

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MENIFEE UNION SCHOOL DISTRICT.

OAH Case No. 2017060872

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 20, 2017, naming Meniffee Union School District.

Administrative Law Judge Rommel Cruz heard this matter in Meniffee, California, on August 15 and 16, 2017.

Mother represented Student and attended the hearing both days. Student did not attend the hearing.

Epiphany Owen, Attorney at Law, represented District. Jodi Curtis, Director of Special Education and Juliet Makapugay, Program Specialist, attended the hearing on behalf of District.

OAH granted a continuance at the parties' request for the parties to file written closing arguments. On August 31, 2017, upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District deny Student a free appropriate public education when it impeded Parent's right to meaningfully participate in the June 8, 2017 individualized education program team meeting?
2. Did District deny Student a FAPE when it failed to provide Parent prior written notice when it refused Parent's request to assign Student a new speech therapist?
3. Did District deny Student a FAPE when, at the June 8, 2017 IEP team meeting, it failed to resolve Parent's issues and requests and failed to properly document the June 8, 2017 IEP Amendments Page as it related to those issues and requests?
4. Did District deny Student a FAPE from February 14, 2017, to June 9, 2017, when:
 - a. District failed to provide Student with specialized academic instruction in the home?
 - b. District allowed the home hospital instruction teacher to resign without the teacher providing Parent a 10-day notice of resignation?
5. Did District deny Student a FAPE when it failed to provide Student with speech therapy on February 22, 2017, March 29, 2017, and April 19, 2017, through June 7, 2017?
6. Did District deny Student a FAPE from April 5, 2017, to June 20, 2017, by:
 - a. Failing to provide a speech therapist trained in Student's augmentative and

¹The issues have been rephrased and reorganized 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.)

alternative communication device?

- b. Determining the speech therapist did not need to be trained in Student's augmentative and alternative communication device prior to starting therapy?

7. Did District deny Student a FAPE when it failed to accurately document the June 8, 2017 IEP Amendments Page, denied Parent an opportunity to amend the IEP Amendments Page, and failed to provide Parent with a complete copy of the IEP Amendments Page?

8. Did District deny Student a FAPE when it failed to conduct an adaptive physical education assessment from September 22, 2016, to the present?

9. Did District deny Student a FAPE because her educational records were either incomplete, inaccurate, misleading, or violated her privacy rights?

SUMMARY OF DECISION

This Decision holds that District denied Student a FAPE by failing to provide Student with specialized academic instruction and speech and language therapy as called for in Student's IEP. District denied Student 2,700 minutes of specialized academic instruction from February 14, 2017, to June 9, 2017. District also denied Student 180 minutes of speech and language therapy from April 19, 2017, to May 3, 2017. Furthermore, District failed to conduct an adaptive physical education assessment which Mother requested, and District agreed to, on October 4, 2016.

This Decision also holds that Student did not meet her burden in proving that District significantly impeded Mother from meaningfully participating in Student's IEP development process. District provided Mother with Student's education records in preparation for the June 8, 2017 IEP team meeting. Mother was a welcomed and active participant at that meeting. At the meeting, District listened to, and considered, Mother's requests and concerns. District did not predetermine its decision that training on Student's eye gaze communication device was not required prior to a service

provider commencing service with Student. Furthermore, Student failed to establish that District denied her a qualified speech therapist capable of successfully working with her using the eye gaze communication device.

FACTUAL FINDINGS

1. Student was an 8-year-old female at the time of the hearing, who resided with Mother within the boundaries of District at all relevant times. Student was eligible for special education under the categories of multiple disabilities and orthopedic impairment. Student's disabilities included severe orthopedic impairment, other health impairment, speech and language impairment, and intellectual disabilities. She presented with deficits in the areas of self-help in toileting and feeding, communication, loco-motion and motoric functioning, and health and safety issues, all of which affected her involvement and participation in classroom activities. Student's immune system was compromised and providers were not to provide services if they were sick or exposed to others who were ill. At all relevant times, Student was receiving home hospital instruction.

2. Student was non-verbal and relied on an augmentative and alternative communication eye gaze device to express herself and organize her language in a systematic way.² The communication device consisted of a monitor with icons on its screen, and each icon represented a word. A bar at the bottom of the monitor tracked Student's eye movements. It would follow Student's eye movements, calculating the speed of her eyes and how long her eyes rested on an icon. Student selected an icon by resting her eyes on the icon, which prompted the device to speak the word. Additional icons could be added as Student's vocabulary expanded. Student began using the

²In this Decision, the augmentative and alternative communication eye gaze device used by Student will be referred to as a "communication device."

communication device during the 2014-2015 school year. She had progressed from a few icons to 42 icons at the time of the hearing.

SEPTEMBER AND OCTOBER 2016 IEP TEAM MEETINGS

3. An IEP team meeting convened on September 22, 2016, was continued and reconvened on October 4, 2016. Among those present were Mother and District's program specialists Juliet Makapugay and Maria Talamantes. Mother was informed that Ms. Makapugay would be taking over as the team's program specialist, succeeding Ms. Talamantes.

4. A week before hearing, Ms. Makapugay was promoted to assistant principal. Before her promotion, Ms. Makapugay had been a program specialist with District since August 2016. She had also been a resource teacher with Corona-Norco Unified School District since 2013. She was previously a resource teacher with Corona-Norco from July 2005 to March 2008, and previously worked as a special day class teacher for three other school districts, from August 2003 to June 2005, and March 2008 to August 2013. She had a bachelor's degree in political science, a master's degree in public administration, and a master's degree in education. She was in the process of obtaining her doctorate in education at the time of the hearing.

5. Ms. Makapugay provided credible testimony. Her responses were thoughtful, confident, and consistent with the evidence presented at hearing.

6. At the October 4, 2016 IEP team meeting, Mother was informed that the teacher being considered to provide home hospital instruction declined the assignment and that District's pupil personnel service was asked to find another teacher. Also, Mother requested an adaptive physical education assessment of Student, which District agreed to conduct. District personnel said they would contact Mother and provide her with an assessment plan, as reflected in the IEP notes. At the time of hearing, District had not conducted an adaptive physical education assessment. At hearing, Ms.

Makapugay acknowledged that the assessment should have been conducted, but could not explain why it was not done.

NOVEMBER 15, 2016 IEP

7. District convened an IEP team meeting on November 15, 2016, for Student's annual review. Among those in attendance were Mother, Ms. Makapugay, assistive technology specialist Margaret Perkins, and speech-language pathologist Gillian Mills.

8. In the area of communication development, Student was found to be socially engaging. She demonstrated good attention to her listener through eye contact and engaged in good turn-taking considering the communication was non-verbal. With the use of an augmentative and assistive communication eye gaze device and some support, Student's communication had improved to two to three turns with a familiar listener. She consistently used her communication device to produce words such as "hi", "in", "out", "on", "off", "pink", "orange", "happy", "thirsty", "tired" and was beginning to use "mine" and "please."

9. For reading, as a baseline, Student worked on identifying letters consistently using her communication device. As an annual goal, Student was expected to expressively identify all 26 uppercase letters when visually presented with a choice of two letters on a white board, and verbally using her communication device. Progress was measured through teacher records/logs. The special education teacher, assistive technology specialist, and the speech-language pathologist were the responsible service providers in this area.

10. As to social skills, Student's baseline was the emergence of two to three word combinations through her expressive language using the communication device. As an annual goal, Student would respond to a greeting using one to two word greetings such as "hello", "hi", "good afternoon", "good morning", with no more than

two prompts in four out of five trials. This was measured by data collected by the teacher. The responsible service providers in this area were the special education teacher and speech-language pathologist.

11. The annual goal in the area of expressive language was to have Student communicate spontaneously using one to two word utterances on a communication device when Student requested an item, took action, needed assistance, made a comment or command and asked a question. Her progress was measured through observations and recorded logs. The responsible service providers in this area were the assistive technology specialist, special education teacher, and speech-language pathologist.

12. The annual goal in the area of pragmatics asked Student to take more than two turns with a communication partner on a joint topic using a voice output communication device when presented with an object that represents a joint reference such as a book or toy. The goal would be measured using observations and data logs. The responsible service providers were the assistive technology specialist, special education teacher, and speech-language pathologist.

13. The IEP provided that the assistive technology specialist would consult with the specialized academic instructor, speech-language pathologist, occupational therapist, physical therapist, and Parent or nurse to collaborate for training and carryover of augmentative and alternative communication training for language implementation. This service was expected start on November 15, 2016, and end on November 15, 2017. It would occur quarterly, one to four hours at Student's home.

14. The IEP provided that Student would receive 75 minutes of specialized academic instruction, five times per week for a total of 375 minutes per week. This would occur in the home. The IEP also provided for 60 minutes per week of speech and language therapy to occur in the home. For extended school year services, speech and

language therapy was expected to start on June 19, 2017, once a week for 60 minutes. The IEP development process was not completed on this date and the next IEP team meeting was scheduled to occur in January 2017.

JANUARY AND FEBRUARY 2017 IEP TEAM MEETINGS

15. The IEP team meeting reconvened on January 24, 2017 and January 30, 2017. Among those present were Mother, Ms. Makapugay, Ms. Perkins, Ms. Mills and Cassie Lenz, a teacher through A+ Tutor, a non-public agency.³ District had still not found a home hospital instruction teacher, so Mother requested District be more diligent in finding a teacher for Student. The status of the adaptive physical education assessment was not mentioned in the meetings. The meeting was continued to February 2017.

16. The IEP team meeting reconvened on February 7, 2017. In addition to the team members mentioned above, home hospital instruction teacher Suzanne Cuccio also attended. District contracted with the Riverside County Office of Education (County) for a teacher to provide Student with five hours per week of home hospital instruction. The memorandum of understanding between District and County provided for services to begin in January 2017 and end in July 2017. The memorandum was finalized on January 27, 2017.

17. Ms. Cuccio was employed by County and assigned to provide Student with the specialized academic instruction. District's FAPE offer as to specialized academic instruction and speech and language therapy for the school year and extended school year remained the same. Mother consented to the IEP with the exception of the recitation of Student's present levels related to gross/fine motor development. The IEP

³District hired Ms. Lenz to provide Student compensatory specialized academic instruction.

team did not discuss the adaptive physical education assessment.

SPEECH AND LANGUAGE THERAPY

18. Gillian Mills was one of Student's speech therapists during the 2016-2017 school year. Her last therapy session with Student was April 5, 2017. During the relevant time period in this matter, Ms. Mills consistently provided therapy every Wednesday, with the exception of February 22 and March 29, 2017. Ms. Mills' service logs noted that Student was not available on February 22 and March 29. Student did not establish that she was in fact available for therapy on those days.

19. On March 31, 2017, District's Special Education Director, JodiCurtis,⁴ emailed Mother, informing her that Ms. Mills would be providing services until April 7, 2017. Ms. Curtis advised Mother that a new speech therapist was hired to replace Ms. Mills. Mother emailed Ms. Curtis the same day, confirming that Ms. Mills provided speech therapy to Student on Wednesdays, from 12:00p.m. to 1:00 p.m. Mother also wanted the new speech therapist to be trained by the assistive technology specialist, Ms. Perkins, on Student's communication device.

20. On April 3, 2017, Ms. Curtis emailed Mother informing her that the new speech therapist, Elizabeth Whiteman, was available to attend a joint session between Student, Ms. Mills and Ms. Whiteman on April 5, 2017.

21. At the time of hearing, Ms. Whiteman had been a licensed speech-language pathologist for approximately 20 years. Two thirds of her career had been

⁴Ms. Curtis began as a program specialist with District in July 2014. She then assumed the position of Interim Special Education Director in August 2015. She became District's Special Education Director in December 2015. Prior to joining District, Ms. Curtis was a program specialist for Temecula Valley Unified School District for about three years. She was also a speech-language pathologist for approximately 14 years.

spent in the educational setting, and the other third in hospitals, skilled nursing facilities, and home health care services. She had a bachelor's degree in speech and hearing services and a master's degree in communication disorders. Ms. Whiteman possessed a Certificate of Clinical Competence for Speech-Language Pathologist from the American Speech-Language-Hearing Association.

22. As a school district speech-language pathologist, Ms. Whiteman was involved in conducting assessments, identifying areas of need, developing IEPs, and providing services as outlined in an IEP. Throughout her career, she estimated working with approximately 1,000 children, with various disabilities, some being non-verbal. Ms. Whiteman estimated working with 30 to 40 students who used an augmentative and alternative communications device. She explained that working with students using an augmentative and alternative communications device was not uncommon for a speech-language pathologist. Ms. Whiteman also had training and experience working with an eye gaze communication device, both with children and adults. She explained that the device generally worked the same for children and adults.

23. On April 5, 2017, Ms. Whiteman accompanied Ms. Mills to Student's home for a joint session. After introductions between Ms. Whiteman, Mother, and Student, Ms. Mills worked with Student for approximately 30 minutes. Ms. Whiteman observed the session. Ms. Whiteman then took over the session and worked with Student for 15 to 20 minutes. Student used the communication device with both therapists. At the end of the session, Mother and Ms. Whiteman exchanged phone numbers. Concerns as to Ms. Whiteman's qualifications, her experience with augmentative and alternative communication devices, or her comfort level working with Student using the communication device were not raised by Mother at that time.

24. At hearing, Ms. Whiteman persuasively established that she had the necessary qualifications, training, and experience to provide Student speech therapy.

Ms. Whiteman also established that she had an appropriate level of familiarity with Student's communication device to begin working with Student immediately after April 5, 2017.

25. District's spring recess began on April 10, 2017, and ended on April 17, 2017, a Monday. Speech therapy was not expected to be provided during the spring recess. No therapy was attempted by Ms. Whiteman on April 19, 2017, the Wednesday spring recess ended, nor was speech therapy provided the following Wednesday on April 26, 2017.

26. On April 27, 2017, Mother emailed Ms. Curtis advising Ms. Curtis that Student had not received speech therapy since April 5, 2017. In the email, Mother expected Ms. Whiteman to provide speech therapy after the spring recess, with a schedule of Wednesdays, 12:00 p.m. to 1:00 p.m., maintaining the same schedule as the previous speech therapist, Ms. Mills. However, Mother did not receive a response from District, and received no confirmation as to if, or when, speech therapy would resume.

27. On May 3, 2017, a Wednesday, Ms. Whiteman went to Student's home to provide speech therapy at 12:00 p.m. Mother and Student were not home. At hearing, Ms. Whiteman recalled calling mother anywhere between 11:30 a.m. and 12:30 p.m. that day. Ms. Whiteman spoke to Mother on the phone advising Mother that she was at the home to provide speech therapy. Mother stated that the notice was too short and that she and Student were at a dentist appointment. It was reasonable for Mother to decline speech therapy that day due to the late notice and not having heard from Ms. Whiteman or District between April 5, 2017, and the time Ms. Whiteman called Mother on May 3, 2017, to inform Mother if and when speech therapy would resume.

28. On cross-examination, Mother testified she told Ms. Whiteman on May 3, 2017, that Ms. Whiteman was not authorized to come to the home until Mother received confirmation as to how long Ms. Whiteman planned to provide speech therapy

to Student. Ms. Whiteman was uncertain as to how long she would be working with Student and would follow up with District for an answer. Mother testified that the only time Ms. Whiteman was authorized into the home was for the joint session with Ms. Mills on April 5, 2017.

29. Ms. Whiteman did not attempt to provide speech therapy the following Wednesday, May 10, 2017. In a May 16, 2017 letter from Ms. Makapugay to Mother delivered via email and mail, Ms. Makapugay explained that Ms. Whiteman would be the speech-language pathologist who would provide services for the remaining regular school year, through June 9, 2017, from 12:00 p.m. to 1:00 p.m. weekly, on Wednesdays. The letter also indicated that Ms. Whiteman would provide services through the extended school year. The letter explained that if Mother refused Ms. Whiteman's service when Ms. Whiteman arrived at the home, District would consider that as a parent refusal and the session would be forfeited, and treated as a session attempted by District. The letter stated that Ms. Whiteman would be providing therapy on May 17, 2017. A notice of procedural safeguards and parents' rights was included in the correspondence.

30. On May 17, 2017, at 9:16 a.m., Mother emailed Ms. Makapugay advising that Ms. Whiteman was not permitted in Student's home. Mother's email expressed frustration that Student had not received speech therapy since April 5, 2017 and that Ms. Whiteman was not trained in Student's communication device. Mother requested an "expedited" IEP team meeting be convened.

MOTHER'S REQUEST FOR RECORDS

31. District scheduled an IEP team meeting for June 8, 2017. On May 26, 2017, in preparation for the meeting, Mother emailed District, requesting to "access, inspect and review all of [Student's] educational records, including, but not limited to, all pupil records, special education records, related service logs, notes, applicable qualifications

of individuals providing services, and attendance verification sheets.” Mother further requested a copy of the records after her inspection was completed. She indicated in her email that she planned to review and inspect the records at 10:00 a.m. on June 2, 2017.

32. On May 31, 2017, at 8:31 a.m., Ms. Makapugay emailed Mother and said she was available to meet with her at 3:30 p.m., on June 2, 2017, for the records inspection. Mother immediately replied back, stating that 3:30 p.m. was too late since she expected to spend a few hours inspecting the records and needed to be home by 5:00 p.m. that day to relieve Student’s nurse. Mother asked if another District staff would be available for the appointment at an earlier time that day.

33. On June 1, 2017, at 6:46 p.m., Ms. Makapugay responded to Mother’s email saying no District staff was available for an earlier appointment that day and that she remained available at 3:30 p.m. Ms. Makapugay also informed Mother that copies of the records would be available for pick up that day and staff would contact her once they were available.

34. On June 2, 2017, at 9:37 a.m., Mother replied to Ms. Makapugay’s email, characterizing Ms. Makapugay’s repeated delayed responses sent outside business hours as “unreasonable and unacceptable – particularly in light of the pending timelines (Ed. Code 49069, five (5) business day requirement expires today, and the upcoming June 8, 2017 IEP).” Memorial Day, a Federal and State holiday, fell on May 29, 2017. Hence, the fifth business day from the date of the request was actually June 5, 2017.⁵

⁵A business day means Monday through Friday, except for Federal and State Holidays.(34 C.F.R. § 300.11 (2006).)California Education Code section 56504 also requires schools to provide a parent an opportunity to examine a student’s records and to receive a copy of the records within five business days from the date of the request.

35. On June 2, 2017, at 10:50 a.m., Ms. Curtis emailed Mother informing her that District processed all records requests during District's business hours of 8:00 a.m. to 4:30p.m. and that no District staff was available on the morning of June 2, 2017 for a records review appointment. Additionally, Mother was advised that printed records would be made available to her for pick up by the end of that day and that Ms. Makapugay was available to meet with Mother at 3:30 p.m. for the records viewing appointment. Mother emailed Ms.Curtis back at 12:01 p.m. that same day, asserting that District was out of compliance with Education Code section 49069 by failing to allow her to review and inspect the records during "school hours" as opposed to "District business hours." District's elementary school hours were from 7:40 a.m. to 2:04 p.m. on regular days and 7:40 a.m. to 12:25 p.m. on minimum days. June 2, 2017 was a regular school day.

36. On June 2, 2017 at 5:20 p.m., Mother emailed District explaining that she was declining to pick up any copies of the education records until after she had physically inspected the records. Mother asserted that District's failure to allow her to inspect and review the records had "greatly affected [her] ability as a parent to meaningfully participate in [Student's] upcoming IEP." Mother advised District that she was available to review the records on June 5, 2017, at 10:00 a.m., another regular school day.

37. On June 5, 2017, at 8:51 a.m., Ms. Curtis emailed Mother advising her that District could accommodate her request at 10:00 a.m. that morning. A copy of the records was also going to be made available at that time. Mother confirmed the appointment.

38. At hearing, Mother testified that the records she expected to find, but were not provided, were service provider resumes and credentials, service logs which detailed what occurred during therapy or instruction, original IEPs signed by the entire

IEP team, and the pupil personnel file. At hearing Mother confirmed receiving the home hospital instruction, occupational therapy, and speech and language therapy logs, but claimed they were attendance logs, not service logs. She also testified that she had previously received copies of Student's complete IEPs.

39. Mother failed to clarify what she meant by "pupil personnel file" or how the documents she inspected on June 5, 2017, were not Student's pupil records. Overall, Student's claims that the records were incomplete or inaccurate was not persuasive and more importantly, failed to establish that the pupil records Mother had expected to find were those that District was required to collect and maintain, either permanently or in the interim.

40. On June 9, 2017, Mother wrote to District asking to challenge the contents of Student's records and requested a hearing. Mother did not specify which records she was challenging, but simply opined the records she examined and received to be "incomplete, not originals, inaccurate, misleading, and in violation of the privacy rights" of Student. Caroline Luke, District's Director of Pupil Personnel Services, responded in writing on June 23, 2017, informing Mother that a hearing panel was scheduled for July 6, 2017, to hear her case. On July 5, 2017, Mother made repeated efforts to fax Ms. Luke clarification of her request. Mother believed the July 6, 2017 hearing was premature and requested instead a meeting with a superintendent designee and an employee pursuant to Education Code section 49070(b).⁶ Ms. Luke responded on July 14, 2017, informing

⁶Education Code section 49070(b) states that "within 30 days of receipt of a request pursuant to subdivision (a), the superintendent or the superintendent's designee shall meet with the parent or guardian and the certificated employee who recorded the information in question, if any, and if the employee is presently employed by the school district. The superintendent shall then sustain or deny the allegations."

Mother that the District was willing to schedule a meeting with her as she requested. Ms. Luke asked Mother to provide three possible dates and times that Mother would be available for a meeting. Mother did not respond.

JUNE 2017 IEP TEAM MEETING

41. Mother, Ms. Makapugay, Ms. Perkins, District's special education teacher Carly Perez, home hospital instruction teacher Stefanie Jones, and speech-language pathologist Elizabeth Whiteman attended the IEP team meeting convened on June 8, 2017. Ms. Makapugay led the team meeting.

42. The meeting started at 8:30 a.m., and was scheduled for one and a half hours. District and Mother audio recorded the meeting.⁷ Immediately after introductions, Mother began addressing her concerns. Ms. Makapugay briefly interjected and explained she had another appointment after the IEP team meeting. Mother responded that she would not be rushed. Ms. Makapugay was calm and respectful in her comments to Mother. Mother had the floor for the majority of the meeting. Ms. Makapugay interjected from time to time to provide appropriate responses and comments for the record.

43. Ms. Whiteman was also polite and responsive to Mother's questions. When asked to participate in the communication device training, Ms. Whiteman eagerly accepted. District's IEP team members did not direct any disrespectful, threatening or any inappropriate comments towards Mother. Mother raised the following issues:

1. Mother wanted an accounting of how many compensatory education hours had been provided. She requested supporting documentation.
2. Mother questioned District as to why Ms. Cuccio was permitted to resign as

⁷Student's audio recording was entered into evidence, and the ALJ listened to the entire recording of the meeting.

Student's home hospital instruction teacher without providing sufficient notice pursuant to District policy. Mother asked that she be provided with documentation, if any, as to Ms. Cuccio's agreement with District's Home Hospital Instruction policy.

3. Mother asked that each service provider be trained on Student's communication device prior to the provider working with Student. Ms. Makapugay, Ms. Perkins, and Mother briefly discussed this issue at the IEP team meeting. Ms. Makapugay asked Ms. Perkins if prior training was required. Ms. Perkins responded by stating that the instructor would simply need to know which folders on the device to find the icons. Mother responded that it was more than just looking through the correct folders.
4. Mother was frustrated with Ms. Whiteman's lack of communication and lack of formal training on the communication device.
5. Mother was concerned that Ms. Jones had not yet been provided Student's complete IEP and requested that be done.
6. Mother expressed frustration over the miscommunication between the occupational therapist and herself regarding providing occupation therapy over the spring break.
7. Mother asked the team why there were no treatment logs in Student's records. She received what she described as attendance logs, not treatment logs. Mother requested a more accurate means of verifying when a service is provided.
8. Mother asked that STAR Academy, a non-public agency, be contacted to provide tutoring services.
9. Mother outlined additional compensatory education owed to Student that had accumulated since the last IEP team meeting of February 7, 2017. Mother

requested additional compensatory education, amounting to 42 hours of specialized academic instruction, eight hours of speech therapy, two hours for occupational therapy, and three hours of assistive technology.

10. Mother requested a clamp pad for an iPad device. A member of the IEP team indicated that it had already been purchased.

11. Mother asked that all IEP team members be invited to future meetings.

12. Since the school year was nearing an end, Mother asked that all providers update IEP progress notes if they had not already done so. A member of the IEP team responded that the progress notes had just been updated and the progress report would be provided to Mother the next day.

44. Mother was permitted to discuss all of her concerns during the meeting. District team members respectfully answered Mother's questions to the extent they were able to at the time. The meeting concluded around 10:00 a.m. Mother received a copy of the June 8, 2017 IEP Team Amendments Page (IEP Amendments Page). The testimony, documents, and the audio recording established that no agreement was reached between District and Mother that Student's IEP would be amended to include language that Student's service providers must be trained on the communication device prior to working with Student.

Mother's Corrections to the IEP Amendments Page

45. Less than two hours after the IEP team meeting concluded, Mother emailed Ms. Makapugay her corrections to the IEP Amendments Page. Some of the corrections asked that the following language be added, including, "[Mother] shared that the purported attendance logs she obtained from [Student's] education records regarding Margaret Perkins, Ann Walker and [s]peech [t]herapy, contained errors in the service dates and description information." Additionally, Mother requested a paragraph be added which stated, "Parent and District agreed that all future service providers who

are required to use [Student's] AAC device to work on her goals, must complete AAC training before providing any services to [Student]." Mother asked that she be provided a corrected IEP Amendments Page for her signature.

46. On June 9, 2017, Mother received an email from home hospital instructor Ms. Perez with the IEP progress reports attached. The entries in the progress report were dated May 30 and 31, 2017 and June 2, 2017. At hearing, Mother explained that because she did not receive the progress report prior to the IEP team meeting, she had no opportunity to review Student's progress and address any concerns she may have had at the meeting.

47. On June 13, 2017, Ms. Makapugay emailed Mother advising her that District would not make any changes to the IEP Amendments Page. Ms. Makapugay explained that the notes were an accurate representation of what transpired at the IEP team meeting. She offered to print Mother's email and attach it to the IEP or in the alternative, suggested Mother write the requested amendments on a document which could then be attached to the IEP. Ms. Curtis and Ms. Makapugay's testimony established this to be a common practice by District. Mother could then sign the IEP Amendments Page that she either agreed to the IEP or agreed to the IEP with the exception of the team comments. At hearing, Mother clarified her understanding of what she considered a complete IEP Amendments Page; a document which was one that incorporated her requested changes within the body of the document, not a document with her suggested changes merely attached.

48. In a separate email on June 13, 2017, Ms. Makapugay informed Mother that Ms. Cuccio did not fill out District's Home Hospital Instruction Policy paperwork because Ms. Cuccio was hired through a memorandum of understanding with County. Additionally, Ms. Makapugay informed Mother that Ms. Jones was provided Student's complete IEP.

49. On June 19, 2017, Ms. Makapugay emailed Mother and inquired what service Mother wanted District to contract with STAR Academy to provide. Mother did not respond to the email.

50. On June 22, 2017, Ms. Makapugay emailed Mother and also mailed through the United States Postal Service, District's formal response to the remaining requests Mother raised at the June 8, 2017 IEP team meeting. Ms. Makapugay's letter provided an accounting of the compensatory education hours that had been provided to Student that was owed to Student through a settlement agreement. Although Mother requested "documentation" relating to these hours, Ms. Makapugay, at hearing, explained her understanding of the request to mean a written tally of the hours.

51. The letter also provided District's accounting of additional compensatory education services Student had accumulated and was owed since February 7, 2017. Of note, District had accounted for more hours of specialized academic instruction than Mother had calculated. Additionally, District was agreeable to providing six hours of compensatory speech and language therapy. However, at hearing, Ms. Makapugay explained those calculations were made before learning that two of the missed sessions were the result of Student not being available.

52. In response to Mother's request for improved verification of services rendered, Ms. Makapugay's letter also advised Mother that a communication log was used by the service providers in the home. She asked if Mother had a different log in mind. If so, then the IEP team could discuss it further with her. Additionally, Ms. Makapugay explained that IEP team participants were invited to IEP team meetings based on the purpose of the meeting listed on the Notice of Meeting form. An Excusal Form with the Notice of Meeting was sent to Mother for her consideration in the event an IEP team member was not expected to attend a meeting. As for contracting with STAR Academy, District had not yet received clarification from Mother as to what service

Mother had wanted through the academy, but District remained open to considering it.

53. District's June 22, 2017 letter also informed Mother that any training for service providers on Student's eye gaze device would be scheduled pursuant to Student's current IEP. District's prior written notice was enclosed with the letter, addressing District's refusal to amend the IEP to reflect that IEP team members be trained by the assistive technology specialist on the device prior to providing services to Student.

54. At hearing, Mother explained that historically when she requested changes to the IEP notes, they were simply added by the IEP team. She had not previously encountered a situation where her requested changes would be added as an attachment to the IEP, as opposed to being incorporated into the body of the IEP.

SPEECH AND LANGUAGE THERAPY AFTER THE JUNE 8, 2017 IEP TEAM MEETING

55. On June 8, 2017, soon after the IEP team meeting concluded, Mother emailed Ms. Curtis and Ms. Makapugay requesting a new speech therapist be assigned due to the "unpleasant verbal exchanges and hostility" she experienced from Ms. Whiteman during the June 8, 2017 IEP team meeting.

56. On June 15, 2017, Ms. Makapugay emailed and mailed Mother, District's written notice of its intention not to assign a new speech therapist for Student. District's written notice acknowledged Mother's request to have a new speech therapist assigned and explained that Ms. Whiteman was qualified and available to provide speech and language therapy to Student. Enclosed with the written notice were the procedural safeguards and parents' rights, along with a contact sheet with the phone numbers of the special education administrator whom Mother could contact should she need assistance in understanding her rights and procedural safeguards. The letter did not contain a description of the other options considered or a description of each assessment procedure, test, record or report used as a basis for refusal.

HOME HOSPITAL INSTRUCTION

57. Carly Perez was employed by District and provided Student specialized academic instruction in the home on Wednesdays for one hour.⁸ She had previously worked with Student and began this latest assignment in February 2017. On February 15, 2017, Ms. Perez was trained by Ms. Perkins on the communication device.

58. Ms. Cuccio started working with Student on February 6, 2017. She provided instruction again on February 7 and 13, 2017, before she received training on Student's communication device on February 15, 2017.

59. Ms. Cuccio was to provide specialized academic instruction on Mondays, Tuesdays, Thursdays, and Fridays, for 75 minutes each day. Ms. Cuccio's service logs noted a number of sessions were cancelled due to "exposed to illness" or "D/N day no session." No clear explanation was provided at hearing to explain these notes or if those missed sessions were the result of either Ms. Cuccio or Student not being available. During the relevant time period, the evidence showed that Ms. Cuccio was unavailable to provide instruction on February 14, 16, 21, 24, 27, March 9, 10, 13, 24, April 6 and 7, 2017. In response, District authorized Ms. Perez to provide additional instruction on days when Ms. Cuccio was unavailable. Ms. Cuccio last taught Student on April 4, 2017.

60. In a letter dated April 29, 2017, District explained to Mother that District was notified on April 19, 2017 by County that Ms. Cuccio had resigned her position and was unwilling to continue with the home hospital instruction of Student. Ms. Cuccio cited parent interference with home instruction as the reason for her resignation.

61. On May 12, 2017, Ms. Makapugay emailed Mother informing her that Stefanie Jones was available for the home hospital instruction assignment. She would

⁸Ms. Perez's qualification or credentials were not in dispute and no evidence was presented at hearing regarding her training, education, and experience.

provide instruction on Mondays, Tuesdays, Thursdays, and Fridays, for 75 minutes each day. Mother replied a few days later informing Ms. Makapugay that Mother would be contacting Ms. Jones to schedule a meet and greet with she and Student.

62. On May 31, 2017, Mother confirmed with District that Ms. Jones was not to start home hospital instruction until she received training on the communication device, scheduled for June 15, 2017. Ms. Jones was expected to start on June 5, 2017.

63. Ms. Makapugay wrote to Mother on June 6, 2017, providing her a schedule of Ms. Jones's services. The letter provided that "District is in agreement to changes in scheduling made by parent and teacher should times vary, as long as they provide the appropriate level of service."

64. Between April 8, 2017, to June 4, 2017, Student did not receive specialized academic instruction on 25 days. From June 5, 2017, to June 9, 2017, Ms. Jones was available to provide instruction to Student, but did not do so due to Mother's request for her to be trained on the communication device prior to starting lessons.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

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 (2006)¹⁰ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that

⁹Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁰All subsequent references to the Code of Federal Regulations are to the 2006 version.

all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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.) "Related services" are transportation and other developmental, corrective and supportive 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 individualized education program 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)(1)(A); Ed. Code, §§56032, 56345, subd. (a).)

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.)

4. 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. 951, fn. 10.)

5. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstance.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test [¶] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.)

6. 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) & (f); 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, § 56502, subd. (i).) 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. 49, 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].) Student requested the hearing in this matter, and therefore Student has the burden of proof related to the issues for hearing.

ISSUES 1, 3, 7, AND 9: DID DISTRICT SIGNIFICANTLY IMPEDE PARENT'S OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE DECISION-MAKING PROCESS REGARDING STUDENT'S IEP?

7. At hearing, Mother claimed she was continually interrupted during the June 8, 2017 IEP team meeting. She described the meeting as hostile and intimidating. In Student's closing brief, she then argued that Ms. Makapugay's lack of qualifications, training, skills, and understanding of Student's unique needs denied Mother an opportunity to meaningfully participate at the meeting. Student also argued that District's failure to resolve the issues and requests made by Mother at the June 8, 2017 IEP team meeting, and to accurately document what transpired at the meeting, denied Student a FAPE.

8. Student also contended that District denied Student a FAPE by refusing to amend the IEP Amendments Page as requested by Mother and failing to provide Mother with a complete copy of the IEP Amendments Page. Furthermore, Student asserted that District denied Mother access to all of Student's records prior to, and while she was preparing for, the June 8, 2017 IEP team meeting. Student also claimed that records District provided for Mother's inspection were incomplete, inaccurate,

misleading, and in violation of her rights.

9. District contended that its IEP team members listened and considered Mother's requests and concerns. None of the other IEP team members impeded Mother from voicing her concerns, asking questions, and discussing the items on her agenda. District further argued that it responded appropriately to all of Mother's requests and concerns and appropriately documented the IEP Amendments Page to reflect what transpired at the meeting.

10. District also argued that it provided Mother a complete copy of the IEP Amendments Page. District asserted that its refusal to change the IEP Amendments Page and its proposal to attach Mother's requested Amendments instead, was appropriate. Furthermore, District contended that Student failed to prove that the records provided by District were incomplete, inaccurate, or in any way violated her rights and additionally, how District impeded Mother from meaningfully participating at the June 8, 2017 IEP team meeting, as a result of the records that were either provided or not provided to Mother.

Parent Participation

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

12. Among the most important procedural safeguards are those that protect

the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education to the child. (34 C.F.R. § 300.501(a); Ed.Code, §56500.4.)

13. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*)). The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds.(a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra* at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

14. California Education Code section 56504 states in relevant part that, "[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies...within five business days after the request is made by the parent, either orally or in writing."

15. Pupil records are "any information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by

handwriting, print, tapes, film, microfilm, or other means.” (Ed. Code, § 49061, subd. (b).) “Pupil records does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute.” (*Id.*) A substitute is a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. (*Id.*)

16. Certain pupil records must be permanently maintained by a school district. (Cal. Code Regs., tit. 5, § 432, subd. (b)(1).) These records include the pupil’s legal name, date of birth, method of verification of birth date, sex of pupil, place of birth, names and address of a parent of a minor pupil, the dates of each school year and summer session when the pupil leaves and enters, subjects taken during each year, half-year, summer session, or quarter; marks or credits given; verification or exemption for required immunizations; and date of high school graduation or equivalent. (*Id.*)

17. Mandatory interim pupil records are those records which schools are required to compile and maintain for stipulated periods of time and are then destroyed in accordance with California statute or regulations. (Cal. Code Regs., tit. 5, § 42, subd. (b)(2).) Such records include a log or record identifying those persons or organizations requesting or receiving information from the record; health information; participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge; language training records; progress slips and/or notes required under Education Code sections 49066 and 49067;¹¹ parental restrictions regarding access to directory information or related

¹¹California Education Code section 49066 refers to grades given as determined by the teacher of the course. Section 49067 discusses the evaluation of each pupil’s achievement for each marking period and requires a conference with, or a

stipulations; parent or adult pupil rejoinders to challenged records and to disciplinary action; parental authorizations or prohibitions of pupil participation in specific programs; and results of standardized tests administered within the preceding three years. (*Id.*)

Analysis

PARENTAL PARTICIPATION DURING THE JUNE 8, 2017 IEP TEAM MEETING

18. Mother was a welcomed and active participant in the June 8, 2017 IEP team meeting. She was permitted to make all the requests and discuss all the issues she intended to raise. Neither Ms. Makapugay, nor any other IEP team member interrupted or impeded Mother's ability to voice her concerns and to question members of the team. None of the comments directed at Mother were insensitive, disrespectful, threatening or in any way inappropriate. Mother's perception of hostility and intimidation was not supported by the evidence through testimony or the audio recording of that meeting. Mother had the opportunity to discuss her concerns and express herself freely. The IEP team listened to her concerns and considered her requests.

19. Additionally, Ms. Makapugay was qualified in her role as program specialist. As of the June 8, 2017 IEP team meeting, Ms. Makapugay had been a program specialist for nine months. She also had extensive experience in special education, to go along with her education and training. Student failed to point to a single piece of evidence to support her claim that Ms. Makapugay's education, training, and experience led to a denial of an educational benefit to Student or impeded Mother from

written report to, the parent of each pupil whenever it becomes evident to the teacher that the pupil is in danger of failing a course.

meaningfully participating in Student's IEP process. Therefore, the weight of the evidence clearly established that Mother meaningfully participated in the IEP process on June 8, 2017.

District's Response to Parent's Issues and Requests Raised at the June 8, 2017 IEP Team Meeting

20. District adequately responded to the each of the requests raised by Mother at the June 8, 2017 IEP team meeting. Mother's request for a clamp for an iPad was resolved that day. The next day she received the updated IEP progress reports from Ms. Perez. On June 13, 2017, District answered Mother's question as to whether Ms. Cuccio completed District's home hospital instruction paperwork, which she did not. Ms. Jones was also provided Student's complete IEP. On June 22, 2017, District provided its responses to the remaining requests. In regards to the misunderstanding as what constituted "documentation" relating to the outstanding compensatory education hours owed through the settlement agreement, Student did not establish how this misunderstanding prejudiced Student.

21. District complied with Mother's requests when District agreed with them, and provided Mother with prior written notice as to the one request it denied; amending the IEP to require communication device training before a service provider begins working with Student. District was not under any duty to grant all of Mother's requests or to address each concern to Mother's satisfaction. As to the request regarding STAR Academy and logs for service verification, it was on Mother to provide District with further clarification because her request was not clear and District appropriately requested clarification. Thus, Student did not meet her burden in showing District failed to address the requests and issues raised by Mother at the June 8, 2017 IEP team meeting. Moreover, Student failed to prove how District's responses at the June 8, 2017 IEP team meeting and its responses in the emails and letters to Mother

between June 9, 2017 and June 22, 2017, denied Student a FAPE.

JUNE 8, 2017 IEP AMENDMENTS PAGE NOTES

22. Student did not meet her burden in proving District denied her a FAPE because of what was reflected in the IEP Amendments Page. IEP notes are not intended to be a word for word recitation of what transpired in the IEP team meeting. The IEP Amendments Page contained an accurate summary of what transpired at the IEP team meeting, and reflected Mother's issues and requests, and District's responses. Any discrepancy between the notes and what transpired at the meeting was insignificant and Student failed to establish how any discrepancies impeded Mother's ability to meaningfully participate in the IEP process or denied Student educational benefit or a FAPE.

REVISIONS TO THE IEP AMENDMENTS PAGE SOUGHT BY PARENT

23. The IEP Amendments Page was prepared and read aloud at the meeting. Some of Mother's requested changes were made during the reading. Mother was provided a copy of the IEP Amendments Page. Subsequently, Mother requested further changes to the notes, which District did not agree to. Mother may have had the impression that any changes she requested must be adopted by the IEP team. She was mistaken. Instead of amending the notes, District proposed to attach Mother's requested changes and comments to the IEP. That proposal was appropriate. The attachment would have allowed the IEP to reflect both District and Mother's understanding as to what transpired at the IEP team meeting. This was the fairest and most accurate means to address the disagreement as to the language in the notes. The absence of Mother's requested changes to the notes themselves did not render the IEP Amendments Page incomplete. District provided Mother a complete copy of the IEP Amendments Page. Therefore, Student failed to prove that District's refusal to add

Mother's requested changes to the IEP Amendments Page denied her a meaningful opportunity to participate in the IEP process or denied Student educational benefit or a FAPE.

STUDENT'S RECORDS

24. Mother asked to inspect Student's "educational records, including, but not limited to, all pupil records, special education records, related service logs, notes, applicable qualifications of individuals providing services, and attendance verification sheets." Her request was made on May 26, 2017. Mother was provided an opportunity to inspect the records and receive a copy of the records within five business days of the request. The fifth business day from the date of the request fell on June 5, 2017. Therefore, District complied with the timelines set forth in Education Code section 56504.

25. Student failed to establish that the records Mother was expecting to receive were records required to be collected and maintained by District, either permanently or in the interim. Mother sought records related to service logs, notes, service provider resumes, and attendance sheets, but Student failed to establish the records which Mother didn't receive were proper "pupil records" that would be maintained in Student's file.

26. District also responded appropriately with Mother's request to challenge the contents of Student's records. Mother requested a hearing and District scheduled a Hearing Panel to review her challenge. Mother then clarified her request to have a meeting rather than a hearing. District honored her request and asked Mother to provide dates and times that she would be available to meet. Mother did not respond.

27. Mother did not receive Student's progress reports until after the June 8, 2017 IEP team meeting. At hearing, Mother explained that she did not have an opportunity prior to the meeting to review Student's IEP progress notes and to address

any concerns she may have had at the IEP team meeting. Yet, at the June 8, 2017 IEP team meeting Mother's only request regarding Student's IEP progress reports was for Student's service providers to update the report since the school year was nearing an end. Mother provided no explanation during the hearing as to what concerns she had with respect to the entries reflected in those IEP progress reports or how she would have wanted to address them at the June 8, 2017 IEP team meeting had she received the reports before or during the meeting. Thus, the weight of the evidence established that Mother was not significantly impeded from meaningfully participating in Student's IEP process.

ISSUE 2: DID DISTRICT FAIL TO PROVIDE PARENT WITH AN APPROPRIATE PRIOR WRITTEN NOTICE WHEN DISTRICT REFUSED TO ASSIGN STUDENT A NEW SPEECH THERAPIST?

28. Student contended that District's written notice in response to her request for a new speech therapist did not comply with IDEA requirements. District contended its refusal to grant Mother's request for new speech therapist did not require an official prior written notice.

29. A school district must provide written prior notice to the parents of a child whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).) The notice shall include a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; if the notice is not an initial referral for evaluation, the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other

options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the school district's proposed or refused action. (20 U.S.C. § 1415(c)(1); 34 C.F.R. §300.503(b); Ed. Code, § 56500.4.)

30. A formal prior written notice was not required to respond to Mother's request for a new speech therapist. Mother's request was unrelated to Ms. Whiteman's qualifications as a speech-language pathologist, Ms. Whiteman's level of training on Student's communication device, or Ms. Whiteman's ability to provide the speech and language therapy prescribed by Student's IEP. Mother's sole reason for requesting a new speech therapist was the perceived hostility from Ms. Whiteman during the June 8, 2017 IEP team meeting. To the contrary, Student's audio recording of that meeting established that Ms. Whiteman directed no hostility towards Mother. Mother's request had no relation to a change in the identification, evaluation, or educational placement of Student, or the provision of a FAPE to Student.

31. Even assuming District was required to provide a formal prior written notice, the written notice District did provide was legally sufficient. It contained a description of Mother's request, sufficiently informed Mother that District was not going to agree to the request, explained that Ms. Whiteman was available and qualified to provide speech and language therapy to Student, and provided Mother with her procedural safeguards and rights, as well as sources Mother could contact to assist her in understanding those safeguards and rights. The absence in the notice of a description of other options considered by District or a description of assessment procedures, reports, tests, or records used in denying Mother's request, did not render the notice defective. Those considerations were not necessary to properly respond to Mother's request based on the perceived hostility from Ms. Whiteman, which did not occur.

32. Even if the absence of those descriptions in the written notice constituted a procedural violation of the IDEA, Student failed to establish how such a violation

significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, caused a deprivation of educational benefits to Student, or denied her a FAPE, especially as Ms. Whiteman was qualified to provide services. Accordingly, Student failed to meet her burden in proving District's written notice was necessary or defective, and failed to establish how any defect, if any, denied Student a FAPE.

ISSUES 4(A), 4(B) AND 5: DID DISTRICT FAIL TO IMPLEMENT STUDENT'S IEP IN REGARDS TO SPECIALIZED ACADEMIC INSTRUCTION AND SPEECH AND LANGUAGE THERAPY?

33. Student contended District failed to provide her with specialized academic instruction and speech and language therapy prescribed by her IEP. Student also argued that District denied her a FAPE when Ms. Cuccio resigned without providing District with a 10-day notice.

34. District argued that Mother prevented Ms. Jones from providing home hospital instruction until Ms. Jones received training on the communication device. This resulted in lost home hospital instruction. District also contended that it had no authority to compel Ms. Cuccio to provide a 10-day notice of resignation since she was not a District employee and did not sign District's home hospital instruction paperwork.

35. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§56032, 56345.) The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

36. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

Speech and language therapy

37. Student's IEP provided for 60 minutes of speech and language therapy, once per week. The IEP did not require the speech therapist to be trained in the communication device prior to commencing therapy.

38. During the relevant time period, Ms. Mills consistently provided speech therapy weekly during her time with Student. Her schedule was from 12:00 p.m. to 1:00p.m. Ms. Mills did not provide therapy on two occasions, February 22, 2017 and March29, 2017, due to Student being unavailable.

39. Ms. Mill's successor, Ms. Whiteman, was a qualified speech-language pathologist with 20 years of experience. She was familiar with communication devices and had familiarized herself with Student's device on April 5, 2017.

40. After Ms. Mill's last therapeutic session, jointly held with Ms. Whiteman on April 5, 2017, District failed to provide therapy for three weeks, from April 19 to May 3, 2017. Though District characterized Student's unavailability on May 3, 2017, as "Parent Refusal", Mother's "refusal" was warranted. Mother had good reason to decline the service that day. Mother and Student were at a dentist appointment. District and Ms. Whiteman did not provide sufficient notice that speech therapy would resume on May 3, 2017. Ms. Whiteman, at the earliest, gave Mother a 30-minutes notice of the session and at worst, called Mother 30 minutes past the appointment. Considering no effort was made to provide speech therapy the proceeding two weeks and not having heard from

Ms. Whiteman or District regarding when speech therapy would resume, it was understandable for Mother to question whether therapy would take place on May 3rd. Student should not have been penalized for having made another appointment for that part of that day. Hence, by a preponderance of the evidence, Student proved that District failed to provide speech and language therapy on three occasions from April 19, 2017, to May 3, 2017.

41. However, Mother's refusal to allow Ms. Whiteman to provide speech and language therapy from May 4, 2017 to June 9, 2017, was not justified. Mother informed Ms. Whiteman on May 3, 2017, that Ms. Whiteman was not welcomed in her home until Mother received confirmation as to how long Ms. Whiteman was committed to providing therapy to Student. The uncertainty of Ms. Whiteman's expected length of service was not a legitimate reason to decline her service. On May 17, 2017, after being informed that Ms. Whiteman was committed for at least the remainder of school year and through the extended school year, Mother still denied Ms. Whiteman access to Student on the basis that Ms. Whiteman was not formally trained on Student's communication device. The IEP did not require the speech therapist, or any service provider to be trained on the communication device prior to commencing services with Student. Therefore, Mother's request to suspend speech therapy until a speech therapist with formal communication device training was available constituted parental refusal of speech and language therapy.

42. The speech therapist was responsible for working with Student on four IEP goals: social skills, expressive language, reading, and pragmatics. The IEP called for weekly, 60-minute therapy sessions. Failing to provide three sessions of therapy, amounting to 180 minutes of speech and language therapy, was more than a minor discrepancy from what was required by the IEP. Thus, Student proved by a preponderance of the evidence that District denied her the benefits of speech therapy in

which she was entitled to, in violation of the IDEA.

Specialized Academic Instruction

43. Student's IEP provided for 75 minutes of specialized academic instruction, five times per week for a total of 375 minutes per week to occur in the home. From February 14, 2017, to June 4, 2017, no home hospital instruction was provided on 36 days, totaling 2,700 minutes of specialized academic instruction. Ms. Jones was available to start instruction on June 5, 2017. Between then and June 9, 2017, District would have provided specialized academic instruction in the home, but for Mother's insistence that the home hospital instruction teacher be trained on the communication device prior to working with Student. Student's IEP made no requirement that the training be completed by Ms. Jones prior to starting lessons with Student. Therefore, missed instruction from June 5, 2017, to June 9, 2017, can only be attributed to Mother's refusal and thus Student forfeited this instruction. The discrepancy between the amount of specialized academic instruction Student was entitled to and the amount she actually received was significant. This was a material failure on the part of District to implement the Student's IEP in violation of the IDEA.

44. However, Ms. Cuccio's resignation did not result in District denying Student a FAPE. Ms. Cuccio was not employed by District. She was a County employee. District obtained her services through a memorandum of understanding with County and as a result, was not bound to provide District with a 10-day notice of resignation. Ms. Curtis persuasively established that District had no authority to prevent Ms. Cuccio from resigning from the voluntary home hospital instruction assignment with Student. Therefore, Student failed to prove that District denied her a FAPE as a result of Ms. Cuccio's resignation as Student's home hospital instruction teacher.

ISSUE 6(A) AND 6(B): DID DISTRICT FAIL TO PROVIDE A TRAINED, OR REQUIRE

TRAINING FOR, A SPEECH THERAPIST ON STUDENT'S COMMUNICATION DEVICE?

45. Student contended District failed to follow the provisions in Student's IEP regarding instruction and access of Student's communication device. Student also claimed District predetermined that Student's service providers need not be trained on the communication device prior to starting services.

46. District contended it provided Student with a qualified speech therapist. District also argued that prior training on the communication device was not required by Student's IEP. Further, District's IEP team members were receptive to, and considered, Mother's request to amend Student's IEP to reflect the prerequisite communication device training.

Qualified Speech Therapist

47. An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at p. 207]; *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

48. Student's IEP dated November 15, 2016, consented to by Mother on February 7, 2017, did not require a speech therapist to be trained on Student's communication device prior to starting speech therapy. There was no expectation that any of Student's service providers would be trained on the device before working with Student. This was evident when Ms. Cuccio began in early February 2017, provided instruction on three occasions prior to receiving training on the device. This was further supported when Mother expected Ms. Whiteman to resume speech therapy on April 19, 2017, with no expectation that Ms. Whiteman would be trained by the assistive technology specialist prior to that date.

49. Ms. Whiteman had prior experience working with students and adults using an eye gaze communication device. She was introduced to Student's device on April 5, 2017, during the joint session with Ms. Mills. From that point, Ms. Whiteman possessed the appropriate level of training and experience to work with Student using the communication device. Ms. Whiteman also had Ms. Perkins, the assistive technology specialist, as a resource. Additionally, Ms. Whiteman was willing and able to participate in a more formal training with Ms. Perkins, which was scheduled for June 15, 2017.

50. Also, at no point did District take the position that Ms. Whiteman did not need training on the communication device. District was never opposed to providing training to Student's IEP providers. Also, Ms. Whiteman had experience with eye glaze communication devices and demonstrated she could communicate with Student with that device. District's position at all times was that the training was not a prerequisite to a provider starting service. Student's IEP clearly did not require the training to any service provider prior to starting services. Therefore, Student did not meet her burden in establishing that District was required, but failed to provide a speech therapist trained in the communication device.

Predetermination

51. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858.) A school district predetermines the child's program when it does not consider the parents' requests with an open mind, thereby denying their right to participate in the IEP process. (*Id.* at 858.)

52. Mother sought to amend the IEP to reflect that providers be trained by the assistive technology specialist on the device prior to providing services to Student. At the June 8, 2017 IEP team meeting, District's IEP team members listened and discussed Mother's request. Ms. Perkins was asked to comment as to whether training was

required prior to starting services. Ms. Perkins made no such recommendation, but rather opined the provider would only need to familiarize themselves with the device folders to locate the appropriate icons. Ms. Perkins did not opine that a more formal training with the assistive technology specialist was required before services could begin. District and Mother did not reach an agreement to amend the IEP. District followed up by providing Mother prior written notice of District's refusal to make the change. Further, Student presented no persuasive evidence that prior training on the communication device was a necessary prerequisite to starting services for Student. Thus, Student failed to prove that District predetermined that the speech therapist or any other service provider did not need to be trained on the device prior to commencing services.

ISSUE 8: DID DISTRICT FAIL TO CONDUCT AN ADAPTIVE PHYSICAL EDUCATION ASSESSMENT AS AGREED UPON BY PARENT AND DISTRICT?

53. Student contended that District denied her a FAPE when it failed to conduct an adaptive physical education assessment that it agreed to do in October 2016. District did not dispute the contention.

Failure to Assess

54. A failure to properly assess is a procedural violation of the IDEA. (*Department of Educ., State of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190, 1196; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.) When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd.(a).) The parent has at least 15 days to consent in writing to the proposed

assessment. (Ed. Code, § 56321, subd. (c)(4).) A school district has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).)

Analysis

55. On October 4, 2016, Mother requested, and District agreed to conduct, an adaptive physical education assessment of Student. District agreed to give Mother an assessment plan. However, that never occurred and District provided no explanation as to why not. District's failure to provide an assessment plan was a procedural violation of the IDEA. District's failure to send Mother an assessment plan and assess Student for adaptive physical education deprived Mother and the IEP team of critical evaluative information about Student's issues in the area of adaptive physical education. In the absence of an assessment, no IEP team meeting was held to consider what that assessment would have revealed and how the findings could have impacted Student's IEP. These procedural failures by District deprived Mother of information about Student's needs, thereby significantly impeding Mother's opportunity to participate in the decision-making process, and Student was denied educational benefit and a FAPE.

REMEDIES

1. District prevailed on Issues 1, 2, 3, 4(b), 6(a), 6(b), 7, and 9. Therefore, Student's requests related to those issues are denied.

2. Student prevailed on Issues 4(a), 5 and 8. District failed to implement Student's IEP by failing to provide Student with the required amount of specialized academic instruction and speech and language therapy. District also failed to conduct an adaptive physical education assessment. As a remedy, Student requested

compensatory education in the amount of 52.5 hours of specialized academic instruction and an unspecified amount hours of speech and language therapy. Student requested that compensatory education for both specialized academic instruction and speech and language therapy be provided by a non-public agency of Mother's choice. Student further requested that District reimburse Mother for educational expenses paid by Mother from May 17, 2017 to present. Finally, Student requested that District conduct an adaptive physical education assessment.

3. District contended that Student is not entitled reimbursement of expenditures because Student failed to present evidence in support of the request. Additionally, District argued that it has qualified staff able to provide compensatory education, and therefore, Student's request for a non-public agency to provide those services should be denied. District disagreed with Student's calculation as to how much specialized academic instruction hours Student missed due to the unavailability of a home hospital instruction teacher. Additionally, District was willing to conduct an adaptive physical education assessment.

4. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. §1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. 359, 369-370.) Remedies under the IDEA are based on equitable considerations and the evidence established at the hearing. (*Id.* at p. 374.)

5. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. Bd. of Educ.* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*) An independent evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548F.Supp.2d 815, 822-823.)

6. Student's IEP provided for 75 minutes of specialized instruction in the home, five times per week. From February 14, 2017, to June 9, 2017, District failed to provide Student specialized academic instruction on 36 days, totaling 2,700 minutes of lost instruction time. Therefore, a compensatory award of 2,700 minutes of specialized academic instruction will provide Student with full compensation of lost instruction time.

7. Student's IEP called for 60 minutes of speech and language therapy, once per week. District denied Student therapy on April 19 and 26, 2017, and May 3, 2017, totaling 180 minutes. Therefore, a compensatory award of 180 minutes of speech and

language therapy will provide Student with full compensation of lost speech therapy.

8. Student failed to prove the need for a non-public agency to provide compensatory education to Student. At the time of hearing, District established it had trained and qualified providers for both specialized academic instruction and speech and language therapy available for Student. Therefore, Student's request for a non-public agency to provide compensatory education is denied.

9. Student's request for reimbursement for expenditures is also denied. Student presented no evidence of any expenditure at hearing.¹²

10. Mother requested an adaptive physical education assessment of Student on October 4, 2016, and District agreed to do this. District acknowledged that the assessment should have been done, but could not provide an explanation as to why it did not do it. In its closing brief, District agreed to conduct one. Eleven months have passed since District agreed to provide Mother with an assessment plan. Therefore, to prevent this issue from being ignored any further, District shall expedite an adaptive physical education assessment of Student.

ORDER

1. District shall provide Student with compensatory specialized academic instruction in the amount of 2,700 minutes, to be used by the end of the 2018-2019 extended school year, or the services will be deemed forfeited. District will provide make up services by this same end date, only for those services missed due to provider absence. Parent shall cooperate with District in the scheduling of the compensatory services and should District suffer the loss of staff to provide this service during the

¹²OAH's August 8, 2017 Order following Prehearing Conference ordered that any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief.

period of this compensatory award, the time to exhaust the award shall be extended consistent with the time it takes District to procure the services of another provider.

2. District shall provide Student with compensatory speech and language therapy in the amount of 180 minutes, to be used by the end of the 2018-2019 extended school year, or the services will be deemed forfeited. District will provide make up services by this same end date, only for those services missed due to provider absence. Parent shall cooperate with District in the scheduling of the compensatory services and should District suffer the loss of staff to provide this service during the period of this compensatory award, the time to exhaust the award shall be extended consistent with the time it takes District to procure the services of another provider.

3. District shall provide Mother with an adaptive physical education assessment plan within 10 days of this Order. District shall schedule an adaptive physical education assessment of Student to occur within 15 days of receipt of Mother's consent to the plan. District will convene an IEP team meeting within 21 days upon receipt of the assessment report, but no longer than within 45 days of receipt of Mother's consent to the plan.

4. All other claims for relief by Student are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on Issues 1, 2, 3, 4(b), 6(a), 6(b), 7, and 9 and Student prevailed on Issues 4(a), 5 and 8.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: September 19, 2017

_____/s/

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings