

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2014070012

DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on January 27, 2014, naming Los Angeles Unified School District.

June R. Lehrman, Administrative Law Judge, heard this matter on October 7, 8, 9, 13 and 14, 2014, in Van Nuys, California.

Seymour Amster, Attorney at Law, appeared on behalf of Student. Student's mother attended the hearing on all days except October 7, 2014.

Patrick Balucan, Attorney at Law, appeared on behalf of District. District representative Rudy Guttierrez attended the hearing on October 7 and 13, 2014. District representative Tonya Gregory attended the hearing on October 8 and 9, 2014. District representative Francine Metcalf attended the hearing on October 14, 2014.

A continuance was granted for the parties to file written closing arguments and the record remained open until October 28, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

Did District deny Student a free appropriate public education during the 2013-2014 school year, including extended school year in the summer of 2014, by:

1. Failing to provide Student with an iPad;
2. Failing to provide appropriate adapted physical education services;
3. Failing to provide appropriate speech and language services;
4. Failing to provide appropriate toilet training;
5. Failing to provide an appropriate one-on-one aide;
6. Failing to provide appropriate occupational therapy services;
7. Failing to provide appropriate vocational therapy services;
8. Failing to provide appropriate English language learner services;
9. Failing to provide appropriate inclusion activities designed for the Student's individual needs;
10. Failing to provide appropriate non-academic and extracurricular activities including sports, assemblies, and school theatrical productions; and
11. Placing Student at an educational facility that is no longer a special education center, but is a co-located general and special education campus?<sup>2</sup>

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<sup>1</sup> The issues have been rephrased and re-ordered for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

<sup>2</sup> Student did not allege any procedural violations such as predetermination or implementation of an individualized educational program without parental consent. Student did not allege in her complaint that her parent's opportunity to participate in the decision-making process regarding the provision of a FAPE was significantly

## SUMMARY OF DECISION

Student, an intellectually disabled 10-year old, contends that she was denied a free appropriate public education when as a result of modifications to a federal court consent decree, she was mainstreamed for 12 percent of her school day in the 2013-14 school year. The evidence showed, however, that Student thrived in the inclusion activities, which included theater, art, music, dance, library and other enriching activities. Contrary to Mother's fears, no harm came to Student from these activities. She was well-liked by the general education students, developed friendships, took part in a theatrical production and generally progressed in her socialization and verbalization skills. Student further contends that her placement, a special education center, was merged into a general education campus during 2013-14, denying her a FAPE. However, the planned co-location did not occur during the 2013-2014 school year at issue here. Thus, except for the inclusion activities discussed above, Student's program did not actually change, nor did the physical locale in which her special day class occurred. Student's services were appropriate during the year, including the speech and language and adapted physical education services offered to the class as a whole. After appropriately assessing Student for adapted physical education, speech and language services, assistive technology and occupational therapy, District made appropriate offers in all these service areas, to which Mother declined to consent. Finally, there was no denial of FAPE with respect to vocational training, English language learner services, or toilet training, and Student was provided with appropriate adult assistance throughout the school day. Student did not allege procedural violations in District's handling of Student's IEP's after the modification of the consent decree, and this Decision does not address any such

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impeded by virtue of procedural violations. This Decision does not address any such potential procedural issues arising out of the facts presented.

potential issues. Thus, Student has failed to meet her burden of proof on any of the issues presented.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is an intellectually disabled 10-year old girl who had attended District schools since kindergarten. She performed within the delayed range of cognitive development, evidencing global developmental delays. She functioned within the estimated three-to-four year age range in developmental skills. Her pre-conceptual thought functioning was within the two-to-four year age range. She could discriminate the size of nesting blocks and could sort and match items by a single attribute such as color or shape. She recognized symbolic language representing body parts and common objects, such as eyes, ears, nose book, car and key. She used expressive language to identify common objects such as pencil, crayon and chair, and could expressively identify single items in pictures such as tree, house, dog, and the like. She could cut with scissors, buckle a seatbelt, swing from a swing and ride a tricycle. She knew the meaning of under, over, between, big and little, more and less, first and last, full and empty. She could count from one-to-10, with assistance and prompting. She knew her classmates by name, and could name them with prompting. She could name her friends and family members, and her own first name. Academically, her skills were within the preschool range, from two-to-four years of age. She could hold a pencil but not independently produce any letters.

2. Student's adaptive skills were within the low adaptive level. She could fix a bowl of cereal and milk independently. She could put her belongings away and dress herself, except for tying shoes. She could wash and dry her hands and face. She was toilet-trained, but required supervision and assistance for personal hygiene. She

required toileting assistance at times. She enjoyed riding a tricycle. She could feed herself with assistance. She knew the concept of time as presented by words like breakfast, lunch, recess, and time to go home.

3. Spanish was the primary language spoken at home. Student communicated with siblings in English and, according to Mother, spoke English better than Spanish. She spoke in one-to-three word utterances. She could answer simple questions, and follow one and two-step directions. Student could follow very simple verbal commands, was cooperative and transitioned between school activities when requested. She could communicate wants and needs with gesture and vocal sounds, and simple single words or short phrases. She was alert and attentive to her surroundings, enjoyed looking at and paging through books. She made eye contact, showed interest in and smiles at others. Her communication skills were within the delayed range, about that of three-year old.

#### BANNEKER SPECIAL EDUCATION CENTER

4. From the 2010-2011 school year through the 2012-2013 school year, Student attended Banneker Special Education Center. Banneker was a facility entirely dedicated to students with moderate to severe disabilities. Its classrooms all opened onto a central hallway, with no access to the outdoors directly from the classrooms. The only exception was that certain classrooms had access to a closed, locked yard. All visitors to Banneker obtained access through one central front entrance, past a desk staffed by school personnel. The school site was designed for easy monitoring and location of its students. Most of the classrooms had immediate access to bathrooms, which were located immediately adjacent to the classrooms, and were accessed from entrances to two classrooms on either side. Some classrooms were located farther from bathrooms, but all classrooms were within very close proximity to a bathroom. The bathrooms had changing tables with cleansing wipes for students who did not have the

ability to cleanse themselves. Student was transported from home to school and back via school bus with an adult assistant on the bus.

5. While at Banneker, Student attended a special day class designated as a "MR" program, meaning an alternate curriculum program for intellectually disabled students.<sup>3</sup> Its focus was on functional academics and self-help skills, with close supervision by teachers and aides. Health, cleanliness and safety were subjects taught with teaching, re-teaching, and prompting. Adults were in close proximity to students for safety purposes, such as to prevent ingestion of inedible objects.

6. Banneker was located adjacent to Avalon Garden elementary school, a general education campus. No activities, except limited co-activities at the holidays, ever occurred that brought the special education students at Banneker together with the general education students at Avalon. Banneker students would never be transported to the Avalon campus without parental permission for a field trip.

7. The Avalon campus had classrooms in bungalows that opened onto the outside to a central courtyard, rather than an internal hallway. The restroom situation was different at the Avalon location than at the Banneker location. At the Avalon location, there were fewer bathrooms, and students had to walk to them.

#### MARCH 20, 2013 TRIENNIAL IEP

8. At Student's triennial IEP team meeting dated March 20, 2013, the team suggested the following goals. In functional reading skills, Student's goal was to identify

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<sup>3</sup> In 2010, Congress deleted references to "mental retardation" in the IDEA, and replaced it with "intellectual disabilities." (Pub.L. 111-256, 124 Stat. 2643.) This decision will conform to this change in the IDEA, and use "intellectual disabilities" and not "mental retardation." (Pub.L. 111-256, § 4; [requirement that States change terminology for individuals covered by provisions of this law].)

days of the week on a calendar. In functional writing, Student's goal was to produce letters. In functional math, Student's goal was to be able to identify a certain number of objects upon request. In vocational education, Student's goal was to sort objects by two attributes such as color and shape. In English language development, Student's goal was to recite and identify all the letters of the alphabet by pointing and singing the alphabet song in English.

9. District offered continued placement at Banneker in the alternate curriculum special day class "MR" program," for 1600 minutes per week, with extended school year services and home to school transportation.

10. As in previous years, she was to remain 100 percent of her time outside of general education. Her participation in general education was to consist only of participation in school activities and events with like-aged typical peers from general education as they visited or performed at Banneker, or on field trips and assemblies as appropriate with adult supervision. The IEP stated that an analysis of the least restrictive environment for Student had determined the current placement was the most appropriate, least restrictive environment at the time.

11. Student was offered English language learner services that were described in the IEP as English language development and content, using specially designed academic instruction in English. Her special day class teacher was identified as the provider of primary language instruction and support.

12. District had a master plan for English learners for general education as well as special education students. The master plan prescribed assessments and instructional programming for English learners. Student's English language development was assessed using an instrument known as the California English Language Development Test from 2010-2012. For the kindergarten year, the test assesses skills in listening and speaking. In first grade and thereafter, it assesses domains in listening, speaking,

reading and writing. Student's performance in 2010, 2011, and 2012 placed her in the beginning range in all domains, without significant progress year after year.

13. Parent consented to the March 20, 2013 IEP. This was the last IEP to which Parent had consented.

#### JUNE 5, 2013 AMENDMENT IEP

14. On June 5, 2013, District convened an amendment meeting to the March 20, 2013 IEP team meeting. The purpose of the meeting was to inform Mother of certain changes being made to Student's program, because of a modification to a federal court consent decree.

15. In 1996, District entered into a federal court consent decree governing its delivery of special education services. The consent decree established objectives, one of which concerned the elimination of obstacles to children with disabilities being educated on general education campuses. In 2003, the consent decree was modified, replacing the objectives with 17 performance-based outcomes, which were to be objective and measurable, and monitored by an independent monitor. The monitor and parties were able, under certain circumstances to modify the 17 outcomes. On September 14, 2012, the monitor approved a stipulated modification that resulted in a revised Outcome Seven. Revised Outcome Seven stated that District was to reduce the number of students with moderate to severe disabilities between the ages of six and 18 at special education centers, by a total of 33 percent over three years, beginning with the 2012-2013 school year. It also provided for certain allowable percentages of general education and special education students (ranging between 28 percent to 35 percent) at co-located schools. Revised Outcome Seven further stated that students with moderate to severe disabilities at co-located schools "shall participate with their nondisabled peers in general education classes an average of 12% of the instructional day and during lunch, breaks/recess and school wide activities."



16. District instructed Cydney Schwarzberg, the assistant principal of Banneker, that the elementary school program would be closing at Banneker as a result of Revised Outcome Seven, and would be re-opening at the neighboring Avalon elementary school campus. The District instructed Ms. Schwarzberg to hold IEP meetings with all Banneker parents to discuss the closure and re-opening. Ms. Schwarzberg initiated IEP's to discuss the moving of the elementary school program from Banneker to Avalon.

17. At the June 5, 2013 IEP meeting, District informed Mother that starting with extended school year in approximately August 2013, it would be moving Student from Banneker to Avalon. Her program would remain an alternate curriculum, in a special day class "MR" program," but the 1600 minutes per week was reduced to 1408 minutes per week. Instead of remaining 100 percent of her time outside of general education, the percentage was reduced to 88 percent. The IEP stated that per the implementation of Revised Outcome Seven, elementary students from Banneker and Avalon would merge into one integrated school on the Avalon campus beginning in the 2013-2014 school year. Student would remain in a special day class with percentages of time for integrated activities to be no more than 12 percent (39 minutes) of her instructional day.

18. Integration activities were to include physical education, arts, music, theater and dance. As in the previous IEP, Student would also participate in school activities and events with like-aged typical peers from general education as they visited or performed, and in field trips and assemblies as appropriate with adult supervision. None of Student's goals were changed, and no goals proposed that specifically related to the integration activities.

19. The IEP stated that an analysis of the least restrictive environment for Student had determined that required supports, services, accommodations and modifications could be met in a special day program on a general education site.

20. The notes stated that the purpose of the IEP was to document the change in the percentage of time outside of special education, and to reflect student participation in integration activities.

21. Mother did not consent to the IEP amendment. She disagreed with the integration of Banneker into Avalon Gardens. She noted concerns about bullying and access to bathrooms.

#### STUDENT'S PROGRAM DURING THE 2013-14 SCHOOL YEAR

22. Beginning with the 2013-2014 school year, Banneker ceased to operate as a special education center for elementary school-aged children. District continued to utilize the location to serve as a career and transition center called the Banneker-Doyle Career and Transition Center, and it still operated programs for seventh-to-12th grades and for students aged 18-to-22.

23. As expressed at the June 5, 2013 IEP, District intended to move all elementary school-aged students who had attended Banneker over to the Avalon campus for the 2013- 14 school year starting in August 2013. However, the physical move had to be delayed because planned modifications to the Avalon facility were not timely accomplished.

24. Thus, for the 2013-14 school year, the elementary school special day class program remained physically housed at the same location as before, at the Banneker site, but the program now operated under the name and auspices of Avalon elementary school. Informally, the Banneker location came to be known as "Avalon South." The neighboring general education campus, to which students would ultimately be moved, came to be called "Avalon North." Thus, in the 2013-14 school year, Student's Avalon

elementary school program was still physically housed in the same facility where Banneker had operated.

25. Even though the elementary-aged students there were technically Avalon students, their physical safety at that location during emergencies was governed by the school safety plan for the Banneker Doyle Career Transition Center, which applied to all persons physically on its premises, visitors included. Student records were not moved and continued to be physically located at the Banneker site. However, the responsibility to notify parents of any emergency or safety concerns for the elementary school special education students located there rested with the principal of Avalon. Emergency contact cards filled out by each parent for contact information were physically maintained at Avalon North, with copies kept at Avalon South. On some District records, Student's "location code" number indicated that she attended Avalon, without detailing her location within the campus as being physically at Avalon South. At Avalon South, there was a full-time nurse during the 2013-14 school year, but not at Avalon North.

26. Other than the change of title from Banneker to Avalon, Student's program for the 2013-14 regular school was identical as before, and was physically located in the same location as previously, with the important exception of the percentage of time in general education and the integration activities. The adult-student ratios did not change. The physical location of Student's classroom for the non-integrated activities remained the same, as did the adjacent restrooms.

27. Ms. Nadya Pantoja was Student's special education teacher during the 2013-14 school year from January 2014 onward. The adult-student ratio in her class was nine students to three adults, including Ms. Pantoja and two aides. By the end of the year, Ms. Pantoja saw improvement in Student's verbalization. For one notable example she asked Ms. Pantoja to "get her backpack," which was a significant improvement in Student's speech production. Ms. Pantoja recalls Student as a very happy student, who

read and played with books, was becoming more independent, and would help other students. For example, she would help them put their backpacks away, would help them zip their sweaters, and would mimic reading to them by role playing. She would sit in a chair and turn pages of books with younger students sitting on the rug, as if she were the teacher.

28. Ms. Pantoja is bilingual and holds a Bilingual, Cross-cultural, Language and Academic Development certificate. The BCLAD authorizes her to modify curriculum for English learners should they require it. Ms. Pantoja utilized such modified curriculum throughout the day, using a program called the Oxford picture dictionary program. Ms. Pantoja identified this program as District's curriculum for special needs English language learners. It consists of a picture, which the student names in English, to stimulate the production of language in general and English in particular. It is part of her lesson plan and part of the curriculum for all English language learner students.

29. In terms of toileting, per Ms. Pantoja Student did not need assistance, was very independent and wanted privacy. However, the restrooms were adjacent to the class and the door could be kept ajar, and there was always an adult at the door asking Student if she required assistance. Student was able to wipe herself and always said she could do it herself. Ms. Pantoja's aides had a protocol for assisting students in the toilet, using gloves, terry wipes and a wash solution. Student only required aide assistance for toileting ten times during the 2013-14 school year, which is minimal assistance for students in that class, many of whom required more constant help.

30. Language and speech services were provided on a push-in collaborative model. The school site language and speech therapist collaborated with the teacher on classroom communication-based curriculum goals for the modified curriculum.

## INTEGRATION ACTIVITIES DURING THE 2013-14 SCHOOL YEAR

31. Integration activities between the special education and general education students during 2013-14 occurred during music, art, physical education, theater, library, lunch and recess. These changes to Student's program were implemented in the 2013-14 school year as implementation of Revised Outcome 7, and as stated in the June 2013 IEP, notwithstanding lack of parental consent. Supervised by aides, the special education students were paired with general education buddies for these activities. Third grade general education teacher Richard Myers, Ms. Pantoja, and arts or adapted physical education teachers oversaw the activities. The teachers had many meetings about integration activities. Mr. Myers and Ms. Pantoja met frequently to discuss their students' interactions, for example to determine which students would team up well as buddies.

32. Mr. Myers read Student's IEP, but left it up Ms. Pantoja to determine which goals were worked on during integration activities. The students practiced social skills together, such as how to take turns, how to follow rules, how to be quiet, how to introduce yourself to your buddy, and the like.

33. The integration activities for art and theater took place at Avalon South, once a week for each class. For the theater integration activities, the general education and special education students together prepared a performance of "Where the Wild Things Are" which was performed at Avalon North. The teachers selected a play they considered age-appropriate which had many roles, although only three speaking roles. General education students and special education students, including Student, played background roles as trees, monsters or wild things, and acted like the ocean, working together to act like waves.

34. Physical education and dance classes took place at Avalon North. Physical education and dance activities were modified for the physical abilities of the special

education students. Adapted physical education was provided twice a week for 40 minutes each class. Team skills were practiced, such as passing a ball back and forth, throwing and catching. Student was sedentary and cautious with any form of movement, and it was difficult to get her to participate, as this was a non-preferred activity. The general education students cheered Student on, saying "you can do it" and "this is how you touch your toes."

35. Library was also an integration activity and a preferred activity for Student. She and her buddy would walk around the shelves, pick a book and the buddy would read it to her. Student smiled and laughed, and verbalized along.

36. While engaging in the integration activities at Avalon North, the special education students either used the bathrooms at the auditorium or library, supervised by aides, or walked back to Avalon South to use the bathrooms and changing rooms located there, if necessary. They used whatever bathroom was closest, accompanied by aides. Ms. Pantoja's protocol was to do toileting for all students at Avalon South before traversing to Avalon North for any inclusion activities there. However if anyone had an emergency, she or her aides would take a group of girls to the bathroom together with an aide. At times one adult could have three girls together in the bathroom at Avalon North. The restrooms at Avalon North were shared between general education and special education students, and there was no plan to separate the restrooms.

37. Student thrived in the integration activities. Student was well-liked by the general education students. The general education students competed over who could be her partner during inclusion activities. She smiled and laughed during the activities and seemed to enjoy them. Student was paired with a general education buddy and they liked each other, forming a special bond. Student used her oral language more and perked up when the integration activities occurred. Although not working on specific goals, the general education students organically assisted the special education students

by asking them to sit next to each other, asking if they wanted to paint or do other activities. According to Mr. Myers, third grade is a very nurturing grade. Ms. Schwarzborg had no concerns about Student engaging in integration activities. Student was sweet-tempered, not a behavior problem, complied with directions from familiar adults, and Ms. Schwarzborg had no concerns for Student's safety during integration activities.

38. Sandra Culler, District school psychologist, opined at hearing that Student could benefit from inclusion activities notwithstanding her mental age of between two-and-four years old. However, IEP goals could and should reflect what the inclusion activities were intended to accomplish. Student did not present elopement or other maladaptive behaviors, and was compliant to direction and redirection. Ms. Culler opined Student could appropriately attend a special day class located on a general education campus, however it was important that she be properly monitored. The risks of harm coming to her when properly supervised were low. Ms. Culler assessed Student in 2013, had worked for District for 34 years, assessed thousands of students, and appeared on the witness stand as credible, thoughtful and very experienced.

#### SEPTEMBER 26, 2013 AMENDMENT IEP

39. District convened an IEP amendment team meeting on September 26, 2013, as an amendment to the March 20, 2013 triennial, to address Mother's concerns. Mother was concerned about the integration activities and did not want Student taken from Avalon South to Avalon North. She expressed concerns about the gates being locked between the North and South sides of the campus. District responded at that time that the gates were not locked. However at hearing, Assistant Principal Melissa Winters acknowledged that the gate was locked one time, and the special education children had to wait in the sun while a key was obtained to open it. Mother requested a one-to-one aide for Student. District responded with an offer of adult assistance for the

restroom, on the bus and during all general education integration activities. Mother requested assistance for Student when getting on and off the bus, and complained that Student was left waiting in the heat for the bus. District responded it would work to resolve transportation wait-time issues.

40. Mother wanted Student to be excluded from all integration activities. District responded that integration activities were "part of the instructional program."

#### MARCH 20, 2014 ANNUAL IEP

41. District convened Student's annual IEP team meeting on March 20, 2014. Student had not met goals in functional reading, functional writing or English language development, on which she was still working on recognition of the alphabet. Present levels of performance were reviewed for health, general ability, adaptive behavior, motor ability, social emotional functioning, language, academics, functional reading, functional writing, functional math, and vocational education. In pertinent part, the health present level stated that Student required assistance and supervision for toileting despite being toilet trained. The English language development present level stated that Student could follow simple commands in English, and could say some simple words like mommy, agua, no, sorry, baby and please. Her vocational education present level stated that she could not yet recite the days of the week.

42. Goals were proposed in the areas of functional reading, functional math, communication, functional writing, English language development, and vocational education. In pertinent part, the English language development goal stated that Student would match same-case letters to each other in trials using upper and lower case alphabet cards. The vocational education goal stated that Student would point to and correctly recite the days of the week when shown cards with the days printed on them. Ms. Pantoja proposed this goal. In her opinion, vocational education is similar to functional life skills. To be able to identify the days of the week would further Student's



functional living and vocational skills by hopefully enabling her to understand and keep to a schedule for work or social events.

43. Student was offered a continuation of her alternate curriculum program at Avalon, in a special day class "MR" program, for 1408 minutes per week with 88 percent of time outside general education; Student would remain in a special day class with percentages of time for integrated activities to be no more than 12 percent (39 minutes) of her instructional day. Such activities would include physical education, arts, music, theater and dance. As in the previous IEP, Student would participate in school activities and events with like-aged typical peers from general education as they visited or performed at the school, field trips and assemblies as appropriate with adult supervision. The IEP stated that for the least restrictive environment, she required a safe, structured and highly supervised educational environment due to her severe cognitive and communication impairments, and that the supports and services she required could be made available in a special day program on a general education campus. The IEP also offered extended school year.

44. Mother expressed concerns about the integration activities. Ms. Pantoja expressed that the integration activities enhanced Student's vocational, communication and functional reading skills, but Mother disagreed with the integration activities. District responded that the integration activities "are part of student's instructional program and will continue."

45. Mother expressed concerns about Student's toileting. She requested that a log be created of when Student used the toilet. Ms. Pantoja expressed that Student wanted her privacy and independence in the bathroom, but agreed to create such a daily log. Ms. Pantoja did not change the toileting protocol, which she considered to have been correct, but agreed to be more vigilant by keeping the log and asking Student more frequently if she needed to use the toilet. Mother reported that Student

had come home with soiled underwear on three occasions. The team discussed modifying Student's communication goal to encourage Student to express her needs with respect to cleansing after toileting.

46. Regarding Student's English language development, it appeared that due to the severity of Student's disability, the California English Language Development Test might be too advanced for her, resulting in her lack of progressing on that test from 2010-2012. The team suggested that her English language development progress be monitored using the Communication Observation Matrix, a variation of the test.

47. Mother had concerns about adapted physical education. On October 11, 2013, October 23, 2013, and November 18, 2013, District had sent an assessment plan requesting parental consent for assessments in the areas of adapted physical education as well as occupational therapy, assistive technology and alternative assisted communication devices, to which Mother did not consent. District provided Mother a fourth copy of the assessment plan at the meeting. Because the assessments had not been conducted, District did not consider Student eligible for and did not offer related services in these areas.

48. Mother did not consent to the IEP and stated she opposed the Avalon Gardens placement.

#### SPRING 2014 ASSESSMENTS

49. At or shortly after the March 20, 2014 IEP meeting, District received a signed copy of the assessment plan and proceeded to assess Student in the areas of adapted physical education, occupational therapy, and assistive technology/augmentative alternative communication.

50. On May 1, 2014, adapted physical education specialist Norma James assessed Student in the area of motor abilities and motor development to determine her eligibility for adapted physical education. The assessor utilized the Adapted Physical

Education Assessment Scale, second edition, a multi-item test of motor performance. It tested Student's ocular control, imitations of postures, throwing, catching and kicking. Overall Student was delayed, and performed below standard for her age. The assessor observed that Student seemed timid and insecure, did not engage in physical activities during recess or lunch, and required frequent prompts to engage in physical activity. She could walk independently. She could track items with her eyes, but not without also moving her head. She understood the task of mirroring postures, and attempted to do so, but demonstrated timidity and hesitation. She had difficulty with eye contact when attempting to catch an object. She was able to throw a ball five feet away with 60 percent accuracy, but lost focus while throwing. When kicking, she could make contact with a stationary ball, but was unable to kick a rolling ball in any direction due to poor balance. She required frequent rest breaks. She reached a point of unwillingness to continue with an activity due to fatigue or lack of interest, and would sit in place and refuse to continue. The assessor recommended that Student receive adapted physical education services two times per week for a total of 60 minutes per week by an adapted physical education specialist, with accommodations of allowing short rest periods.

51. On May 6, 2014, occupational therapist Justin Chao assessed Student to address concerns with Student's writing and pre-writing skills, which can be affected by posture, hand-eye coordination, to-hand coordination, sensory integration, and fine motor skills. He interviewed Ms. Pantoja, conducted a review of records, and observed Student in class. He did not do formal occupational therapy testing due to Student's difficulty following instructions, but did a clinical observation.

52. Mr. Chao found that Student had good postural stability and balance to move through space, and was physically able to access the school environment. She was able to keep an upright posture, move between various school settings independently, including sitting, standing and walking, to navigate the school environment and

participate in tabletop and playground activities. She did not trip or fall and could sit upright in a chair. She had good muscle strength, functional muscle tone and normal range of motion in her upper extremities to participate in the school setting.

53. Student demonstrated foundational visual perception and visual tracking skills. She could see and understand what objects were, such as toys and classroom tools. She could identify basic colors and sizes. She could complete a simple puzzle using eight knobbed pieces. She could distinguish pictures and objects from a busy background. Her visual tracking appeared normal.

54. In the fine motor skills arena, Student exhibited proper grasp patterns and motor planning skills. She could use her hands to manipulate objects, such as holding pencils and crayons. She could position the instruments and hold them with appropriate grasp. She could imitate straight lines and a circle, with prompting. She could trace, a pre-writing skill. She could color within the lines. However, she was unable to copy any letters.

55. Student was able to participate in daily classroom activities and routines, and was independent in many areas of self-care at school. She could wash and dry her hands, access her backpack and place it in the closet, and use utensils for eating. She did not exhibit inappropriate sensory-seeking or avoidance behaviors.

56. On May 8, 2014, speech language pathologist Meghan O'Brien conducted a language and speech and an augmentative-alternative communication assessment, to determine if Student needed language and speech therapy, and to determine if Student required use of an augmentative/alternative communication system to access her curriculum. Ms. O'Brien serves as the lead consultant on augmentative/alternative communication systems for the entire District.

57. For her language and speech assessment, Ms. O'Brien conducted a records review, teacher interview, classroom and clinical observations, a review of work samples,

and standardized as well as alternate testing. Student's speech production was severely impaired compared to same-aged peers. She exhibited articulation delays, deleted consonants when speaking, spoke at a low volume, and was only 60 percent intelligible. Her receptive vocabulary skills, or the ability to understand the meaning of single words, fell significantly below average, more than two standard deviations below average, which indicated very severe impairment. Her expressive vocabulary skills, or the ability to label objects, was also in the same range and was profoundly impaired. Student was unable to understand the demands of certain of the standardized testing instruments Ms. O'Brien attempted to administer to her.

58. Ms. O'Brien concluded that Student had speech sound production errors, deleting and distorting sounds, which reduced the intelligibility of her speech. She found that Student needed language and speech therapy services to receive a FAPE.

59. For her augmentative/alternative communication assessment, no standardized assessment tools exist. Therefore assessors use informal means to determine what devices will best suit a student's needs. Ms. O'Brien used a variety of trials with different methodologies to see how Student responded to each. First, she assessed Student's communicative intent by using a checklist that District has developed, known as the Observation of Communicative Competence. This assessment checklist helps determine a student's communication level and ability by looking at behaviors in a continuum of five categories: pre-intentional, intentional/pre-symbolic, symbolic, literate, low verbal and proficient. Student presented with a low verbal level of communication skills. In her symbolic communication, Student could identify pictures by name and match pictures to objects, and match identical pictures. Next, Ms. O'Brien administered the Bruno Test of Aided Communication Symbol Performance, 2003 Edition. This test is used as a component of an augmentative/alternative communication assessment to provide a systematic and objective mechanism for assessing a student's

optimal symbol and field size, categorization skills, and recognition of pictures. It is used for students who do have some symbolic skills, to assess the number and complexity of symbols they can perceive, and to test their sorting ability.

60. Student demonstrated the ability to reliably locate icons in a field of up to 16. She could not identify abstract pictures. She demonstrated strong topical categorization skills for concrete items such as food, clothing and animals. Student's performance led Ms. O'Brien to recommend a configuration on an augmentative/alternative communication device of 16 symbols per board, with a 1/14 inch size for the symbols, with vocabulary organized by topic, and symbol selection to be taught representing people, verbs, places, objects, adjectives/ adverbs and prepositions.

61. Next, Ms. O'Brien tried different types of devices, to see how Student responded, starting with a non-technological communication book with a static display and 12 color-coded icons per page. She then moved to a digital communication device with a static display, but Student's abilities exceeded its capabilities. She then tried an application called Touch-Chat. Touch Chat can only be used on an iPad Mini device. This software has synthesized voice output, text-to-speech capabilities, and can be organized by topic and by number of icons per page. The trial showed Student making sentences and exhibiting communicative intent, and appeared appropriate for Student's abilities. Student explored all the options on the page displaying food items, as she activated targets in sequence and used her right and left hands alternately for target activation. Student demonstrated the ability to navigate the system to return to the main menu and explore up to two levels of vocabulary, looked and smiled at the assessor when activating the McDonalds target, and smiled and nodded when asked if she liked the device. Ms. O'Brien ruled out the use of a different software application called

Proloquo2Go, because Student was confused by the grammatical organization it utilized and made nonsensical messages on it.

62. Ms. O'Brien concluded that Student demonstrated interest and ability to use a dynamic display augmentative/alternative communication system to communicate for the pragmatic purposes of requesting, labeling and commenting.

63. Ms. O'Brien concluded that Student required access to a trial of up to 60 days using an augmentative/alternative communication system within the school and home settings. She recommended that the system have the following features: a tablet-based, dynamic display, topically-organized with 16 icons per page, using picture symbols, with synthesized voice output and a built-in camera. During the trial period, Ms. O'Brien recommended that data be collected to determine if use of system significantly enhanced Student's ability to access her curriculum.

#### MAY 16 AND MAY 21, 2014 IEP'S

64. District convened an amendment IEP team meeting on May 16, 2014. Mother was unable to attend. District convened the meeting in her absence to comply with legal timeframes following the assessments it had performed on Student.

65. A further amendment meeting was then convened on May 21, 2014, which Mother did attend. The purpose of these two meetings was to review the assessment results.

66. Ms. O'Brien prepared a present level of performance in the area of communication that stated that Student showed articulation delays. She had a strong interest in looking at pictures and books, could reliably locate icons in a field of 16, demonstrated strong categorization skills, and had the interest and ability to use a dynamic display augmentative/alternative communication device to communicate for the pragmatic purposes of requesting, labeling, and commenting. Ms. O'Brien recommended the 60-day trial device. Ms. O'Brien prepared a proposed goal that

Student would use speech and a trial speech-generating device, to produce intelligible one-to-three word utterances to comment on classroom lessons five times per day, with prompting. The IEP team offered services consisting of 30 minutes of weekly "collaborative" speech therapy for both the regular school year and extended school year, to begin upon parents' signature. Ms. O'Brien intended the 30 minutes to consist of small group exercises with other students using AT devices.

67. Ms. James prepared a present level of performance based on her assessment in the area of adaptive behavior, and a proposed goal that Student would cooperate for a 25 minute stretch without stopping, in a classroom activity selected by the teacher. The IEP team offered services of 60 minutes per week of adapted physical education during the regular school year, and 120 minutes per month during extended school year.

68. Mr. Chao prepared a present level of performance in the area of visual motor skills based on his assessment. He developed a proposed goal that Student would copy her first name with legible letter formation, with verbal and/or physical prompts. The IEP team offered 30 minutes per month of "collaborative" occupational therapy services for both the regular and extended school year.

69. Mother did not consent to this IEP. Ms. O'Brien and Assistant Principal Ms. Winters informed Mother that if she did not consent to the augmentative/alternative communication trial, it could not begin, but that Mother could disagree with other parts of the IEP. Mother misunderstood this to mean that to get the iPad she had to agree to the placement, which she did not do. Therefore, no iPad trial began.

#### EXTENDED SCHOOL YEAR 2013-2014

70. Extended school year for the 2013-14 school year was in August 2014. For extended school year, the special education students were physically moved to the new



location at Avalon North. Mother did not allow Student to attend, due to safety concerns.

#### MOTHER'S AND EXPERT'S TESTIMONY

71. According to Mother and her advocate April Munoz, who testified at hearing, Student was unable regularly to wipe herself after toileting, and the Avalon North bathrooms were inappropriate because they are shared. It was more appropriate, in Ms. Munoz' opinion, for a private room to be utilized, rather than a stall in a public restroom.

72. Mother's expert witness Marsha Vasquez, a registered nurse, testified to the health detriments if Student were to be not properly cleaned after toileting. In her opinion, Student required the assistance of an aide trained in proper cleaning techniques for cleansing after toileting, and also required assistance in hand-washing. She also confirmed Student's need for proper hydration and exercise.

73. Mother testified, and Assistant Principal Ms. Winters confirmed, that the transition to Avalon North integration activities occurred without Mother's consent. Mother learned it had occurred once when she went to look for Student at the South campus and Student was not there, and Mother was informed that Student was being integrated into the general education activities on the Avalon North campus.

74. Mother observed that after the transition, during a time frame as recent as last week, Student came home scared and with bruises and did not want to go to school anymore. She appeared with scratches on her face, dirty clothes and rashes in her private area that Mother surmised were because of improper cleansing. Recently Student came home with her underwear on the wrong way. Mother examined Student's underwear and thought it was not cleansed properly. Mother also observed that Student's water bottle was often still full at the end of the day, that Student came home dry and with chapped lips, that the bus was not air-conditioned and that students

waited for the bus in the sun. She also complained that the gate between Avalon and Banneker was locked so students had to wait in the sun when it is hot. Mother's testimony was not specific as to the periods during which these events took place. During the 2013-14 school year, Mother's friend Guadalupe Ortiz observed Student in a group of students going from the North to the South campuses in hot sun, and the students appeared to be sweating while walking. She also saw Student waiting for the bus in an unshaded area in the hot sun.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq.<sup>5</sup>; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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

"Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) "Related services" are transportation and other developmental, corrective and supportive services, specifically including psychological and counseling services, that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp.

200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In the instant matter, Student was the petitioning party and therefore had the burden of persuasion.

5. There are two principal considerations in claims brought pursuant to the IDEA: substantive denial of FAPE and procedural denial of FAPE. Unlike substantive

failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

#### ISSUE 1: ASSISTIVE TECHNOLOGY

6. Student contends she was denied a FAPE by not being given access to an iPad. Student further contends that her access to an iPad was improperly conditioned on her agreement to the May 2014 IEP. District contends that it offered Student appropriate assistive technology immediately after being permitted to assess her in this area. District further contends it did not condition the offer on consent to the entire IEP, only requiring partial consent to the iPad offer itself.

7. The IEP team must consider assistive technology needs in determining the child's educational program. (20 U.S.C. § 1414 (d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v) (Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. (14 U.S.C. § 1401(1); 34 C.F.R. § 300.5.) An assistive technology service is any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. (34 C.F.R. § 300.6.) Assistive technology devices, services, or both, must be made available to a child with a disability if required as a part of the child's special education, related services, or supplementary aids and services. (34 C.F.R. § 300.105.)

8. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessments must be administered by trained and knowledgeable personnel, and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv),(v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, § 56320, subd. (b)(3).) Competent persons who are knowledgeable of the student's disability shall conduct assessments. (Ed. Code, §§ 56322, 56320, subd. (g).) Assessments must be provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (20 U.S.C. § 1414(b)(3)(A)(ii).)

9. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or

pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

10. A parent cannot withhold consent to assess and still receive special education and related services. "Every court to consider the [Individuals with Disabilities Act's] reevaluation requirements has concluded that "'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student ....'" (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 that "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing."

11. If a parent consents in writing to the receipt of special education and related services for the child, but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).)

12. Here, District sought parental consent to assess Student's assistive technology needs throughout the 2013-2014 school year, sending the assessment plan on October 11, 2013, October 23, 2013, November 18, 2013, and a fourth time at the March 20, 2014 IEP meeting. Once it obtained consent, District assessed Student with a thoughtful and thorough analysis of Student's particular skills and abilities with respect to particular devices. Ms. O'Brien used a variety of trials with different methodologies to see how Student responded to each, assessing Student's communicative intent and symbolic skills and then determining the optimal symbol and field size for Student's individual symbolic skills, based on the number and complexity of symbols Student could perceive. Student's performance led Ms. O'Brien to recommend a particular

configuration on an augmentative/alternative communication device, individualized to Student's own abilities. Next, Ms. O'Brien tried different types of devices, to see how Student responded, from static non-technological communication books to color-coded icons to different types of digital communication devices with static and non-static displays. The IEP team then appropriately offered a trial of up to 60 days on a tablet-based, dynamic display, topically-organized with 16 icons per page, using picture symbols, with synthesized voice output and a built-in camera. During the trial period, the team appropriately recommended that data be collected to determine if use of system significantly enhanced Student's ability to access her curriculum.

13. Student has not established any denial of a FAPE. Ms. O'Brien's assessment was appropriate as was the resulting offer. The absence of a prior offer of assistive technology was due to Mother's lack of consent to the assessment from the assessment plan first offered in October 2013 onward. The lack of services after the IEP was also due to Mother's lack of consent to the offered trial. It appears that Mother misunderstood District's requirement of partial consent to begin the trial, interpreting it as a demand that she consent to an IEP in its entirety, but District witnesses were credible that they did not in fact demand this. In conclusion, Student failed to meet her burden of showing she was denied a FAPE by being denied an iPad. The IEP made an appropriate offer designed to address Student's unique needs that Mother did not accept.

## ISSUE 2: ADAPTED PHYSICAL EDUCATION

14. Student contends that she was not offered or provided appropriate adapted physical education, arguing that she ought to have been taught to play team sports. District contends it offered and provided appropriate adapted physical education services.

15. District must take steps, including the provision of supplementary aids and services, to provide nonacademic and extracurricular services and activities, such as



athletics, in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. (34 C.F.R. § 300.107.) Further, District must make physical education available, specially designed if necessary, to children with disabilities. (34 C.F.R. § 300.108.)

16. Student's contentions lack merit. The offered and provided adapted physical education was appropriate. Prior to consenting to an adapted physical therapy assessment, Student was nevertheless provided with physical education activities, overseen by an adapted physical education teacher, modified for the physical abilities of the special education students, twice a week for 40 minutes each class. Team skills were practiced, such as passing a ball back and forth, throwing and catching. Although Student was sedentary and cautious with any form of movement, and although it was difficult to get her to participate in this non-preferred activity, she was encouraged to do so by the teachers and general education students.

17. On May 1, 2014, after consent was obtained, Student was assessed in the area of motor abilities and motor development to determine her need for adapted physical education services, and found that she required this related service. The assessor recommended, and the IEP team offered, that Student should receive adapted physical education services two times per week for a total of 60 minutes per week by an adapted physical education specialist, with accommodations of allowing short rest periods. The offer was appropriate. Therefore, Student did not establish that District's provision or offer of adapted physical education was deficient.

### ISSUE 3: SPEECH LANGUAGE THERAPY

18. Student contends that she was not offered or provided appropriate speech language therapy, arguing that she did not have articulation errors as assessed, but should have been provided speech therapy during inclusion activities with general

education students to stimulate her learning of English. District contends it offered and provided appropriate speech and language services.

19. Related services include speech-language services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subds. (a) and (b).)

20. Student's contentions lack merit. The offered and provided speech and language services were appropriate. Prior to consenting to an assessment, Student was nevertheless provided with language and speech services in her special day class on a push-in collaborative model, in which the school-based language and speech therapist collaborated with the teacher on classroom communication-based curriculum goals for the modified curriculum. After consent was obtained, Ms. O'Brien's assessment concluded that Student had speech sound production errors, which reduced the intelligibility of her speech and that Student required language and speech therapy services. Ms. O'Brien's assessment was thorough and appropriate. The IEP team offered services 30 minutes of weekly collaborative speech therapy, to consist of small group exercises with other students using assistive technology devices. The offer was appropriate based on the assessment.

21. There was no evidence to support Student's contention that Ms. O'Brien's assessment erred in identifying Student's articulation errors. Nor did Student present any evidence to support the contention that it would have been more appropriate to offer speech therapy during inclusion activities with general education students to stimulate her learning of English; moreover such contention is inconsistent with Student's overall contention that it was inappropriate to include her to any degree in inclusion activities with general education students.

22. In conclusion, Student has not established that District's provision or offer of speech language services was deficient. Therefore, Student did not establish that she was denied a FAPE by virtue of inappropriate speech language services.

#### ISSUES 4 AND 5: TOILET TRAINING AND ONE-ON-ONE AIDE

23. Student argues that her toileting skills were inadequate and that she required additional training in this area, as well as the help of a one-to-one aide for this and other health reasons. District contends that the adult assistance Student was offered and provided was appropriate.

24. Student has failed to meet her burden of proof on these issues. The evidence as it pertains to the 2013-14 school year at issue here was that Student was inconsistently able to clean herself properly after using the toilet, requiring assistance but only at times. The restrooms were adjacent to the class at Avalon South, and the door could be kept ajar, and there was always an adult at the door asking Student if she required assistance. Student was usually able to wipe herself and said she could do it herself. Per Ms. Pantoja, Student did not need assistance except for a minimal number of times during the 2013-2014 school year, as she was very independent and wanted her privacy. However it was provided and available when required. These protocols and services were appropriate, as they allowed Student to develop independence while providing her with an appropriate level of assistance and support when required. While engaging in the integration activities at the Avalon North site, the special education students were always supervised by aides, using either the Avalon South bathrooms and changing rooms if necessary, or the general education restrooms at Avalon North.

25. During the relevant time frame, 2013-2014, Mother reported at the March 20, 2014 IEP that Student had come home with soiled underwear on three occasions. She requested that a log be created of when Student used the toilet and the team agreed. Because Student wanted her privacy and independence in the bathroom, Ms. Pantoja did not change the toileting protocol, which she considered to have been correct, but agreed to be more vigilant by keeping the log and asking Student more frequently if she needed to use the toilet. The team discussed modifying Student's

communication goal to encourage Student to express her needs with respect to cleansing after toileting. Student's health present level of performance at that time stated that Student required assistance and supervision for toileting despite being toilet trained. The present level and goal were appropriate, as was the suggested modification to the goal to address Mother's concerns, as was the creation of the log book.

26. Although improper cleansing would create obvious health hazards, the evidence did not support Mother's contention that Student was unable regularly to wipe herself after toileting, or that the Avalon North bathrooms were inappropriate because they were shared. The few instances that occurred in the 2013-14 school year were addressed appropriately, and did not rise to the level of a denial of FAPE. Mother's testimony concerning rashes in Student's private area which Mother surmised were because of improper cleansing appeared to relate to the 2014-15 school year, which was not pled and is not at issue herein. Mother's testimony explicitly concerned issues as recent as the week before the hearing. The only corroborated concern during the time frame at issue here was the concerns raised at the March 20, 2014 IEP that was properly addressed as a communication issue. In conclusion, Student did not establish that she required additional training, nor a one-one aide to help with her toileting issues during the time frame at issue in this case.

#### ISSUE 6: OCCUPATIONAL THERAPY

27. Student contends that she was not offered or provided appropriate occupational therapy, arguing that she did not only have the pre-writing skills deficits as assessed, but ought instead to have been provided with occupational therapy to address problems with cleaning herself after toileting, opening a water bottle during the day, and learning how to ride a bicycle. District contends it offered and provided appropriate occupational therapy services.

28. After consent was obtained, occupational therapist Mr. Chao assessed Student to address concerns with Student's writing and pre-writing skills. Mr. Chao found that Student was physically able to access the school environment. She was able to move between various school settings independently, including sitting, standing and walking, such as to navigate the school environment and participate in playground activities. She did not trip or fall. She had good muscle strength, functional muscle tone and normal range of motion in her upper extremities to participate in the school setting. She demonstrated foundational visual perception and visual tracking skills. In the fine motor skills arena, Student exhibited proper grasp patterns and motor planning skills. She could use her hands to manipulate objects, such as holding pencils and crayons. She could position the instruments and hold them with appropriate grasp. She could color within the lines. Student was able to participate in daily classroom activities and routines, and was independent in many areas of self-care at school. She could wash and dry her hands, access her backpack and place it in the closet, and use utensils for eating.

29. Student presented no evidence that occupational therapy services were required to help her learn to ride a bicycle; nor that she was physically unable to wipe herself properly such that fine motor skills training was required in this area. Student presented no evidence to dispute the accuracy of Mr. Chao's assessment, or in support of the contention that the assessment identified incorrect areas of deficit. The evidence established that Student was able to access playground activities and ride a tricycle. Student exhibited proper grasp patterns and motor planning skills; she could use her hands to manipulate objects, such as holding pencils and crayons; she could position the instruments and hold them with appropriate grasp. The evidence established she was physically capable of proper self-cleansing.

30. Mr. Chao prepared a present level of performance in the area of visual motor skills based on his assessment. He developed a proposed goal that Student

would copy her first name with legible letter formation, with verbal and/or physical prompts. The IEP team offered 30 minutes per month of "collaborative" occupational therapy services for both the regular and extended school year, to incept upon parents' signature. The offer was appropriate based on the assessment. Student has not established that District's offer was deficient.

#### ISSUES 7 AND 8: VOCATIONAL THERAPY AND ENGLISH LANGUAGE LEARNER SERVICES

31. Student contends that District denied her a FAPE by providing insufficient and inadequate vocational training and English language learner services. District contends the services it provided and IEP goals it offered pertaining to these two areas were appropriate.

32. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) The State must ensure that each public agency takes steps to ensure that children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including vocational education. (34 C.F.R. § 300.110.)

33. At Student's triennial IEP team meeting on March 20, 2013, the team suggested a functional reading skills goal to identify days of the week on a calendar and a vocational education goal to sort objects by two attributes such as color and shape. At the annual IEP team meeting on March 20, 2014, Student's vocational education present level stated that she could not yet recite the days of the week. New goals were proposed. The vocational education goal stated that Student would point to and correctly recite the days of the week when shown cards with the days printed on them. Ms. Pantoja proposed this goal. In her opinion, vocational education is similar to

functional life skills. To be able to identify the days of the week would further Student's functional living and vocational skills by hopefully enabling her to understand and keep to a schedule for work or social events. The vocational education goal was appropriate in both IEP's, and Ms. Pantoja's functional curriculum SDC program was the appropriate placement in which to work on it. In conclusion, Student failed to produce any evidence tending to establish that she was denied appropriate vocational education

34. In the area of English language development, Student's triennial IEP of March 20, 2013 stated an English language development goal to recite and identify all the letters of the alphabet by pointing and singing the alphabet song in English. Student was offered English language learner services to be provided by Ms. Pantoja, described in the IEP as English language development and content, using specially designed academic instruction in English. Ms. Pantoja is bilingual and holds a Bilingual, Cross-cultural, Language and Academic Development certificate. The BCLAD authorizes her to modify curriculum for English learners should they require it. Ms. Pantoja utilized such modified curriculum throughout the day, using a program called the Oxford picture dictionary program. Ms. Pantoja identified this program as District's curriculum for special needs English language learners. It is part of her lesson plan and part of the curriculum for all English language learner students. The goal was appropriate, and Ms. Pantoja's qualifications and curriculum were appropriate. Student has failed to produce any evidence tending to establish that she was denied appropriate English language learner education.

35. District had a master plan for English learners for general education as well as special education students. The master plan prescribed assessments and instructional programming for English learners. Student's English language development was assessed using an instrument known as the California English Language Development Test from 2010-2012. Student's performance in 2010, 2011, and 2012 placed her in the

beginning range in all domains, without significant progress year after year. Therefore, at the annual IEP team meeting on March 20, 2014, the team stated that due to the severity of Student's disability, the California English Language Development Test might be too advanced for her, resulting in her lack of progressing on that test from 2010-2012. The team suggested that her English language development progress be monitored using the Communication Observation Matrix, a variation of the test. The assessments were appropriate, and the team was appropriately tailoring the assessments, goals and services to Student. In conclusion, Student has failed to produce any evidence tending to establish that she was denied appropriate English language learner education.

#### ISSUES 9 AND 10: INTEGRATION AND EXTRACURRICULAR ACTIVITIES

36. Student contends District denied her a FAPE by placing her in inclusion activities that were not individualized, not appropriate to her unique needs, and unsafe. Student further contends that she was not provided appropriate non-academic and extracurricular activities including sports, assemblies, and school theatrical productions. District contends that the inclusion and extracurricular activities it provided were appropriate.

37. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) School districts must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. The continuum of program options includes, but is not limited to: regular education; resource specialist



programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

38. The Ninth Circuit follows a four-part test on the question of whether a placement is in the LRE. The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R. v. State Bd. of Educ., supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options (*Id.* at p. 1050).

39. Pursuant to the IDEA, District must take steps, including the provision of supplementary aids and services, to provide nonacademic and extracurricular services and activities, such as athletics, in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. (34

C.F.R. § 300.107.) In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and other services and activities, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. (34 C.F.R. § 300.117.)

40. Since it is undisputed that Student could not be educated full-time in a general education environment, the LRE analysis requires determining whether she has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.

41. The evidence amply established that Student thrived during inclusion activities with the general education third grade students. These enriching activities included dance, art, theater and library. She practiced social skills, gained self-esteem, was well-liked, enjoyed herself, and made friends. She prepared for a theatrical performance and played a role equal to the non-speaking roles of general education students who also participated. She smiled, laughed, and verbalized. She used her oral language more and perked up when the integration activities occurred. Student failed to present adequate evidence why she should not have these successful inclusion activities, and instead be isolated in a self-contained program.

42. The activities were appropriately individualized to her skills and needs. Teachers oversaw the activities and had many meetings about integration activities, including frequent discussions of individual students' interactions, for example to determine which students would team up well as buddies. It worked, as evidenced by the fact that Student and her buddy formed a special bond, and Student's verbalizations

increased during inclusions activities. Ms. Pantoja determined which goals were worked on during integration activities; although Student had no specific inclusion IEP goals, she benefitted from the inclusion activities which were naturally and organically furthered by the general education students' encouragement.

43. Student's safety was not compromised. She was supervised by aides during all inclusion activities. Mother's concerns about bruises, rashes, chapped lips, dirty clothes, scratches, and lack of hydration on the co-located campus were non-specific as to time and appeared to relate to the 2014-15 school year, which was not pled and is not at issue herein. Mother's testimony explicitly concerned issues as recent as the week before the hearing, notwithstanding that the issues raised by her complaint concerned only the 2013-14 school year. The only corroborated concern during the time frame at issue, was a single incident at or around the time of the September 2013 IEP in which the gate between Avalon North and South was locked, and the students had to wait in the sun while a key was fetched. This situation was remedied, as the gates were not thereafter locked.

44. Student could safely benefit from inclusion activities notwithstanding her mental age of between two-and-four years old. She did not present elopement or other maladaptive behaviors, and was compliant to direction and redirection. She was properly monitored, and the risks of harm coming to her when properly supervised were low.

45. In conclusion, District provided Student an appropriate program in the LRE, along with nonacademic and extracurricular services and activities in the manner necessary to afford her an opportunity for participation in those services and activities. Student has failed to establish that the inclusion and extracurricular activities provided to her during the 2013-14 school year denied her a FAPE.

## ISSUE 11: EDUCATIONAL FACILITY

46. Student contends District denied Student a FAPE by placing her at an educational facility that is no longer a special education center, but is a co-located general and special education campus. District contends that the placement was appropriate.

47. A change in location is not necessarily a change in placement. A placement is a point along the continuum of placement options, while a location is the physical location where a student receives special education or related services, such as a classroom. A change in location may rise to a change in placement if the change in location substantially alters the student's educational program. The determination as to whether a change in placement has occurred is to be made on a case-by-case basis. Relevant factors are whether the educational program set out in an IEP has been revised; the extent to which the child will continue to be able to be educated with nondisabled students; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. (*See Letter to Fisher*, 21 IDELR 992 (OSEP 1994).)

48. Courts have analyzed whether school closures constitute changes of placement in the context of stay-put requirements, and have found that because of changing circumstances, the status quo cannot always be replicated exactly, for example when schools are closed or students advance from grade to grade. (*Ms. S ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) It does not violate stay-put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also

*Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

49. Student's placement at Avalon, in the alternate curriculum special day class "MR" program," was appropriate in the 2013-14 school year as it had been at Banneker in prior years. No actual school closure or change of location is presented by the facts of this case, which involves only the 2013-14 school year. Except for the integration activities discussed separately above, there was no actual change during this period except in the nomenclature of Student's school location from Banneker to Avalon South. During the 2013-14 school year, the Banneker/Avalon South physical location was not yet closed, and the physical location of Student's program was not yet changed. The mere changing of the name or auspices under which the school operated during this time frame, did not substantially and materially change Student's IEP or deny her a FAPE.

50. In the 2013-14 school year, the intended closure of the Banneker location and the intended physical move of students from the Avalon South to Avalon North campus had not yet occurred. Thus, except with respect to the integration activities discussed above, no such actual closure or move is at issue in this case. (*Cf. Letter to Fisher, supra*, 21 IDELR 992 (OSEP 1994) (Providing guidance concerning the closure and discontinuance of a learning center formerly operated as a separate wing at a high school, and the relocation of special education students to the high school itself, and examining when a change in location substantially or materially alters an educational program.)

51. Student argues that certain aspects of the change constituted safety concerns, however the concerns are purely speculative. The physical safety during

emergencies of Avalon students located on the Avalon South campus were governed by the school safety plan for the Banneker Doyle Career Transition Center for all persons physically on its premises, visitors included. This did not result in any actual safety issues or any denial of FAPE to Student. Likewise, the location of Student's records, which continued to be physically located at the Banneker site, nor the Avalon responsibility to notify parents of any emergency result in any actual notification issue or denial of FAPE. Concerns about where emergency contact cards were physically maintained, or about the ramifications of Student's "location code" number on certain District records, were speculative. The absence of a full-time nurse at Avalon North during the 2013-14 school year did not result in any health or safety issues or concerns, and did not result in a denial of FAPE, given that except for certain inclusion activities at Avalon North, Student continued to be located at Avalon South where a full-time nurse was on site.

52. Other than the change of title from Banneker to Avalon, and except for the integration activities addressed above, Student's program for the 2013-14 regular school did not change and was physically still located in the same location as previously. The adult-student ratios did not change. The location of Student's classroom for the non-integrated activities remained the same, as did the adjacent restrooms. Student was not denied a FAPE from the name change nor the change of the auspices under which the location operated.

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this case.

## RIGHT TO APPEAL THIS DECISION

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

Dated: November 25, 2014

/s/

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JUNE R LEHRMAN

Administrative Law Judge

Office of Administrative Hearings