educational records and some treatment records from AP, the agency that supervises Student's current educational program. She interviewed five AP professionals with knowledge of Student, including three (Dr. Parker, Dr. Taubman, and Mr. Schroeder) identified below. She also interviewed Rebecca Ziemba, the District's autism behavior specialist; twice talked with Ms. Albano; and observed Ms. Albano's class. She also talked to Mr. Tandoula, Student's last classroom teacher in the District, and watched a DVD about Student's situation produced by Parents in 2011. As a result of these inquiries, which supplemented her own direct experience with Student, Dr. Freeman concluded that Student's needs had not essentially changed since 2009. In her testimony Dr. Freeman demonstrated detailed and current knowledge of Student and her needs and program that was confirmed by other witnesses and documentary evidence.[1]

36. Dr. Freeman was a particularly persuasive witness, not just because of her excellent credentials, her extensive exposure to Student at Parents' request, and her reputation as an advocate for children and parents, but also because of her changing perspective over time. Dr. Freeman was one of the experts who originally recommended that Student be placed mostly at home with one-to-one instruction from adults, and thus was originally supportive of the placement Parents wish to retain. For all the reasons above, Dr. Freeman's testimony is given substantial weight here.

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[1] Parents fault Dr. Freeman for not also talking to Student's home staff, who work with Student daily. However, no member of the home staff was called as a witness, and there was no evidence that the home staff would have told Dr. Freeman anything different from what she learned from the people she did contact.

37. At hearing, Dr. Freeman enthusiastically endorsed the District's proposed placement of Student in Ms. Albano's SDC. She stated that she never anticipated Student would remain at home as long as she has, and that by June 2011, it was clear that Student was ready to return to school full-time. She emphasized that returning to school was Student's most pressing need in June 2011, because she had been primarily isolated at home, learning one-to-one from adults, for several years. Dr. Freeman observed that in preschool Student had begun to initiate with other children, but more recently that skill appeared to be gone or not as prominent; she is not always aware of the people around her and does not seem interested in other children. Dr. Freeman established that lack of social behavior is the hallmark of children with autism and is what hinders them most throughout life. Dr. Freeman persuasively testified that Student's return to school was urgent, because every day she remains away from school and her peers, the more socially impaired she will become. Social skills and awareness cannot be taught while she is in an isolated environment with adults. Student still needs one-to-one teaching, but in June 2011, it was time her environment changed. By that time, her priorities should have been to be aware of other people, to learn in groups, and to learn in a more typical and natural environment.

38. Based on her visit to Ms. Albano's class and her talks with Ms. Albano, Dr. Freeman testified convincingly that the SLOCOE SDC was appropriate for Student in June 2011, and that Ms. Albano appeared to be a dedicated and well-organized teacher with a well-trained staff. Ms. Albano was focused on what Student needed to learn, such as learning from others, being independent, and controlling her own behaviors. Placement there would allow her to work toward her goals and toward functional independence.

39. Dr. Tracee Parker has a doctoral degree in psychology from UCLA, where she worked in the Young Autism Project under Dr. Lovaas. She has vast experience in

the treatment of autistic children and in training others in that treatment, and is probably the professional most familiar with Student's current situation. Although Dr. Parker was working as a consultant for SLOCOE in 2006 when she first evaluated Student, she wrote an exhaustive report sharply criticizing the SLOCOE program in which Student was placed at the time. Her report and recommendations became the principal bases for the 2007 Settlement Agreement and the primarily home-based program Student has had since then. Dr. Parker has been a Clinical Associate for AP since 1997, and in that role has supervised the home-based program she designed for Student since the Settlement Agreement was executed.

40. Dr. Parker testified that she, too, strongly endorses the disputed IEP and the District's effort to return Student to school full-time. She has spoken to Ms. Albano and observed her SDC at Mesa, and believes Student could achieve meaningful educational benefit there under the offered IEP and its goals. Dr. Parker testified persuasively that the class reflects the characteristics she wanted for Student. It is structured and organized; has a functional focus; the staff has a nice but direct style with students; and the teacher would be very effective with Student because she has a strong ABA background, takes the approach to teaching that Dr. Parker desires for Student, and correctly understands the priorities for children of that population. Dr. Parker saw a focus in the classroom on behavior and learning to learn, which Student needs. Like Dr. Freeman, Dr. Parker was convincing in testifying that in June 2011, Student needed to return to school full-time and learn how to live in the real world.

41. Dr. Parker made a mistake in her testimony; she testified that some years ago she had trained Ms. Albano. Ms. Albano testified she was trained in ABA primarily by SLOCOE but not by Dr. Parker specifically. Parents argue that Dr. Parker's testimony should be disregarded because of this mistake, but the evidence showed that Dr. Parker has trained so many professionals in the local educational community it was an easy

mistake for her to make. The mistake was unimportant in context and did not substantially undermine Dr. Parker's testimony, which was confirmed by many others and was uncontradicted by any other professional.[2] Parents offer no other reason why Dr. Parker's testimony should not be believed, and none appears in the record. Dr. Parker's testimony is therefore given significant weight.

42. Dr. Mitchell Taubman is a licensed clinical psychologist who has a doctoral degree in developmental and child psychology from the University of Kansas. As an undergraduate at UCLA he, too, studied under Dr. Lovaas; he was the primary therapist for the Young Autism Project from 1979 to 1981. He has trained social workers and residential program staff, and is a licensed vendor for regional centers as well as a community college instructor in special education. Dr. Taubman teaches and lectures widely, including as an adjunct assistant professor of psychology at UCLA. He has presented or published many peer-reviewed papers in the field of autism.

43. At present Dr. Taubman is the Co-Director of Autism Partnership, and supervises Dr. Parker and other AP staff involved with Student. Although he has had no direct contact with Student, he has for years received extensive reports from Dr. Parker, Mr. Richard Schroeder, and other AP staffers who work regularly with Student. He showed extensive familiarity with Student in his testimony. Dr. Taubman is based in Seal Beach but visits the District about once a month, and has observed Ms. Albano's class and spoken to her. He testified that in his opinion the placement of Student in her class was appropriate; that its delivery model was well suited to implementing the offered IEP and its goals; and, that the class focuses well on the skills needed for independence, which are essential for Student. He believes Ms. Albano's class is a natural learning environment in which she and AP could work well together.

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[2] Even Ms. Genevieve Sullivan, Student's expert witness, testified that she had been trained by Dr. Parker and would defer to Dr. Parker's opinions.

44. Parents discount Dr. Taubman's testimony because it derives from the reports of others, but since it explains and supplements the testimony of people like Dr. Parker and Mr. Schroeder, who do work directly with Student, it is admissible even though it is hearsay. A thorough knowledge of a student, though derived from others, is sufficient to make an expert opinion worthwhile. Under the IDEA as well, many IEP team members may have knowledge gained from others; they are not required to have direct experience with a student to have a role in her educational programming. Dr. Taubman's opinions were shared and confirmed by several other witnesses.[3]

45. Richard Schroeder is an AP consultant who provides treatment of students, and training and recommendations to families, school districts and their staffs, in the implementation of ABA principles in treating children with autism. He too has a background as a senior Autism Project therapist at UCLA. He has supervised Student's in-home treatment since fall 2010 under the supervision of Dr. Parker, with whom he consults weekly. He also reports on her progress to Dr. Taubman about once a month.

46. Mr. Schroeder testified persuasively that he thought Student would have derived significant educational benefit in June 2011 from placement in Ms. Albano's class. It would have helped her to advance beyond the home setting, and would have provided an appropriate place to work on her goals. It would have given her opportunity for badly needed group instruction and an opportunity to generalize the skills she had been developing.

47. Witnesses employed by the District also testified that, in June 2011, the offered IEP was appropriate and would have provided Student a FAPE. Donald Dennison is the Director of Student Services in the District and administers its special education

[3] Dr. Taubman also stated that Dr. Parker trained Ms. Albano, an error that is even less important than when made by Dr. Parker herself, since he apparently heard it from her. That is no ground for disregarding all of his testimony.

programs. He has been an elementary school teacher and has extensive experience as a school psychologist. He has attended Student's IEP team meetings and showed great familiarity with her history and program. In Mr. Dennison's opinion, the offered IEP appropriately placed Student in Ms. Albano's SDC, where she would have the opportunity to develop the precursor skills she needed to learn to participate in the larger world. In June 2011, it was the best transition point between Student's home-based program and the realization of the goal of independence in the larger world, and placement there was reasonably calculated to provide her with educational benefit.

48. Tisha Quam is the District's Coordinator of Special Education and is Student's case manager. She has multiple subject, learning handicapped, and administrative services credentials and a resource specialist certificate. She has significant experience both as a resource teacher and as a director of special education in another district. She too has attended Student's IEP team meetings and consulted regularly with staff who serve Student, and is familiar with Student's her history and records. Ms. Quam credibly testified that in June 2011, the offered IEP would have met Student's needs.

STUDENT'S EXPERT

49. The only professional who questioned the validity of the offered IEP was Genevieve Sullivan. Ms. Sullivan has a master's degree in educational counseling and guidance from California Polytechnic State University in San Luis Obispo. She has been a Board Certified Behavioral Analyst (BCBA) for 11 years and has 17 years of experience in providing intervention programs for persons with disabilities, many of them autistic, ranging from two to 82 years old. She has worked in school settings and as an autism supervisor for SLOCOE, and has provided ABA and other training to many aides who work in SLOCOE and District classes. She has a private practice as a behavioral

consultant and is the Clinical Director of Autism Connections, a non-public agency in San Luis Obispo.

50. Ms. Sullivan currently consults for the local Regional Center, and has served Student in that capacity since October 2010, primarily in the areas of personal hygiene and safety. She sees Student three to four times a month at home. She has consulted with Student's supervisors from AP. At hearing, Ms. Sullivan opined that in June 2011, Student was not ready to return to school full-time because she so sensitive to noise and distraction, that she could not learn there; being in a classroom would cause her sensory overload; and she should continue to receive one-to-one instruction primarily in the home.

51. However, Ms. Sullivan's credentials are slender, and her exposure to Student brief, when compared to those of the District's experts. Ms. Sullivan had never seen Ms. Albano's SDC and knows nothing about it. Moreover, she was trained by Dr. Parker and testified that she deferred to Dr. Parker's judgment (which was that the disputed IEP offered Student a FAPE). The testimony of the District's experts substantially outweighed Ms. Sullivan's for these reasons alone.

52. More importantly, Ms. Sullivan's testimony lacked substantial credibility because she contradicted herself in the course of changing her opinions in ways that conformed to Parents' changing litigation strategy. In IEP meetings and at hearing, Parents argued that in June 2011, Student was not ready to return to school for a full day. They contended that Student's sensitivity to noise and to disturbances around her was so great that she could not learn among other students in Ms. Albano's SDC, and that to obtain a FAPE Student had to remain primarily at home receiving one-to-one instruction from adults. Ms. Sullivan was the only professional who supported that view. The centerpiece of her testimony was that in June 2011, Student could not have adequately worked on her goals in a classroom. She testified that at that time Student

could learn new information only in a "pretty isolated setting," a one-to-one setting without a lot of auditory or visual distractions. In June 2011, Ms. Sullivan opined, Student was unable to learn new information in a group setting because she would just become frustrated and engage in self-stimulatory behavior. She needed additional instruction and advancement in group skills before she could learn in the "noise and chaos" of a classroom.

53. The evidence at hearing thoroughly refuted the proposition that Student could receive a FAPE only by remaining primarily at home, and Parents abandon that contention in their closing brief. They no longer argue that Student was generally not ready to return to school in June 2011; instead they argue that she was not ready to return under the terms of a flawed transition plan; in the care of inadequately trained staff; and without goals for toileting and menstruation management, monthly meetings of her providers, access to a pull-out room, and an adequate offer of ESY. After testifying at hearing, Ms. Sullivan changed her opinions in the same ways. In a declaration submitted after hearing, Ms. Sullivan responded to an accurate description of the position she took at hearing about Student's needs in June 2011 by stating: "It is not my position that [Student] work solely in 1:1 home settings" and that "I want [Student] back in school , but ... in a way that will make her successful." She declared that her position now, on what Student needed in June 2011, was that Student should only have returned to school "a minimum of half time," and should have increased that time under a variety of conditions including a flexible transition plan, a properly trained staff, the availability of a pull-out room, and adequate preparation of staff to meet Student's needs for toileting and menstruation management.[4]

[4] There is some ambiguity in Ms. Sullivan's post-hearing declaration as to whether the views she expressed there applied to Student in June 2011 or in June 2012 when the declaration was filed. To the extent they might be read to apply only to the

54. Ms. Sullivan's new views substantially contradicted her previous testimony. She offered no explanation for abandoning the position that Student could not learn in the "noise and chaos" of a classroom in favor of the view that Student should have returned to school in June 2011 a minimum of half-time and longer when certain conditions were met. That contradiction, and the congruence of Ms. Sullivan's new views with Parents' changed strategy, deprived her opinions of any substantial credibility.

55. The preponderance of expert opinion presented at hearing confirmed what the evidence showed: that the District's June 2011 offer to place Student in Ms. Albano's SDC in the fall would have met her needs related to her disability and was reasonably calculated to allow her to obtain educational benefit.

PARENTS' ARGUMENTS

Need for Goal for Toileting

56. Parents assert that the offered IEP should have contained a goal relating to toileting. The evidence showed that Student is not yet independent in toileting, though she has made considerable progress in recent years. Parents equate needing toileting assistance with needing a goal, but no professional – not even Ms. Sullivan -- supported

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present they are too remote in time to have much significance here. But in her declaration Ms. Sullivan was refuting a statement in a declaration by Dr. Taubman about her position on what Student needed in June 2011, and her declaration sometimes refers to that time period. Moreover, Parents filed the declaration in support of their criticisms of the June 2011 IEP offer. So the more reasonable reading of Ms. Sullivan's declaration is that it expresses her views as to Student's needs in June 2011. The distinction likely makes no difference, since there is no indication in the declaration that Ms. Sullivan believes there had been any change in the last year in Student's needs, and the declaration strongly implies that there has not.

that view at hearing. Parents assume that no assistance for Student's toileting needs would have been available in Ms. Albano's SDC in the absence of a toileting goal. The evidence showed that assumption is incorrect.

57. Ms. Sullivan, in her role as consultant for the Regional Center, has designed a toileting "program" for use at Student's home. In her post-hearing declaration Ms. Sullivan asserts that until school staff are trained in the Regional Center program, Student will not be able to work on that program in school. But there was no evidence that any harm will befall Student as a result of not working on the Regional Center toileting program during school hours, nor was there any evidence that school staff would do anything inconsistent with that program. Dr. Freeman, Dr. Parker and Mr. Schroeder all credibly testified that Student's toileting program should most appropriately be worked on primarily at home.

58. Ms. Sullivan opined in her post-hearing declaration that Student should not go to school more than half time until school staff have already been trained in her toileting program before she arrives. Her opinion rests on the assumption that Student could not use the bathroom at school at all:

> [Student] cannot hold her bowels and bladder for 6 hours, so, to me, that means she shouldn't spend 6 hours in school at present, at least until school staff are trained in her toileting ... program[], because if otherwise, she will regress ...

Ms. Sullivan's assumption that Student would have been unable to use the toilet at school merely reflects her admitted unfamiliarity with Ms. Albano's SDC. Ms. Albano established that her SDC has a bathroom; that privacy is an important component in its use; and that her staff regularly provides toileting assistance to her students, some of

whom are autistic. She is willing to adapt to Student's toileting needs in consultation with AP and the District.

59. Student's need for assistance in toileting in June 2011 was genuine, but not so unique or complex that, at school at least, a "program" was required in which staff had to be specially trained before Student arrived. As Parents state in their closing brief, Student had made much progress in this area but in June 2011 "she still needed help with buttoning and unbuttoning her pants and with wiping ...." There was no evidence that Ms. Albano and her experienced staff were unable to address these needs. An earlier toileting goal was removed from Student's May 2009 IEP, without apparent ill effect, because Student has support at home for toileting from the Regional Center. Dr. Freeman testified persuasively that no toileting goal was required in June 2011 for Student's needs to be adequately managed in Ms. Albano's class while she was at school, since that assistance could have been given by Ms. Albano's staff.

60. In disputing the need for a toileting goal, both parties refer to events subsequent to the June 2011 IEP meeting. The District points to evidence that in January 2012 Parents eventually agreed to the offered goals, even though they lacked a toileting goal, and argues that Parents therefore waived their right to complain of the absence of such a goal. But parents are free to argue that an IEP is inadequate even if they have previously agreed to it. And no such waiver can fairly be implied in these circumstances, because Parents did not, by agreeing to the proposed goals, necessarily make the judgment that no toileting goal was necessary. They may well have concluded that having some new goals, even if imperfect, was better than requiring Student to continue to work on the old and obsolete goals in her May 2009 IEP.

61. Parents, for their part, rely on events that allegedly occurred at an IEP meeting on March 5, 2012. They assert that the ALJ erred at hearing in excluding evidence of developments at that meeting on the ground that whatever happened at a

later IEP meeting under different circumstances was irrelevant to the "snapshot" of information before the June 2011 IEP team when its decisions were made. Rather than seek reconsideration of that ruling, or make a timely offer of proof, Parents include in their closing brief numerous extra-record factual assertions about developments at the March 5, 2012 IEP meeting, and argue that those alleged facts should have been admitted at hearing and therefore should be considered here. One of those assertions is that in March 2012, the District offered Student a toileting goal. Parents argue that the alleged March 2012 offer of a toileting goal constitutes a concession by the District that the June 2011 IEP offer should have contained a toileting goal, and that without such a goal the June 2011 offer was "fatally flawed."

62. Parents' factual assertions about the March 2012 IEP meeting are not supported by evidence in the record and therefore cannot be considered here.[5] But even if they were, the District's alleged March 2012 offer of a toileting goal would not support the conclusion Parents draw. A district is free, in its discretion, to offer more extensive special education and related services than the minimum required by law, and this record shows that the District frequently exercised that discretion in Student's favor in the June 2011 offer. So its later offer of a toileting goal would not necessarily have amounted to a concession that the goal was necessary for providing Student a FAPE even in March 2012, let alone nine months earlier. Moreover, the record of prehearing proceedings in this matter shows that in early March 2011, the parties were engaged in intensive discussions aimed at settling the two due process hearing complaints that were then pending. Those efforts may have affected their positions at the March 5, 2012 IEP team meeting.

[5] Parents make numerous other arguments in their closing brief based on their assertions about events at the March 2012 IEP meeting. Because those arguments are not supported by facts in the record, they are not further considered here.

63. The preponderance of evidence showed that the absence of a toileting goal in Student's IEP would not have prevented her from obtaining a FAPE, and that her toileting needs could have been adequately addressed by Ms. Albano and her staff.

Need for Goal for Menstruation Management

64. At Mother's request, the District added to the proposed IEP, under the Health section, the statement that "[Student] has begun her menstrual cycle and it's important for staff to know that she has difficulty communicating when she is in pain about this." The District also appended to the IEP a statement by Mother that Student's cycles are irregular, and that she had not mastered or generalized the key components of independence relating to menstruation. Parents contend that the IEP offer should also have contained a goal for managing Student's menstrual needs. In her declaration Ms. Sullivan makes the same argument that she does with respect to toileting – that Student should not have gone to school full-time until school staff had already been specially trained in her menstruation "program." Ms. Sullivan stopped short of asserting that Student needed a goal (as opposed to a program) for menstruation management, and no professional supported Parents' claim that such a goal was necessary.

65. As with her need for assistance in toileting, Student's need in June 2011 for assistance with her menstrual cycle was apparent but not unusual or complicated. She sometimes became moody during her period, which was irregular, and needed to be able to communicate about her pain. The offered IEP contained three self-help goals that would have aided her in doing that. Physically, she had made progress in managing her cycle but, the evidence showed, still needed frequent checks of her pads. Neither Parents nor Ms. Sullivan explain why Ms. Albano's experienced staff would have needed

special training with such a problem before Student arrived, and there was no evidence that they were not already capable of dealing with it.[6]

66. In addition, Dr. Parker testified persuasively that menstruation is a matter best left to management at home. To the extent the need might arise for such assistance at school, she testified, the teachers in Ms. Albano's class, and teachers in general, are used to adolescence. Dr. Freeman also testified persuasively that Student did not need a goal in the offered IEP for menstruation management. She established that menstruation in autistic girls affects their behavior just as it does in typically developing girls; menstruation management was thus not an IEP issue; and handling the matter should be worked out between Mother and the teacher. The preponderance of evidence therefore showed that the absence of a goal for menstruation management in the offered IEP would not have prevented Student from obtaining a FAPE.

The One-to-One Aide

67. Ms. Albano's SDC is supported by three IA's. According to Dr. Freeman, Dr. Parker, Dr. Taubman, and Mr. Schroeder, those IA's are well-trained and experienced in dealing with autistic children. Dr. Freeman observed that NPDCASD's designation of Ms. Albano's class as a model classroom would necessarily mean that the staff has a high level of training.

68. The disputed IEP offered Student a one-to-one IA at school who would work with her exclusively. Parents first contend that Student needed two such IA's, fully trained in her needs, in order to receive a FAPE. They rely for support of this argument

[6] Parents assert that in addition to checks of her menstrual pad, Student needed frequent "menstrual trials." The record does not disclose the meaning or significance of this term, and neither Ms. Sullivan or any other professional mentioned any need for "menstrual trials."

on a 2006 recommendation by Dr. Parker for two trained aides. However, a 2006 recommendation about aides in a program based at home has no bearing on Student's needs for IA support in Ms. Albano's SDC five years later.

69. Parents further contend that in June 2011, Student needed two IA's specially trained in her program because the law requires that her IA take a 30-minute break for lunch and another 15-minute break during the day. Parents fear that, while Student's IA was on her break, Student would have been left alone, unsupervised, and could have hurt herself. This contention is unpersuasive because it does not consider the availability and skill of Ms. Albano and her other staff. Mr. Dennison explained that during the IA's break, another IA would have provided coverage for Student. There was no evidence that mandatory breaks for IA's have ever diminished the safety of any student in Ms. Albano's SDC.

70. Parents next contend that the IA offered in the disputed IEP would necessarily have been unqualified to assist Student. The law does not require that an annual IEP set forth the training that implementing staff would have, and the offered IEP contains no such statement. It does state that the IA would be "qualified," and refers to the IA as a "Special Circumstances Instructional Assistant" or SCIA. At hearing, Parents introduced in evidence a District document setting forth the District's minimum requirements for applicants for a position as SCIA. Those minimum requirements do not include training in ABA or in dealing with autistic students. Parents make the assumption that by providing for a "qualified" SCIA, the IEP offer meant that the District would furnish an IA with *only* the minimum qualifications of an SCIA, and argue that such an aide could not adequately serve Student.

71. Parents' interpretation of the IEP's offer of an aide -- that the IA, or SCIA, would have only the minimal qualifications for the position – is unjustified because it ignores other parts of the offer. The IEP notes of the November 2010 team meeting

reflect that the District assured Parents that "[th]e District will provide a level of training for the IA that will allow her/him to implement [Student's] IEP." The IEP's transition plan required that the IA receive 40 hours of training and supervision specific to Student during the transition period. The IEP also provided for 11 hours of consultation services and 16 hours of supervision services a month from AP, and additional supervision from the District's own autism behavioral specialist for 15 hours a month. Mr. Dennison established that in anticipation of Student's return to school, the District was training IA's in techniques of ABA like those Student experienced at home.

72. In addition, at the June 6, 2011, IEP team meeting, both parties contemplated that the IA would be Ms. Anita Morales, a District employee who has significant training in ABA and in dealing with autistic students. Dr. Parker and Dr. Taubman have worked with Ms. Morales and consider her well-trained and capable of adequately assisting Student. Dr. Parker added that after a week's additional training, Ms. Morales would have been fully ready to serve Student. Ms. Morales had already observed Student in her elementary school class and had observed Ms. Albano's class in preparation for the assignment.

73. In a related argument, even though by June 2011, Ms. Morales was already trained in ABA and in dealing with autistic students, Parents contend that the offered IEP would have denied Student a FAPE because Ms. Morales was not fully trained in Student's specific needs *before* the IEP offer was made. The law requires that the District furnish Student a qualified and adequately trained aide, but it does not require that all of the aide's training occur before an IEP offer is made.[7] Particularly in these

[7] In a similar argument, Parents contend that the June 2011 offer was not "bona fide" because the District could not yet identify the campus on which the four days of extended autism services (EAS) would be delivered, and did not notify Parents of that location until approximately a month before the EAS were to begin. There is no

circumstances, when the District rightly suspected Parents would not accept the June 2011 IEP offer, completing Ms. Morales' training in Student's particular needs before the offer was made would have been a waste of public resources. There was no evidence that waiting to complete Ms. Morales' specific training concerning Student until the transition period would have had any adverse effect on Student's education in Ms. Albano's SDC. Although Mr. Schroeder and Dr. Parker agreed that Ms. Morales should have had additional training – apparently in light of the promise of additional training in the IEP – there was no substantial evidence that Ms. Morales' general training in ABA and in aiding autistic students would not have sufficed to equip her to support Student adequately.

74. The preponderance of evidence showed that the disputed IEP's offer of an IA exclusively for Student for each school day was reasonably calculated to provide Student with adequate IA support.

Misstatement of Grade Level

75. On its computer-generated first page, the offered IEP incorrectly states Student's grade level as fifth grade. Mr. Dennison established that this was an error caused by the way the computer system rolls over information from year to year. Since Student was primarily at home for years, her grade level is somewhat difficult to determine, but she would probably have been entering the seventh grade in the fall of 2011.

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requirement that an IEP contain those details, and there is no evidence that Student's education would have been adversely affected in any way simply because those details were not contained in the IEP.

76. Ms. Albano's class includes students in Grades 7 through 9, grade levels appropriately including Student.[8] Since the evidence showed that Student's educational program is highly individualized based on her needs and is not determined by grade level, the computer mistake on the first page of the IEP had no effect on the offer, on Student's education, or on Parents' participatory rights. Parents' argument demonstrates that they were well informed about Student's grade level. And since the IDEA does not require an IEP to state a grade level, the misstatement did not even constitute a technical violation of special education law.

Transition Plan

77. The IDEA requires a detailed statement of transition services for an eligible student to begin to transition to postsecondary life, beginning not later than the first IEP to be in effect when the child turns 16. State law also requires a transition plan for a student moving from a private school or SDC to a placement in the general education environment. As Student was 14 in June 2011, and not moving into the general education setting, the offered IEP was not specifically required to contain a transition plan for either purpose.

78. The District's offered IEP did include a plan for Student's proposed transition from her primarily home-based services back to school. The preponderance of evidence showed that the transition plan was probably unnecessary to provide Student a FAPE. Dr. Freeman testified that while many autistic students do have difficulty with transitions, she had seen no evidence that Student has ever had such difficulty, and, according to Dr. Parker, neither had she seen such evidence. There was no evidence at

[8] In their closing brief, Parents concede that since Ms. Albano's class serves students in grades 7 through 9, Student's current grade level "should not impact [her] transition to school."

hearing that Student had particular difficulty with transitions. In June 2011, Student was not a stranger to the classroom; she had been attending part-time, if unevenly, at Ocean View.

79. Nevertheless, the offered plan contained provisions for each of the four weeks of the contemplated transition period. Dr. Freeman described the offered IEP's transition plan as "more than adequate" and "kind of slow." The plan provided for a full-time qualified IA to assist Student, using a social behavioral consultation model (a description of which was attached). It required that during the transition period the IA would receive a minimum of 40 hours of supervision from the District's autism behavior specialist (Ms. Ziemba) and the non-public agency consultant (AP), an amount of training that Dr. Freeman regarded as "huge."

80. The transition plan also provided that during the first and second weeks of the transition Student would continue attending school on her existing part-time schedule, and would also continue the current level of instruction in the home, where the IA would observe her. During the second week, the IA would begin interacting with Student at school and the home staff would also be present at school. During the third and fourth weeks, Student's time at school was to increase every three school days; the home staff would no longer accompany her; and the time devoted to home instruction would be reduced accordingly. By the end of the fourth week Student would be attending school full-time, all District-supported home-based services would end, and the District's reimbursement for those services would cease. All of this was to occur under the supervision of the District and AP.

81. Parents contend that the transition plan would have denied Student a FAPE because it was overly rigid in committing the District to returning Student to school according to a timetable rather than according to her progress during the

transition. As evidence they point to the wording of this provision of the plan, which would have taken effect during the third week:

> [Student] will begin to increase her time at school in "period" portions which reflect academic instructional periods. An increase will occur every three days based on school days rather than any other criteria.

Parents interpret the phrase "based on school days rather than any other criteria" as providing "a rigid 4-week window" during which Student's time at school would have to increase during the transition whether she was succeeding, struggling, or failing, and no matter what untoward events might occur. They argue that the transition plan was therefore unreasonably rigid. Ms. Sullivan, in her post-hearing declaration, opined that the transition plan "needs to be flexible, based on how [Student] is doing ...."

82. Parents' interpretation of the above phrase is unreasonable because it is out of context. The evidence showed that during discussions of the transition plan at IEP meetings, Parents insisted that Student's return to school be gradual and her time at school be increased (or not) according to her perceived progress rather than by a schedule. It was not clear whose perception of her progress would govern. The District, on the other hand, insisted on an agreed timetable for her return. By the time of the IEP meeting in June 2011, it had been 4 years since Parents had agreed, in the Settlement Agreement, that the ultimate goal of both parties was to return Student to school full-time. It had been more than a year, through 12 IEP meetings, since the District had begun its effort to negotiate an IEP that Parents could accept in order to return Student to school. In light of the inordinate amount of time and resources that these efforts had consumed, it was reasonable for the District finally to insist on a fixed schedule for Student's return to school, rather than agree to a vague formula that would likely have

produced further disagreement and delay. The disputed phrase in the transition plan was intended only to reflect the resolution of that dispute.

83. The evidence established that the disputed phrase was not intended to commit the District to increasing Student's time at school during the transition no matter what occurred. While the language could have been improved, District witnesses uniformly testified that they knew and assumed they could retain flexibility during the transition period to cope with unexpected developments. Dr. Parker, who would have been instrumental in the transition, testified there was simply no way to anticipate everything that might occur and provide for it in a written plan, but that she and others assumed flexibility would exist.

84. As the District witnesses – and perhaps Parents -- were aware, the governing law would override any perceived rigidity in the transition plan. If something went wrong during the transition, either Parents or the District could have called an IEP team meeting to fix it. The parties could have altered the transition plan even without an IEP team meeting, by agreeing in writing to a modification of the IEP of which the transition plan was a part. As Dr. Freeman observed, in those ways flexibility was built in to the transition period. For all these reasons, the transition plan was not inappropriately rigid or inflexible.

85. Parents also argue that the offered IEP would have denied Student a FAPE because the transition plan contemplated Student's return to a school day of 370 minutes (roughly six hours), but would have been put into effect during the ESY, which had only a four hour school day. This came about because the transition plan was first proposed in the November 2010 IEP offer, and would have gone into effect in the next four weeks if Parents had agreed to the offer at that time. It was restated in the April 2011 offer, and would also have gone into effect during the regular school year if Parents had agreed to the offer in April. The plan was unchanged in the final June 2011

offer, and the parties contemplated it would go into effect during the ESY if Parents had accepted the offer in June.

86. There was no evidence that implementing the transition plan in the context of a four-hour school day, rather than a six-hour school day, would have had any adverse impact on Student's education or her return to school full-time. Nor was there any evidence that any additional transition services were necessary to bridge the gap between the four-hour days of the ESY and the six-hour days of the upcoming academic year. On this record, the implementation of the transition plan during ESY, rather than during an academic year, would have had no adverse effect on Student and would not have denied her a FAPE.

Monthly Meetings of Providers

87. At Dr. Parker's suggestion, the 2007 Settlement Agreement contained a provision requiring that every month the providers responsible for Student's mostly home-based program would meet to discuss her progress and services. Parents argue that the June 2011 offered IEP would have denied Student a FAPE because it did not offer to continue those meetings. The argument is unpersuasive because those meetings were instituted under conditions prevailing 4 years before the June 2011 IEP offer, and in the context of a different program in which Student's providers were divided between home and school. Dr. Parker, who originally proposed the meetings and knew that they would not continue under the June 2011 offer, nonetheless testified that District's offer would have provided Student a FAPE. There was no evidence that the monthly provider meetings required by the Settlement Agreement would have been necessary, or even useful, when Student's providers were centered in Ms. Albano's SDC.

Need for a Pull-out Room

88. Parents contend that the offered IEP would have denied Student a FAPE because it did not provide Student a "pull-out" room where she could escape from noise and distraction and sometimes receive one-to-one instruction. They point out that Ms. Albano's SDC does not have a pull-out room. Their argument rests partly on Ms. Sullivan's opinion, in her post-hearing declaration, that Student, in June 2011, needed access to a pull-out room for one-to-one and small group work. However, Ms. Sullivan knew nothing about Ms. Albano's classroom, or the facilities available or methods used in it, and for the reasons set forth above, her opinions were not substantially credible.

89. Parents' argument also depends on documents written by Dr. Parker and Mr. Schroeder of AP, recommending the occasional use of a pull-out room during the school portion of Student's current program. For example, in a document dated May 30, 2011, Dr. Parker and Mr. Schroeder discussed a training exercise for Student that involved scripting a particular conversation with her, and recommended that staff "Start these in room 17 [the Ocean View SDC's pull-out room]" and later move the exercise to the classroom.[9]

90. The evidence Parents cite does not support their argument. A recommendation for the occasional use of an available pull-out room for particular exercises is not the same thing as a statement that Student cannot obtain a FAPE without the availability of a pull-out room. That is especially so when the recommendation was made by two witnesses who have examined Ms. Albano's SDC and testified that Student can obtain a FAPE there. When Dr. Parker and Mr. Schroeder

[9] As noted above, the offers made in November 2010 and April 2011 would have placed Student in an SDC at Ocean View, while the final June 2011 offered placement in Ms. Albano's SDC at Mesa.

testified, Parents did not ask them whether they thought Student needed a pull-out room in Ms. Albano's SDC in order to obtain a FAPE.

91. Moreover, Ms. Albano testified that while her classroom does not have a pull-out room, it has a "pull-out area" for that purpose. Parents do not mention that testimony in their argument.

92. Finally, whether to use a pull-out room in Student's instruction is a methodological question that the law leaves to the District as long as it provides Student a FAPE, and in recent times the use of a pull-out room is increasingly disputed. Dr. Freeman testified that the older approach to the teaching of autistic students was to isolate them from all distraction in an artificial environment, but that recent research has indicated that method is counterproductive, and that it is better to expose such students at least somewhat to the distractions with which they must learn to cope in real life. Dr. Freeman testified that it is important that Student learn to learn in the presence of distractions, because that is the environment life provides, and that use of a pull-out room is "counter indicated" for Student. Dr. Freeman is far more qualified than Ms. Sullivan to address such matters, had much more credibility, and more reasonably explained the basis for her opinion. Dr. Freeman's opinion that a pull-out room should not be used for Student was more persuasive than Ms. Sullivan's opposite opinion.

93. The preponderance of evidence showed that Student could obtain a FAPE in Ms. Albano's classroom even though it lacked a pull-out room (as opposed to a pull-out area).

ESY

94. A district is required to provide ESY services to a student with an IEP if it is necessary to provide the student a FAPE. A student with a disability is eligible for ESY if her IEP team determines that interruption of her educational programming may cause regression that, when coupled with her limited recoupment capacity, would render it

impossible or unlikely that she will attain the level of self-sufficiency and independence otherwise to be expected in view of her disability.

95. The disputed IEP offered Student 20 days of ESY on an elementary school campus during June 2011and four 3-hour days of EAS in early August. Parents first contend that placing Student on an elementary school campus, rather than on a middle or high school campus, would have denied her a FAPE in light of her age, which in June 2011 was almost that of a high school student. However, age alone is not determinative in the placement of a special education student, whose program is specially designed. Mr. Dennison testified, without contradiction, that for ESY purposes, it was the district's view that a student transitioning from one important setting to another, such as from elementary to middle school, was best served by starting in the program she had most recently experienced, in the school environment she had most recently attended, rather than by starting in a setting she had not otherwise experienced. For Student that environment was an elementary school. That was a methodological choice the District was entitled to make as long as Student was offered a FAPE, and there was no evidence that placement on an elementary school campus would have harmed Student's education in any way.

96. Parents also assert that ESY would have been at Grover Elementary School, a school Student had not before attended, and that Student would have had a different teacher from the one she had during the regular elementary school year. Neither of these alleged facts is in the record and it would not matter if they were, since there was no evidence that attendance at a different school or instruction by a different teacher would have harmed Student's ESY education in any way, especially since there was no evidence that Student has any serious difficulty with transitions.

97. Parents argue that since the June 2011 offer of Ms. Albano's SDC for the 2011-2012 school year rested on the conclusion that middle school was the appropriate

placement for her, middle school must have been the appropriate placement in the summer as well. This argument inverts the concept of an extended school year, which extends the preceding academic year; it does not anticipate the year to come.

98. Parents also contend that the offer of ESY denied Student a FAPE because it did not make provision for the four to five weeks between the end of the normal 20-school-day ESY and the beginning of the next academic year in August (excluding the four days of EAS). The factual premise for this argument is inaccurate. Ms. Quam established that Student's ESY would have ended in mid-July 2011. Four three-hour days of EAS would have been delivered on August 2 through 5, 2011. The new academic year would have started in the third week of August. Thus the only periods in which Student would have been without services were two weeks in July and two weeks in August, separated by the four days of EAS.

99. Ms. Sullivan testified that if Student had five weeks in summer without any interventions, she would "probably regress." However, all students probably regress to some degree during summer break. There was no evidence that the District's failure to make provision for services during the two, two-week periods, in addition to providing services during the regular ESY and four days of EAS, would have caused regression from which Student could not readily recoup, or would have rendered it impossible or unlikely that she would have attained the level of self-sufficiency expected of her. And the IEP team could reasonably conclude that Student's time during those weeks was unlikely to be without interventions, in light of Student's ongoing receipt of regional center services and Parents' dedication to her welfare.

100. Parents also argue that the summer program offered by the District significantly reduced the services Student received in previous summers. But the needed level of services was not necessarily the same in a school-based program as in a home-based program. Except for the alleged regression discussed above, Parents do not

identify any adverse effect that the reduction of the previous level of services, by itself, might have caused.

101. Finally, Dr. Freeman testified that such a brief break would probably do Student some good. At present she is constantly under tight stimulus control, but treatment around the clock is not appropriate. She should be able to do the same things her sisters do, go places with them, and have a family life. Student would not be injured by five weeks without ABA if she had planned activities.

102. For the reasons above, the evidence showed that the District's offer of 20 school days of ESY and four days of EAS was reasonably calculated to provide Student a FAPE during the summer of 2011.

## LRE

103. The IDEA requires that a student with a disability be placed in the least restrictive environment in which she can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. The evidence showed that the District's desire to ensure that Student was able to interact with others her own age was central to its offer.

104. The evidence showed, and the parties agree, that Student's disabilities were sufficiently severe in June 2011 that she could not have been satisfactorily educated in the general education environment. She was nonverbal and required the sustained attention of a one-to-one aide, as well as intense monitoring of her behavior. She also primarily required instruction in functional life skills. Student's proposed placement in Ms. Albano's SDC, with its opportunities for occasional exposure to typical peers visiting the class, and mingling with the general education population outside of class, was the least restrictive alternative to a general education placement. The evidence showed convincingly that Student could have been satisfactorily educated in Ms. Albano's SDC. The District's offer therefore would have placed Student in the LRE.

105. In sum, and after considering all the evidence described above and Parents' arguments, the preponderance of evidence showed that the District's June 2011 IEP offer would have met Student's needs related to her disability and was reasonably calculated to allow her to obtain educational benefit.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Because the District filed the request for due process hearing, it has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

### PARENTAL PARTICIPATION IN THE DECISION-MAKING PROCESS

#### Meaningful Participation in IEP Meetings

2. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ*. (3d Cir. 1993) 993 F.2d 1031, 1036.)

#### Required Members of an IEP Team

3. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise

regarding the pupil, as invited at the discretion of the district or parents; and, when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

CONSEQUENCES OF PROCEDURAL ERROR

4. The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-206 [73 L.Ed.2d 690] (*Rowley*).) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

ELEMENTS OF A FAPE

5. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the IEP required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9).). "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

6. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to

provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Rowley, supra,* 458 U.S. at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947-951.) What the statute guarantees is an appropriate education, "not one that provides everything that might be thought desirable by loving parents." (*Tucker v. Bay Shore Union Free School Dist.* (2d Cir. 1989) 873 F.2d 564, 567 [citation omitted].)

7. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective." (*Id.* at p. 1149, quoting *Fuhrmann v. East Hanover Bd. of Educ., supra,* 993 F.2d at p. 1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; see also *Carlisle Area School v. Scott P.* (3d Cir. 1995) 62 F.3d 520, 534; *Roland M. v. Concord School Comm.* (1st Cir. 1990) 910 F.2d 983, 992, cert. denied, 499 U.S. 912 (1991).)

REQUIREMENTS FOR IEPS

PLOP's, Goals, and Objectives

9. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R.§ 300.320 (2006); Ed. Code, § 56345.) An annual IEP must

contain, among other things, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects her involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1) (2006); Ed. Code, § 56345, subd. (a)(1).) The statement of PLOP's creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

10. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) For a student assessed using alternative assessments aligned to alternative achievement standards (like Student), the goals must be broken down into objectives. (20 USC § 1414 (d)(1)(A)(i)(I)(cc).)

11. In addition, the IEP's statement of goals must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).)

12. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

Transition Plans

13. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, the IEP must include appropriate transition plan. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); Ed. Code, § 56345, subd. (a)(8).) An IEP must also contain a transition plan for a student moving from a private school or SDC to the regular education environment. (Ed. Code, § 56345, subd. (b)(4).) There is no requirement that an IEP contain a plan for the transition of a student from placement at home to placement in an SDC.

14. The IDEA and state law permit rapid changes to an IEP in response to unforeseen circumstances such as a lack of anticipated progress. Parents or the district may call for an IEP team meeting. (Ed. Code, § 56343, subds. (b), (c).) The district and parents may agree not to convene an IEP team meeting, but instead to develop a written document that modifies or amends the current IEP. (20 U.S.C. § 1414(d)(3)(D); Ed. Code, § 56380.1, subds. (a), (b).)

ESY Services

15. A district is required to provide ESY services to a student with an IEP if an ESY program is necessary to provide the student a FAPE. (34 C.F.R. § 300.106(a)(2006).) However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different from the standards pertaining to FAPE in the regular school year. The purpose of special education during the ESY is to prevent serious regression over the summer months. (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an ESY placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville County* (4th Cir 2002) 303 F.3d 523, 538.) In order to be entitled to ESY, a

child's gains during the school year must be "significantly jeopardized" in the absence of ESY. (*Id.*, 303 F.3d at pp. 537-538.)

16. In California "[a]n extended year session is included in the school year in which the session ends." (Ed. Code, § 56325, subd. (c).) The standard for determining ESY eligibility is set forth by regulation, and turns on a showing that interruption of the student's educational programming "may cause regression, when coupled with limited recoupment capacity, [which] would render[] it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence" that would otherwise be expected in view of her disabilities. (5 C.C.R. § 3043, 1st par.) In making that determination a district may consider, among other things, the ability of parents to provide educational structure in the home and the availability of alternative resources. (*Johnson v. Independent School Dist. No. 4* (10th Cir. 1990) 921 F.2d 1022, 1028, cert. denied, 500 U.S. 905 (1991).)

17. Federal law does not require a minimum or maximum number of days for ESY. (See 34 C.F.R. § 300.106 (2006).) In California an ESY program must contain a minimum of 20 instructional days. (5 C.C.R 3043, subd. (d).) It must be "the same length of time as the school day for pupils of the same age level attending summer school in the district ... ." (*Id.*, subd. (g)(1).)

Instructional Methodology and Staff Training

18. The *Rowley* decision established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, *supra,* 458 U.S. at p. 208.) The Education Department has advised that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46665 (Aug. 14, 2006) (Comments on 2006 Regulations).)

19. An IEP is not required to set forth the training of personnel or providers. (*S.M. v. Hawai'i Dept. of Educ.* (D.Hawai'i 2011) 808 F. Supp. 2d 1269, 1273-1274; see 34 C.F.R. § 300.320 (2006).)

Rule of Construction

20. Federal law provides that nothing in the section of the IDEA governing the contents of IEP's "shall be construed to require ... that additional information be included in a child's IEP beyond what is explicitly required in this section … ." (20 U.S.C. § 1414(d)(1)(A)(ii)(I); Ed. Code, § 56345, subd. (i).)

LRE

21. A school district must provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006).)

ISSUE: DID THE DISTRICT'S IEP PROPOSED ON JUNE 6, 2011, OFFER STUDENT A FAPE IN THE LRE?

22. Based on Factual Findings 1-10, and Legal Conclusions 1-4, the IEP team meetings at which the District's June 2011 IEP offer was created were attended by all participants the law requires. The IEP contained all the contents required for an IEP. The IEP was produced in compliance with all the procedural requirements of the IDEA.

23. Based on Factual Findings 1-8, 33-55 and 11-104, and Legal Conclusions 1 and 5-21, the District's June 6, 2011, IEP offer, complied with the substantive requirements of the IDEA. It addressed all of Student's unique needs and was reasonably

calculated to allow her to obtain meaningful educational benefit. Its provisions for PLOP's, goals, objectives, accommodations and modifications, and statements concerning assessments and the timing and duration of services all complied with applicable law.

24. Based on Factual Findings 1-8, 33-55 and 56-66, and Legal Conclusions 1 and 5-20, the District's June 6, 2011, IEP offer, was not required to contain goals for toileting and menstruation management. Those matters were best addressed primarily at home, and could have been adequately managed in Ms. Albano's SDC in the absence of specific goals. The teacher and aides were experienced with dealing with adolescents and there was no evidence they could not have competently handled Student's needs in these areas.

25. Based on Factual Findings 1-8, 33-55 and 67-74, and Legal Conclusions 1 and 5-20, the District's June 6, 2011, IEP offer, of a qualified IA for Student was appropriate and included the offer of an IA who was properly trained. The IEP did not offer an inadequately trained IA or limit the IA to having minimal qualifications, and an additional IA assigned specifically to Student was not needed in order to supervise Student during the IA's breaks.

26. Based on Factual Findings 1-8, 33-55 and 75-76, and Legal Conclusions 1 and 5-20, the misstatement of Student's grade level on the first page of the offered IEP would not have denied Student a FAPE, deprived Parents of their participatory rights, or otherwise have had any impact on Student's education.

27. Based on Factual Findings 1-8, 33-55 and 77-86, and Legal Conclusions 1 and 5-20, the transition plan in the District's June 6, 2011, IEP offer, was adequate and not overly rigid, and could have been modified quickly if necessary. It was reasonably calculated to support Student in her transition to full-time school attendance.

28. Based on Factual Findings 1-8, 33-55 and 87, and Legal Conclusions 1 and 5-20, the District's June 6, 2011, IEP offer, was not required to include monthly meetings of Student's providers in order for her to obtain a FAPE. Those meetings may have been appropriate for Student's home-based program but were not required in a program based in Ms. Albano's SDC.

29. Based on Factual Findings 1-8, 33-55 and 88-93, and Legal Conclusions 1 and 5-20, the offered IEP was not required to ensure that Student had access to a pull-out room in order to offer her a FAPE. She would have had access to a pull-out area that served the same purpose. Whether to use a pull-out room in educating her is a question of methodology for the District to decide as long as Student was offered a FAPE. The preponderance of evidence showed that its usage was not appropriate.

30. Based on Factual Findings 1-8, 33-55 and 94-102, and Legal Conclusions 1 and 5-20, the District's June 6, 2011, IEP offer, for ESY was appropriate and reasonably calculated to allow Student to obtain educational benefit and prevent serious regression between the end of the 2010-2011 academic year and the beginning of the 2011-2012 academic year. There was no need for Student to receive additional services between the end of the ESY and the beginning of the next academic year beyond the EAS that were offered.

31. Based on Factual Findings 1-8, 33-55 and 103-104, and Legal Conclusions 1 and 5-21, in June 2011, Student could not have been satisfactorily educated in a general education environment. The IEP offer of June 6, 2011, would have placed Student in the least restrictive environment in which she could have been satisfactorily educated, and would have provided significant exposure to typically developing peers.

## ORDER

The District's IEP offer to Student of June 6, 2011, constituted an offer of a FAPE in the LRE.

## PREVAILING PARTY

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

## 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 16, 2012

_____/s/_____

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings