

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2013110547

DECISION

Parents on behalf of Student (Student) filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on November 13, 2013, naming the Irvine Unified School District (Irvine). The matter was continued for good cause on December 23, 2013.

Administrative Law Judge Paul H. Kamoroff heard this matter in Irvine, California, on February 25, 26, 27, and March 4 and 5, 2014.

Brian R. Sciacca, Attorney at Law, appeared on behalf of Student. Student's mother and father attended each day of the hearing. Student did not attend the hearing.

Tracy Petznick Johnson, Attorney at Law, appeared on behalf of Irvine. Mark Miller, Executive Director of Special Education for Irvine, attended the hearing on February 25, 26, and 27, 2014. Dr. Erica Hawkes, special education coordinator for Irvine, attended the hearing on March 4 and 5, 2014. Robin Hunter, Principal of the Early Childhood Learning Center (Learning Center), was present throughout the hearing.

The ALJ granted a continuance for the parties to file written closing briefs and the record remained open until March 26, 2014. Upon timely receipt of the written closing briefs, the ALJ closed the record and the matter was submitted for decision on that date.

ISSUES¹

1. Did Irvine procedurally deny Student a free appropriate public education (FAPE) during the 2011-2012 school year, starting on January 27, 2012, by:
 - a) Failing to include a general education teacher as part of his initial individualized education program (IEP) team meeting;
 - b) Predetermining the placement and services offered to Student; and
 - c) Failing to discuss and consider the continuum of placement and services available?
2. Did Irvine substantively deny Student a FAPE during the 2011-2012 school year, starting on January 27, 2012, by failing to:
 - a) Provide adequate services in the area of behavior;
 - b) Provide adequate services in the area of speech and language;

¹ The issues have been rephrased and reorganized for clarity. Student's issue, "Did Irvine procedurally deny Student a FAPE in the 2012-2013 and 2013-2014 school years, by retaliating against Parents for asserting Student's rights as a child with a disability by refusing to offer a preschool placement at his January and February 2013 IEP meetings" has been incorporated into Issue 6 to avoid redundancy of this allegation. 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.) During the hearing, Student's motion to withdraw allegations pertaining to the extended school year was granted.

- c) Provide adequate services in the area of physical therapy;
 - d) Provide adequate services in the area of occupational therapy; and
 - e) Provide him placement in the least restrictive environment?
3. Did Irvine deny Student a FAPE during the 2011-2012, 2012-2013, and 2013-2014 school years by failing to properly respond to Parents' request for independent educational evaluations?
4. Did Irvine procedurally deny Student a FAPE during the 2012-2013 and 2013-2014 school years by:
- a) Failing to consider input from Parents and failing to consider the results of IEE's obtained by Parents; and
 - b) Failing to include input from a general education teacher regarding placement and services?
5. Did Irvine substantively deny Student a FAPE during the 2012-2013 and 2013-2014 school years by failing to:
- a) Utilize appropriate behavior strategies to address toileting issues at Student's Head Start placement;
 - b) Provide appropriate supports and services in the general education environment to allow Student to safely participate in the program at all times;
 - c) Provide adequate speech and language services;
 - d) Provide adequate occupational therapy services; and
 - e) Provide adequate physical therapy services?
6. Did Irvine deny Student a FAPE by failing to offer any educational placement from February 2013 to the present?

SUMMARY OF DECISION

This matter involves a preschool student who has been found eligible for special education and related services as a student with a speech and language impairment.

Student also experiences difficulty in the areas of gross motor, fine motor, self-help, and social skills. Student's parents (Parents) allege the various foregoing procedural and substantive violations denied him a FAPE for the 2011-2012, 2012-2013, and 2013-2014 school years. Parents primarily contend that his initial IEP meeting failed to include a general education teacher, and they were not informed of a continuum of placements for preschool students. On this basis, Parents assert that the special day class placement offered at Student's initial IEP meeting, held in January 2012, was predetermined and too restrictive. Parents also complain that Irvine failed to properly accommodate Student's gross motor delays, which created an unsafe school environment and resulted in an incident where Student was injured while using the restroom at school. Parents also complain that the related services offered to Student were not consistent with the level of services recommended by their independent assessors. Finally, Student asserts that Irvine's failure to offer a school placement, pursuant to an IEP held in February 2013, denied him a FAPE.

Irvine disputes that it has denied Student a FAPE. Irvine avers that Parents excused the attendance of a general education teacher at Student's initial IEP, this IEP offer was not predetermined, and that a continuum of placements was described to Mother, who participated at this meeting. Irvine maintains that it took sufficient steps to address Student's gross motor delays, and that Student's injury at school was merely an accident. Irvine also asserts that the IEP's it provided Student constituted a FAPE, and that he did not require a school placement as of the February 2013 IEP.

For the following reasons, the Decision finds that Irvine did not commit a procedural or substantive violation by failing to provide a general education teacher at Student's initial IEP meeting or by predetermining this offer. Student lawfully excused the attendance of a general education teacher, school staff described a continuum of placements at this meeting, and Mother participated in the development of the IEP. The

Decision finds that the IEP's offered to Student through February 6, 2013, constituted a FAPE. Moreover, Irvine took reasonable steps to accommodate Student's gross motor difficulty, and the at-school injury was not indicative of a denial of a FAPE. Finally, the Decision finds that, based upon the information available as of the February 6, 2013 IEP, Irvine denied Student a FAPE by failing to offer him direct occupational therapy and a classroom placement.

FACTUAL FINDINGS

1. Student is a five-year-old boy who at all relevant times resided with his parents within the boundaries of Irvine. Student is eligible for special education and related services under the eligibility category of speech and language impairment. At the time of the hearing, Student was in preschool and enrolled at Immanuel Lutheran School (Immanuel), a private school.

2. Student exhibited expressive language delays, including difficulty with articulation, vocabulary, and deficits in pragmatic language. As a result, he did not orient to others during communication and he was difficult to understand. Student also had concomitant difficulty in fine and gross motor skills. He had difficulty manipulating objects with his hands, low muscle tone, and impacted body coordination and balance. As a consequence, Student had difficulties in hand-writing, dressing himself, and he appeared clumsy and was vulnerable to falling. Student also had delays in attention and he required frequent prompting from teachers and staff.

CONDUCT PRIOR TO STUDENT'S INITIAL IEP

3. Student was diagnosed by the Regional Center of Orange County (Regional Center) as having Global Developmental Delay at age two. The Regional Center provided Student applied behavior analysis (ABA) at home until he turned three years of age. The ABA was delivered through the nonpublic agency Nyansa Learning

Corporation (Nyansa). In November 2011, the Regional Center referred Student to Irvine for evaluation to determine whether he qualified for special education and related services.

The Learning Center

4. In November 2011, upon receiving the Regional Center's referral for Student, Irvine directed Parent's to enroll Student at the Learning Center. The Learning Center was an Irvine preschool which comprised 23 classes, 10 which were general education and 13 which were special day classes. All of the Learning Center general education classes were either State or Head Start preschool programs.² The Head Start and State preschools were normally limited to pupils' whose family's income did not exceed a predetermined level. However, the Learning Center made an exception for pupil's whose IEP's called for a general education placement and did not require these students' families to meet the prescribed financial requirements. As a result, approximately 10 percent of pupil's with IEP's who attended the Learning Center received instruction in either a State or Head Start general education classroom. The Learning Center incorporated an intensive speech and language program, the General Language General Speech Patterns program, universally in both its special education

² Chapter 308, Statutes of 2008 Assembly Bill 2759, created the California State Preschool program. This program consolidated the funding for State Preschool, Prekindergarten and Family Literacy, and General Child Care center-based programs serving eligible three- and four-year-old children to create the California State Preschool Program. When a school district does not have regular education preschools, children who are age three are eligible for the State Preschool Program if the family's adjusted income does not exceed the income ceilings established by the State Department of Education.

and general education classes. The General Language General Speech Patterns emphasized the need for students to learn speech and language in a manner that is generalized into the classroom environment.

The In-Take Meeting

5. On November 8, 2011, the Learning Center held an in-take meeting for Student. Student was two years, nine months old. It was normal for the Learning Center to hold an informal meeting with the parents of incoming preschool students to introduce them to the Learning Center, Irvine's policies and procedures and, if applicable, to develop an assessment plan and schedule an initial IEP meeting. Kari Garron, who was an in-take coordinator for the Learning Center, facilitated the in-take meeting. Mother attended without Father. Ms. Garron has facilitated approximately 900 in-take meetings for the Learning Center. She testified on behalf of Irvine and was a persuasive witness.³

6. As an in-take coordinator, Ms. Garron was concerned that each family of an incoming pupil was provided consistent information regarding the classes and programs available at the Learning Center. To maintain this consistency, she provided each family the same incoming packet of informational documents. The packet included a procedural handbook, a copy of parent's rights and procedural safeguards, and a copy of the Learning Center's continuum of placements entitled "Early Childhood Learning Center Special Education Preschool Continuum of Programs." The continuum of placements described the general education classrooms available at the Learning Center, the speech and language clinic, and various special day classes.

³ Ms. Garron received a master's in early childhood education in 2008, taught special education preschool for five years, and she had been Irvine's in-take coordinator for the Learning Center for over three years.

7. Student's in-take meeting lasted for approximately an hour. Along with Mother, Ms. Garron developed an assessment plan and scheduled an initial IEP meeting for Student. The agreed upon assessments included testing in academics; intellectual development; language, speech, and communication; physical therapy; health; self-help; and, a diagnostic classroom assessment.⁴

8. Mother agreed to an initial IEP meeting for January 27, 2012, and she agreed in writing to excuse the attendance of a general education teacher at the IEP meeting. Mother left the in-take meeting with the informational packet of documents, along with a copy of the assessment plan and the IEP meeting notice which contained the signed excusal of the general education teacher.

THE INITIAL IEP

9. On January 27, 2012, Irvine convened Student's initial IEP team meeting. Student was 2 years, 11 months old. In addition to other Irvine staff, Sandy Avzaradel, assistant principal at the Learning Center, attended the meeting and acted as Irvine's administrative designee. Ms. Avzaradel has a general education credential and has vast experience in the general education preschool curriculum. The IEP team also included the participation of staff from Nyansa. Mother attended the meeting.

10. The IEP team reviewed Student's background information, health, and development. Mother reported to the team that Student was "clumsy" and fell frequently, and she was concerned that he may be autistic. Nyansa reported that

⁴ In California, the term "evaluation" is used interchangeably with "assessment." The diagnostic classroom assessment required a pupil to be observed in a school placement for 36 hours over three weeks. Parents eventually elected to forego the diagnostic classroom assessment because Student was ill when the assessment was scheduled.

Student had difficulty meeting his goals in the individual setting. Student had average cognitive abilities and a generally calm demeanor; however, he required continued growth in functional communication, social-play interactions, pragmatic language, overall muscle strengthening, interactions with others, eye contact, response to name, fine motor skills, adaptive skills, and sensory processing.

11. The IEP team then reviewed its initial evaluations of Student, which were included in a multi-disciplinary assessment. The following school staff participated in the development of the multi-disciplinary assessment: Sean Viney, school psychologist; Linda Hill, speech pathologist; Alicia Brown, special education teacher; and, Brooke Barton, physical therapist. Each of the assessors attended the IEP meeting and shared the results of their testing with Mother.

12. Mr. Viney and Ms. Brown administered cognitive and pre-academic testing for Student on December 8, 2011.⁵ Each assessor had conducted a review of Student's records, observed him in Mr. Viney's office, interviewed Mother, and conducted informal and formal testing of Student. During the testing, Student had poor eye contact, difficulty orienting to the examiner, and he required frequent prompting and adult assistance to complete the testing. Results of the testing demonstrated that Student was delayed in the areas of attention and memory, visual perception, problem solving, and number concepts. In each area assessed, Student exhibited pre-emerging skills that were between six-to-12 months behind his chronological age. Student also had delayed

⁵ Sean Viney received a master's in school psychology in 2010. He has been a school psychologist for Irvine for over three years where he has experience assessing and providing therapeutic services for pupils between two-to-five years of age. During the hearing, he presented persuasive testimony for Irvine.

adaptive skills and serious delays in the areas of communication, social skills, and self-care. Student did not present with significant behavioral deficits.

13. In addition to the standardized testing, Mr. Viney administered two autism rating scales: the Autism Screening Instrument for Educational Planning and the Autism Spectrum Rating Scales, which were both completed by Mother. The rating scales are provided for individuals who are suspected of having autism. The results of the inventories fell within the "unlikely" range when considering the probability of autism. However, due to some inconsistencies between the results of the inventories, Mr. Viney concluded that there was not enough information to fully rule out autism as a suspected disability.

14. Ms. Hill administered a speech and language assessment to Student on December 6, 2011.⁶ As part of her report she reviewed Student's records, administered informal and standardized testing, conducted observations, and parent interviews. Student demonstrated delays in the area of pragmatic communication, gestural communication, and social conventions. Student did not reference or make eye contact with the examiner without explicit requests. He did not look at Ms. Hill when varied emotions were portrayed and experienced difficulty in the ability to shift his eye gaze between objects. Student was intermittently non-compliant during the examination, and he required frequent prompting to complete the testing.

⁶ Linda Hill received a master of arts in speech pathology in 1978 and has been a state credentialed speech and language pathologist for over 33 years. She has worked for Irvine since 2003, where she has assessed and provided services to numerous students, primarily between the ages of three-to-five-years old. She provided testimony for Irvine.

15. In the area of spontaneous speech, Student's expressive language was "significantly below age expectations." During the 90 minutes of testing, Student failed to use a variety of verbs and nouns, and he was only able to understand 55 words and to produce only 20 different words. In comparison, it is normal for typically developing peer of Student's age to understand and produce over 500 words. Student was also significantly delayed in his ability to produce consecutive utterances; Student demonstrated a one and a half standard deviation below the mean for his age. Student was also delayed in his ability to use grammatical elements, an area of spontaneous speech, and he was two years delayed in the areas of actions and gestures. Ms. Hill attempted to assess Student's articulation skills, but she was unable to complete this subtest due to Student's inability to imitate the targeted words. In the area of articulation, Student substituted various consonant sounds, and his speech intelligibility was at the 60 percent level.

16. In sum, Student demonstrated an expressive speech and language delay, with deficits in pragmatics, semantics, morphology, vocabulary, and speech articulation. As a result, Student was difficult to understand and had seriously delayed language skills. Ms. Hill's recommendations for speech and language services for Student included placement in a classroom where he could generalize his skills. Given the nature of Student's delays, a clinic based setting by itself would have been insufficient to remediate his disability.

17. Ms. Barton conducted her physical therapy assessment for Student at the Learning Center in December 2011.⁷ Her assessment included parent interview, observations, and formalized testing. Ms. Barton observed Student on the school

⁷ Ms. Barton received a doctorate in physical therapy in 2005, and she has been a physical therapist for Irvine since 2009. She testified for Irvine during the hearing.

campus, including the playground, and in the therapy clinic. Student had difficulty transitioning between the locations and had to be carried by his Mother. He also required frequent redirection and reinforcers throughout the evaluation. Student was unable to put on his shoes, had poor balance, and he was unable to step-up onto a four-inch mat. Student was unable to ascend or descend stairs without assistance and he had difficulty ambulating over uneven terrain. Student was unable to run without very close supervision and he was vulnerable to falling. He fell four times during the physical therapy evaluation. Overall, Student's gross motor abilities were seriously delayed and Student was unable to sustain control over his body's center of gravity, to maintain balance, or to safely move from one place to another.

18. Following the review of the multi-disciplinary evaluation, the IEP team adopted eight goals in the areas of stair navigation; campus navigation; visual perception; two in pragmatic language; two in expressive language; and a goal for speech production. Except for the speech production goal, each of the goals required the assistance of a classroom teacher to implement.

19. During the IEP meeting, Mr. Viney described the continuum of programs which were available at the Learning Center. He reported on the various classrooms, ranging from the various special day classes to the State and Head Start general education preschools. He described how the IEP team was obligated to consider placement options and to offer the least restrictive environment when formulating a placement for pupils who qualified for special education. Mr. Viney routinely described the continuum of placements available at the Learning Center during initial IEP meetings and he was concerned that he presented this information to parents in a consistent and meaningful manner. To do so, Mr. Viney utilized a laminated work-sheet during his presentation which included descriptions of the programs available at the Learning

Center, and using a dry erase marker, he used the worksheet as a visual aide to describe the restrictiveness of each classroom.

20. The January 2012 IEP team determined that Student required a structured, language intensive classroom placement, with repeated instruction from a teacher, and peer modeling, to benefit from special education. The IEP offered the following: specialized academic instruction in a mild-to-moderate special day class for 180 minutes daily, four days per week; speech and language services in a small group, for 30 minutes, six times per month; and individual physical therapy services for 30 minutes, once weekly. The IEP provided participation in the general education environment for "buddy" activities, recess, and school-wide functions. The educational placement and services were offered at the Learning Center.

CONDUCT FOLLOWING THE JANUARY 27, 2012 IEP

21. On February 3, 2012, Parents sent a letter to Ms. Hunter consenting to the IEP, with some areas of exception. Parents requested that Irvine provide Student (1) more access to typically developing students; (2) an individual aide to shadow him when he accessed his typical peers; (3) more intensive speech and language services; (4) a goal for Student to overcome his difficulty sitting on a bench or backless chair; and, (5) additional accommodations to ensure that he did not fall while at school.

22. On February 17, 2012, Ms. Hunter sent a letter to Parents denying their requests. Overall, she responded that Student's access to typical peer was sufficient and that his unique needs could be addressed through the instruction embedded in the classroom placement. Therefore, additional services or accommodations were not warranted. She stated the following:

Specialized academic [instruction] insertion model supports children quite differently than what a child experiences when

they participate solely in therapy sessions at a speech/language clinic and return to another environment in which penalization and practice of those skills is not constantly monitored, practiced and/or expected.

[The] IEP team continues to believe that the intensive language stimulation within the educational setting, the ongoing daily modeling of language and social interactions with his peers, and the direct speech/language therapy he will receive each week will support Student's ability to make satisfactory progress on agreed upon goals and objectives.

23. On February 6, 2012, Student began attending the Learning Center. He attended a mild-to-moderate special day class which was taught by Kristi Ecarma.⁸ Ms. Ecarma's class had six pupils, including Student, and two classroom aides. At first, Student had difficulty adjusting to the placement, but he gradually began interacting with others and he was able to use two higher functioning peers as language models. Student was appropriately placed in this class, and he was receptive to the class structure and Ms. Ecarma's directed teaching. Ms. Ecarma or an aide were available to accompany each pupil to the restroom. For Student, Ms. Hunter had additionally instructed the teacher and staff to keep Student at "arm's length" at all times to accommodate his vulnerability to falling; and Ms. Ecarma or her aides provided Student this additional accommodation. Student developed physically during his time in Ms.

⁸ Kristi Ecarma is credentialed to teach special education preschool and has been an education specialist for Irvine since 2008. She provided sworn testimony on behalf of Irvine.

Ecarma's class, his balance improved, and he required less support during recess and toileting as the year progressed.

24. On February 17, 2012, Parents requested an observation of the continuum of programs at the Learning Center; an IEP meeting; and, an IEE in an unspecified area.

25. On March 5, 2012, Ms. Hunter informally met with Parents to address their various concerns. Irvine agreed to Parents' request to observe a continuum of programs at the Learning Center, and to convene an addendum IEP meeting. With regard to the IEE, Ms. Hunter explained to them that Irvine was obliged to either fund the IEE or to quickly file a due process hearing request to defend its own assessments. Following the meeting, Father sent an email to Ms. Hunter wherein he withdrew Parents' IEE request.

THE MARCH 21, 2012 IEP ADDENDUM

26. Irvine convened an addendum IEP meeting for Student on March 21, 2012. In addition to other school staff, general education teacher Suzanne Martinez attended the meeting. Mother and Father attended the meeting, along with the clinic director of Nyansa.

27. The IEP team first reviewed Student's present levels of performance. Ms. Ecarma reported that Student had been appropriately placed in her mild-to-moderate special day class. Student had benefited from classroom-based instruction, which Irvine staff referred to as "intentional instruction," rather than the individual instruction which he had received from Nyansa. Student had met his goal in the area of visual perception; however, he had not met the first benchmarks for any other goal, which had been set to be achieved by March 2012. Given this delay in Student's progress, the team agreed to move the first benchmarks for each goal to June 2012.

28. Mother and Father actively participated in the IEP meeting. Each asked questions and made suggestions pertaining to Student's educational program. Irvine agreed to their request to collect data to develop another language goal in the area of

peer requests and initiation; and data to determine whether it was necessary to develop a goal for Student to sit on a backless bench. Irvine also agreed to Parents' request to increase Student's mainstreaming by adding four 30 minute periods of mainstreaming each week. The additional mainstreaming would occur in the morning, where Student would join breakfast with a general education class with an aide facilitating the incursion. Additionally, Irvine agreed to Father's request for a weekly log that recorded Student's interactions with his general education peers.

29. The March 2012 IEP team adopted two new goals. The first goal was in the area of play skills and the second goal was in the area of social skills. Each goal was to be addressed in his classroom, and the teacher was solely responsible for implementing and collecting data for the goals. Each goal stressed the importance of Student attaining the goal across peers and settings.

30. The IEP team did not make any further changes to Student's IEP, and Mother and Father consented to the IEP addendum.

THE APRIL 16, 2012 IEP

31. Irvine convened an addendum IEP meeting for Student on April 16, 2012, to review additional behavioral testing which had been conducted by Irvine to determine whether Student was autistic or otherwise behaviorally challenged. Mr. Viney reviewed the results of observations conducted while Student participated in the classroom, during breaks, and during recess; and the results of inventories completed by Nyansa.⁹ The updated testing concluded that Student did not demonstrate autism or behavioral difficulty.

⁹ Mr. Viney utilized inventories and rating scales from the Autism Screening Instrument for Educational Planning, Third Edition, the Autism Spectrum Rating Scales, and the Behavior Assessment System for Children, Second Edition.

THE JUNE 5, 2012 IEP

32. Irvine convened another addendum IEP meeting for Student at the end of the 2011-2012 school year, on June 5, 2012. Student was three years old. In addition to other Irvine staff, Suzanne Martinez attended the meeting. Sofia Sawitz, an independent physical therapist from the Rehabilitation Institute of Southern California also attended. Mother and Father attended with an educational advocate.

33. Ms. Sawitz thoroughly reviewed her independent physical therapy report with the IEP team. She completed her report on May 8, 2012, which included observations and formal testing. Student demonstrated decreased range of motion, strength, sitting tolerance, and balance. Student exhibited delayed developmental milestones and had difficulty performing daily living activities including walking and toileting. He also had poor balance and was unable to stand on one leg for any period of time. Ms. Sawitz recommended that Student's physical therapy services increase from 30 minutes per week to 30 minutes twice weekly.

34. The IEP team also discussed Parents' concerns that Student required additional assistance while toileting and that he was unsafe at recess. However, Student had begun successfully utilizing the toilet and the playground equipment independently, and he was no longer falling while in class, the restroom, or during recess. Given his progress, Student's present level of physical therapy was adequate to assist him in accessing his education and that an increase in services, as recommended by Ms. Sawitz, was not warranted. Nonetheless, Irvine agreed that school staff would accompany Student at recess and the restroom, during both special education and general education classes. The IEP team also adopted one new physical therapy goal, in the area of upright posture. The goal was for Student to, while sitting on a backless bench, perform a two handed functional activity.

35. The IEP team next reviewed the restrictiveness of Student's classroom placement. Student had benefited from his mainstreaming opportunities and he had not been a disruption to the general education teacher or class. However, he still required specialized academic instruction and intentional instruction to remediate his various disabilities. Accordingly, the IEP team determined that, for the 2012-2013 school year, Student would be placed in a general education class, where the teacher also utilized the General Language General Speech Patterns program; and to provide Student an independent facilitator to deliver him specialized academic instruction in the general education classroom.

36. The June 5, 2012 IEP offered Student specialized academic instruction, in a collaborative model between Irvine's independent facilitator and the classroom teacher, for 30 minutes twice weekly; individual physical therapy services for 30 minutes, once weekly; and, speech and language services in a small group, for 30 minutes, six times per month. The IEP offered placement solely in a Head Start general education classroom.

37. Parents consented to the IEP, with the exception that they wanted additional physical therapy services. Parents also requested that Irvine fund a physical therapy IEE.

38. On June 18, 2012, Ms. Hunter sent a letter to Parents declining to increase Student's physical therapy and agreed to fund a physical therapy IEE. Ms. Hunter was uncertain whether Parents wanted Irvine to reimburse them for Ms. Sawitz's report, or to fund a new evaluation. At any rate, Ms. Hunter requested that Parents provide her the name and contact information of their desired assessor so that Irvine could pay for the IEE. Parents did not respond to Ms. Hunter's letter and failed to provide Irvine the requested information. As a result, Irvine had not funded a physical therapy IEE for Student due to Parents' noncooperation.

THE SEPTEMBER 14, 2012 IEP

39. On September 14, 2012, Irvine convened an addendum IEP meeting for Student to review an occupational therapy assessment requested by Parents. Student had just begun preschool for the 2012-2013 school year. In addition to other Irvine staff, a general education teacher and Irvine's occupational therapist, Debbie Cornell, attended the meeting. Mother and Father attended the meeting.

40. Ms. Cornell reviewed her occupational therapy evaluation conducted on August 10, 13, 16, 17, 20, 23, and 28, 2012.¹⁰ As part of her assessment, Ms. Cornell reviewed Student's school records, interviewed his teacher, observed him at school, and administered formal and informal testing. She observed Student in a variety of locations, including the classroom and while toileting. Student had low muscle tone in the trunk, extremities, and in each hand. He had laxity, or instability, and weak muscles at each thumb joint, which impacted his ability to manipulate objects with his fingers. While using the restroom, Student was accompanied by a classroom aide but he was independently able to ascend and descend a six-inch step to access the urinal, and he did not have any balance difficulty in accessing the toilet. He had difficulty pulling his pants down, and he was unable to independently manipulate a button or a zipper. Student attempted a number of times to snap the button on his pants but he was unsuccessful. He also struggled with the elastic waistband and had difficulty pulling up or down his pants. The aide undressed and dressed Student. Overall, Student exhibited

¹⁰ Ms. Cornell is a state licensed occupational therapist with over 30 years' experience in both the public and private sectors. She has been an occupational therapist for Irvine since 2011. She provided testimony on Irvine's behalf during the hearing.

weak muscles and had difficulty manipulating objects with his hands, including an inability to maintain a functional grasp on a writing utensil.

41. Based upon her observations and testing, Ms. Cornell concluded that Student required occupational therapy to access and to participate in his daily school program. Ms. Cornell had provided occupational therapy as an embedded service to Student while he participated in Ms. Ecarma's special day class, and she recommended that Student receive the same service while he attended the Head Start preschool. Although entitled a consultative service, the service was a collaboration between the occupational therapist, the teacher and other school staff. The service took place in the classroom and addressed Student's ability to access his curriculum. Ms. Cornell would observe and directly assist Student in the classroom, and then instruct the teacher, independent facilitator, and other staff, how to remediate Student's occupational therapy deficits throughout the school day.

42. Parents complained that a consultative service would be insufficient to meet Student's occupational therapy needs, and they instead requested that Irvine provide him clinic-based services. Irvine staff emphasized the importance of the occupational therapy being embedded in the classroom. Similar to Ms. Hunter's February 17, 2012 letter, the September 14, 2013 IEP team believed that the independent facilitator and classroom teacher would have a significant role in remediating Student's deficits throughout the school day, and generalizing his skills in the classroom environment which was a more natural setting than a clinic. On this basis, Irvine denied Parents' request for additional occupational therapy and instead adopted Ms. Cornell's recommendations. For similar reasons, Irvine also denied Parents' request for additional specialized academic instruction from the independent facilitator. Irvine believed that Student's present level of specialized academic instruction was appropriate because his goals and services were embedded in the classroom and being worked on

by both the independent facilitator and the teacher. However, the IEP team agreed to revisit this request following the results of a progress report, which Irvine intended to complete in November.

43. The September 14, 2012 IEP added occupational therapy consultation, at 60 minutes per month, to Student's IEP. The service was offered sequentially throughout the month, and not in a single block. The team also adopted a new occupational therapy goal, which intended for Student to manipulate clothing with his hands. Irvine staff responsible for implementing the goal included the independent facilitator, classroom teacher, and the occupational therapist. Parents did not agree that the level of occupational therapy offered was adequate for Student and they did not consent to the IEP addendum.

CONDUCT FOLLOWING THE SEPTEMBER 14, 2012 IEP

44. On October 25, 2012, Student was injured while using the restroom at the Learning Center.¹¹ At the time of the injury, independent facilitator, Laurie Gleason, accompanied Student. Ms. Gleason was assisting Student pull up his pants when he lost balance and fell forward, hitting his forehead on the restroom floor. Ms. Gleason quickly carried Student, who was conscious and crying, to the school nurse, who tended to him and contacted his parents. Student did not suffer any permanent injury.

45. On October 29, 2012, Parents informed Irvine that they were removing Student from the Learning Center and would be seeking reimbursement from Irvine for a private school placement. Parents enrolled Student at Immanuel for the remainder of the 2012-2013 school year, and for the 2013-2014 school year.

¹¹ On October 15, 2012, the Learning Center had agreed to Parents request to move Student from a Head Start class to a State classroom. No changes to Student's IEP occurred as a result of the classroom transfer.

THE FEBRUARY 6, 2013 IEP

46. Irvine convened a three part annual IEP meeting for Student on January 23, January 28, and February 6, 2013 (the February 6, 2013 IEP). Student was four years old. In addition to other Irvine staff, a general education teacher attended each day of the IEP meeting. Mother and Father also attended each day of the meeting. The IEP team reviewed the results of an Learning Center progress report, and two independent evaluations which Parents had provided to Irvine prior to the IEP meeting. The independent reports included an occupational therapy assessment conducted by Cherie Francis and a psycho-educational evaluation conducted by Dr. Robin Morris. Neither Ms. Francis nor Dr. Hunter attended the IEP meeting.

47. The team first reviewed a progress report dated November 29, 2012, which had been composed by Learning Center staff and which detailed Student's progress on each IEP goal, up to his removal from the Learning Center on October 29, 2012. By that point, Student had 14 IEP goals which were designed to be attained by January 27, 2013. Student had met two of the 14 goals. Student achieved the visual perceptual goal in March 2012, and his goal in the area of campus navigation by November 2012. Student had yet to attain any of the remaining goals and he had not met a single remaining benchmark outside of the clinic setting.

48. The team next reviewed Ms. Francis' occupational therapy evaluation.¹² Ms. Francis reviewed Student's records, observed him at the Learning Center and at

¹² Cherie Francis received a bachelor's in occupational therapy and a certification in sensory integration and praxis. She has been a state licensed occupation therapist since 1986, and has extensive experience assessing children in the area of occupational therapy and providing occupational therapy in the school setting. She provided testimony for Student and she was persuasive witness.

Immanuel, and she administered formal and informal tests to Student at her clinic.¹³ Student had difficulty combining sensory motor and cognitive abilities in the performance of complex tasks. As a result, Student was delayed in his ability to copy designs and imitating hand positions. Student also had delays in body awareness, and planning and ideas, which impacted his ability to sit, to step over objects, and to navigate through objects. Student was significantly delayed in the area of balance and motion, which impacted his ability to utilize classroom equipment, stand, sit, and evidenced overall poor coordination. He also exhibited auditory delays and required directions being repeated. Student had difficulty following two-step directions, answering general questions, and repeating simple sentences.

49. Student also demonstrated vestibular processing delays. The vestibular system interprets information about bodily movement received by the inner ear. This influences postural control, visual/motor control, and an overall ability to function. Additionally, Student exhibited proprioceptive delays. Proprioception gives information from the joints and muscles about the location of the body and its movement. Student demonstrated weaknesses in his ability to hold a writing utensil, and increased his likelihood for being injured during play. Student also demonstrated delays in the areas of praxis and motor control. Praxis is the ability to plan, sequence and execute a motor task. Student had difficulty manipulating his hand and finger positions, lower body awareness, and motor planning. He was unable to copy a simple block design of three blocks. Student was clumsy, walked with an inward gait, and often fell or ran into objects or people. When he was standing still, he required something to lean on. He was unable

¹³ Ms. Francis administered the Miller Assessment for Preschoolers and the Sensory Processing Measure-Preschool.

to manipulate objects with his hands and needed assistance in this area 100 percent of the time.

50. Ms. Francis found that Student had hypotonia (decreased muscle tone), vestibular and proprioceptive processing delays, and fine and gross motor deficits. In her opinion, Student required clinic-based occupational therapy for one-to-two hours per week, in addition to what he had received in the classroom.

51. The February 6, 2013 IEP team also reviewed an independent psycho-educational evaluation which had been conducted by Robin Morris, Psy.D, M.F.T.¹⁴ Dr. Morris reviewed Student's records, interviewed teachers and assessors, observed him at Immanuel, and administered informal and standardized tests. Amongst other tests, she administered the Developmental Neuropsychological Assessment (NEPSY). On the NEPSY, Student scored at the second percentile in design copying and below the fifth percentile on comprehension of instructions. Student was unable to copy shapes or lines. Student's fine motor skills were an area of particular disability, and Dr. Morris recommended clinic based occupational therapy. Due to the severity of his fine motor deficit, Dr. Morris determined that Student qualified for special education under other health impairment due to Developmental Coordination Disorder, in addition to eligibility under speech and language impairment.

52. As a psychologist, Dr. Morris is concerned with a pupil's ability to generalize skills into the classroom. The areas of disability attributable to Student, including deficits in expressive language, fine motor and gross motor, poor attention,

¹⁴ Dr. Morris is a clinical psychologist who specializes in working with infants and children. She earned her bachelor's degree in 1991, her master's degree in clinical psychology in 1992, and her doctorate in 1997. During the hearing, she testified persuasively on behalf of Student.

and a need for redirection, fell beyond the scope of what could be successfully remediated through solely clinic based services. Rather, Student required the assistance of an education specialist, repeated instruction by a teacher, and a classroom of peers to model. Dr. Morris' report was consistent with her testimony, and both emphasized the need for Student to participate in a classroom. Overall, Dr. Morris recommended that Student be placed in a preschool classroom where he could receive repeated instruction, peer models, and generalize his skills. In addition, she recommended that Student receive clinic-based occupational therapy for two hours weekly, collaboration between the occupational therapist and classroom teacher, speech and language, and physical therapy.

53. The February 6, 2013 IEP team offered six new goals in the areas of expressive language, speech intelligibility, speech/motor ability, self-help and stair navigation.

54. The February 6, 2013 IEP offered Student speech and language services in a small group, for 45 minutes weekly; individual physical therapy services for 30 minutes, weekly; consultative physical therapy services, for 30 minutes per month; and, consultative occupational therapy services for one, 60 minute session per month. All of the services were offered exclusively in a clinic setting at the Learning Center. The consultative services were each offered in a single block, and without collaboration between the provider, teacher or staff. The IEP eliminated Student's specialized academic instruction and the preschool classroom. Irvine did not offer any form of educational placement in this IEP.

55. Although Irvine assessments of Student were approximately a year old or less, the IEP team determined that it had insufficient information regarding Student's present educational needs. The IEP team also believed that the information contained in the independent reports was unreliable. On this basis, Irvine provided Parents' an

assessment plan at the conclusion of the meeting. The plan offered school assessments in the areas of academics, speech and language, occupational therapy, physical therapy, health, self-help, social/emotional, and behavior. Parents did not consent to the assessment plan or to the February 6, 2013 IEP.¹⁵

STUDENT'S SPEECH AND LANGUAGE THERAPIST

56. Lindsey Woller has provided Student weekly speech and language services through the nonpublic agency Speech Pathology Associates since September 2013. Ms. Woller is a state licensed speech pathologist who received a master's of science in communication disorders in June of 2013. Prior to receiving her master's, Ms. Woller worked as a speech therapist for the Tustin and Santa Ana Unified School Districts. She testified on Student's behalf.

57. Based upon her direct provision of weekly services to Student, her review of school and independent testing, and progress reports conducted by staff at Speech Pathology Associates, Ms. Woller determined that Student had a speech disorder, an oral motor planning disorder, and an expressive language disorder. Student also had serious delays in the area of articulation and he had difficulty moving his mouth. Student's speech was intelligible 60 to 75 percent of the time. In comparison, speech intelligibly for a typical peer of comparable age should be nearly 100 percent. Student also required frequent redirection of his language skills throughout the day to remediate his disability. For these reasons, it was Ms. Woller's opinion that Student required direct speech and language services for 60 minutes each week and, due to the nature of his disability, carrying over the learning of these skills into a classroom.

¹⁵ Parents eventually consented to the assessment plan and, as of the hearing, Irvine was in the process of conducting the evaluations.

IRVINE'S SPEECH AND LANGUAGE THERAPIST

58. Elaine Haynes provided Student's school based speech and language therapy during the 2011-2012 and 2012-2013 school years, up to October 29, 2012, and she has observed him at Immanuel. Ms. Haynes received a bachelor's in communication sciences and disorders in 1999, and a master's in communication in 2006. She has a certificate of clinical competence in speech/language pathology and a clinical rehabilitative services credential, and she has been a licensed speech and language pathologist since 2006. She has worked for Irvine as a speech pathologist, where she has administered assessments and delivered services for pupils with speech and language delays, for over eight years. She provided persuasive testimony during the hearing.

59. Ms. Haynes was familiar with Student's speech and language goals. She described that the modality to address the goals in a manner that was embedded in the classroom, in addition to instruction provided by the speech therapist, was appropriate given the nature of Student's deficits. As a speech and language pathologist, Ms. Haynes believes it is important for disabled students to model the speech productivity of typically developing peers and to have the opportunity to incorporate what they learn into a classroom environment, which is more natural than a clinic setting. For Student, whose delays were predominantly expressive and pragmatic, it was particularly important to provide a classroom for Student to receive repeated instruction throughout the day, peer models, and to generalize his skills. A classroom teacher, in addition to a speech pathologist, was necessary to work on Student's articulation, vocabulary, eye contact, gaze, and orientation to speaker. As a result, Ms. Haynes did not agree with the February 6, 2013 IEP offer to eliminate Student's general education classroom placement. Rather, during testimony, she persuasively repeated several times that Student required a general education classroom to benefit from special education.

MS. GLEASON'S TESTIMONY

60. Laurie Gleason was Student's independent facilitator from July 2012 through October 2012. Ms. Gleason was responsible for providing Student's specialized academic instruction, which she provided as a "push in" service in the general education classrooms. She testified during the hearing. Overall, Ms. Gleason concluded that Student's IEP goals, and the modality described to attain his goals, were appropriate to meet Student's unique needs. The modality to attain the various goals included the specialized academic instruction she delivered to Student, and goals embedded in the classroom program.

61. Ms. Gleason was working with Student at the time of his October 25, 2012 accident. Similar to other Learning Center staff, Ms. Hunter had also instructed Ms. Gleason to take extra precautions when delivering services to Student because he was vulnerable to falling. As a result, Ms. Gleason was assisting Student in the restroom on this occasion. She was next to Student and helping him pull up his pants, when he leaned forward and fell. She quickly carried Student to the school nurse who attended to his injury. Although Ms. Gleason was distraught that Student had been injured under her care, there was little more that she, or Irvine, could have done to avoid this particular accident.

ROBIN HUNTER'S TESTIMONY

62. Robin Hunter has been employed by Irvine since 1994 as an elementary school teacher, coordinator of school readiness, program specialist, and since 2005, she has served as principal of the Learning Center. She testified on Irvine's behalf.

63. Ms. Hunter observed Student at the Learning Center, attended several of his IEP meetings, and she was familiar with Student's educational history and program. She also frequently corresponded with Parents in person and by email. Ms. Hunter

carefully addressed Parents' various concerns regarding Student's poor coordination. She instructed the teacher, classroom aides, and staff to take special precautions for Student, including keeping him at "arm's length" at recess and in the restroom.

64. Ms. Hunter facilitated the February 6, 2013 IEP meeting. She opined that the offer to eliminate Student's specialized academic instruction and classroom placement was based primarily upon data demonstrating that Student had progressed substantially during the past year, despite having several absences, and Irvine's conclusion that further school assessments were needed. Student had missed eight school weeks since last attending the Learning Center, and Irvine did not want to rely exclusively on its past assessments, the November 29, 2012 progress report, or the independent evaluations, to determine Student's present educational needs. For these reasons, the IEP team concluded it was necessary to obtain updated information from Irvine assessors.

65. Ms. Hunter is an experienced and competent school administrator. Her testimony regarding the steps Irvine took to create a safe environment for Student was persuasive. Ms. Hunter recognized early on that Student required a higher level of accommodation than what was normally provided Learning Center pupils, even those with disabilities. She communicated frequently with Parents and incorporated their safety concerns into Student's educational program. She ensured that Parents had an opportunity to meaningfully participate in the development of Student's special education program, and she facilitated six IEP meetings for Student over the course of one year in an effort to accommodate Parents' various requests. She quickly responded to Parents' letters and in addition to frequent IEP meetings, she met with them informally. Ms. Hunter diligently informed teachers and staff of Student's unique coordination delays, and she made certain that additional precautions were taken to ensure his safety in class, recess, and while in the restroom. Although Student did fall

while at school, Irvine staff was present at the time, within arm's length, and were able to immediately care for his injury. Student was not badly injured and the incident was not caused by a failure to act on the part of Irvine.

66. However, Ms. Hunter's testimony regarding the February 6, 2013 IEP was less persuasive than the testimony of other Irvine and Student witnesses; who generally described that Student's classroom was a necessary element of his special education. Her testimony was also incongruent with Irvine's November 29, 2012 progress report, which showed that Student had not progressed substantially since his prior IEP's. Finally, Ms. Hunter failed to support why her lack of confidence in the independent evaluations, or a desire for additional school assessments when Irvine had recently assessed Student, warranted the elimination of his specialized academic instruction and educational placement.

PARENTS' TESTIMONY

67. Mother and Father each testified on Student's behalf. They each complained that Irvine had failed to take sufficient steps to prevent Student from falling while at school.¹⁶ Parents did not believe that school staff routinely accompanied Student when he used the restroom, and they questioned the circumstances surrounding his October 25, 2013 injury. They did not believe that Ms. Gleason was with Student at the time of the injury, and they asserted that the nature of his injury indicated that he fell from a higher distance from the ground than the toilet seat. On this point, Parents' testimony was not as persuasive as Ms. Gleason's, who credibly testified that

¹⁶ During the hearing, Father asserted that Irvine denied Student's educational rights by failing to provide him an individual aide at all times to ensure that he didn't fall. However, Student failed to allege a denial of FAPE on this basis and the Decision will therefore not examine this issue.

she was present at the time of Student's accident. Ms. Gleason's testimony was also corroborated by other Irvine staff, including the school nurse Janet Penny-Cook, who cared for Student immediately following the accident and witnessed Ms. Gleason rush Student into the nurse's office. Ms. Hunter, Ms. Ecarma, and Student's classroom aide Joshua Lee, also persuasively testified that school staff was instructed to be within arm's length of Student at all times, including when he was utilizing the restroom.

68. Father, who is a Yale educated attorney, complained that Mother, given her lack of legal training, did not have the ability to make an informed waiver to excuse the general education teacher at Student's initial IEP meeting. On this basis, Parents argue that the excusal of the general education teacher at Student's initial IEP meeting was unlawful. However, Mother was a capable adult who maintained, along with Father, legal custody of Student.

69. Parents further argued that they would not have consented to a special day class had they been informed that the Learning Center included general education preschools at the time of the initial IEP meeting. However, Mother was informed of the Learning Center's continuum of programs, including its general education preschools, at both the in-take meeting and during the initial IEP meeting. Ms. Garron persuasively testified that she reviewed the continuum of programs with Mother during the in-take meeting. Mr. Viney similarly testified that he had reviewed the continuum of programs during the initial IEP meeting that Mother attended and participated in. Mother was unable to recall whether this information was discussed at either meeting.¹⁷ For these

¹⁷ Father did not attend either the November 8, 2011 in-take meeting, or the January 27, 2012 IEP. He could not recall discussing either meeting with Mother at the time they occurred.

reasons, the testimony provided by Irvine that it timely informed Parents of its continuum of programs was more persuasive than that provided by Parents.

70. On October 29, 2012, Parents informed Irvine in writing of their intent to remove Student from the Learning Center, to place him in a private school, and to seek reimbursement for the private placement from Irvine. Following his removal, Parents carefully considered various private schools to best meet Student's needs. They chose Immanuel due to its small class size of ten students per class, peer models, structure, and due to the physical layout of the campus restrooms which were designed to accommodate preschool aged pupils like Student. Immanuel kept track of Student's progress and shared these progress reports with Irvine. Student responded well to the small class size and teaching modality, and he progressed socially and academically while at Immanuel. Tuition at Immanuel was \$200 per month, plus an annual enrollment fee of \$200. In addition to Immanuel, Parents privately funded speech and language, physical therapy, equine therapy, and occupational therapy for Student. Launchpad Therapy for Kids (Launchpad), a nonpublic agency, provided private occupational therapy one hour per week from September 2012 through May 2013, at which time Parents stopped the occupational therapy due to financial constraints. Parents have intermittently increased, decreased, and terminated services due to costs.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹⁸

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it.

¹⁸ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) 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 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).)¹⁹

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.) 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 Dist. 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

¹⁹ References to the Code of Federal Regulations are to the 2006 version unless otherwise indicated.

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).) 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 a preponderance of the

evidence].) In this case, Student is the petitioning party and therefore had the burden of persuasion for all issues.

ISSUE 1: PROCEDURAL VIOLATIONS DURING THE 2011-2012 SCHOOL YEAR:

5. Student complains that Irvine denied him various procedural rights during the 2011-2012 school year, beginning at his January 27, 2012 initial IEP.

6. 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.)

a) Failing to Include a General Education Teacher as Part of Initial IEP Team:

7. Student first complains that Irvine violated his right to have a general education teacher attend the January 27, 2012 IEP meeting. Irvine does not dispute that a general education teacher is a required member of the IEP team or that one was not in attendance at the meeting, but claims that Student excused the general education teacher's attendance for this meeting.

8. The IEP team consists of the parents of the child; not less than one regular education teacher of the child; not less than one special education teacher or provider of the child; a representative of the LEA; an individual who can interpret the instructional implication of evaluation results; and at the discretion of the parent or agency, other

individuals who have knowledge or special expertise regarding the child; and whenever appropriate, the child. (34 C.F.R. § 300.321(a))

9. A mandatory member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parent and the district agree, in writing, that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (34 C.F.R. § 300.321) The IDEA makes a distinction between the excusal of IEP team members whose area of service is being discussed and excusal of IEP team members whose area is not being discussed. The excusal of a team member whose area of service is not being modified or discussed requires a written agreement between the parent and the school district, while the excusal of a team member whose area of service is being modified or discussed requires written consent. (34 CFR 300.321(e)(2).) In either case, the excusal of a mandatory IEP team member is permissible if the parent and the school district consent in writing to the excusal. The IDEA does not prohibit excusals for initial IEP team meetings, prohibit certain IEP team members from being excused, or limit school districts and parents from agreeing to excuse IEP team members. (71 Fed. Reg. 46,675 (2006).)

10. While excusal of the general education teacher may limit a student's procedural rights, that outcome, by itself, is not unlawful. *K.E. ex rel. K.E. v. Independent School District No. 15* (8th Cir. 2011) 647 F. 3d 795, 806.

11. Here, Mother consented in writing to excuse the attendance of a general education teacher for Student's initial IEP meeting of January 27, 2012. On November 8, 2011, Mother met with Irvine coordinator Ms. Garron to discuss the Learning Center's policies and procedures, programs, and to develop an assessment plan and set an initial IEP meeting. Ms. Garron explained the continuum of programs available at the Learning Center, including the general education classes. Given Students' therapeutic history as a

client of the Regional Center, developmental delays, and suspected autism, Mother and Ms. Garron agreed that a general education class would not be discussed or an existing general education class modified at the pending IEP meeting. Irvine and Mother therefore agreed to excuse the attendance of a general education teacher for the January 27, 2012 IEP meeting.

12. Student does not dispute that Mother provided her written consent to excuse the attendance of a general education teacher at the IEP meeting. Rather, Student argues that Mother's excusal was not an informed waiver. Student argues that Mother did not understand the legal significance of excusing a general education teacher and contends that her written excusal was invalid. However, Mother was not a conserved adult, and she, along with Father, were Student's legal guardians, with all of the applicable rights and obligations. Moreover, Student provided no factual support establishing that Mother was incapable of making educational decisions on behalf of Student. To the contrary, Mother was a capable adult who solely attended meetings and signed assessment plans on Student's behalf. Student also failed to provide legal support establishing that Irvine's reliance on Mother's written excusal of an IEP team member was invalid due to her lack of legal training. This argument, if accepted, would place an onerous burden on school districts who would then be required to examine the legal knowledge of each parent. Such a requirement is overly burdensome and is not prescribed by law. As a consequence, it was reasonable for Irvine to rely on Mother's written excusal of a general education teacher.

13. Student did not meet his burden of persuasion establishing that Irvine procedurally denied Student a FAPE during the January 27, 2012 IEP, by failing to include a general education teacher as part of his initial IEP team meeting. Uncontroverted evidence shows that Mother lawfully consented to the excusal of the attendance of a general education teacher for this IEP meeting.

b) Predetermining Placement and Services:

14. Student next contends that the IEP's that Irvine offered Student during the 2011-2012 school year were predetermined. Irvine argues that Parents were integral participants in the development of Student's IEP's.

15. A procedural violation occurs when a district violates one or more of the procedures set out in federal or state law for holding IEP meetings and developing IEPs. Parents are an integral part of the IEP team, and their opinions and concerns must be addressed and considered by the IEP team. If a district predetermines the offer of placement it prevents the student's parents from participating in the IEP process. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.)

16. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

17. The IDEA also imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. Parents play a "significant role" in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001, 167 L.Ed. 2d 904].); 20 U.S.C. § 1414 (d)(1)(B)(i); Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.3d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when he or

she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693.)

18. The weight of the evidence demonstrated that Irvine did not predetermine its offer of placement and services for Student. Mother attended the January 27, 2012 initial IEP team meeting, and actively participated by asking numerous questions, commenting on various aspects of the multi-disciplinary assessment, providing additional input, and requesting an additional assessment in the area of autism. Irvine staff fastidiously discussed the assessment with Mother, considered her input, and agreed to her request for further assessment. Student's private therapists from Nyansa also participated in the IEP meeting and shared information pertaining to Student's performance and disability. Mr. Viney discussed the full continuum of programs available at the Learning Center, and there was no evidence provided which indicated that Mother's participation during the meeting was inhibited.

19. Student primarily argues that the IEP was predetermined because a general education teacher was not in attendance. Student submits that had a general education teacher been present, he or she would have shared with Parents information regarding the continuum of placements available at the Learning Center. Upon receiving this information, Parents would not have consented to a special day class. However, Irvine informed Parents of the continuum of programs, including its general education preschools, prior to the IEP meeting during the November 8, 2011 intake meeting, and again during the January 27, 2012 initial IEP meeting. Ms. Garron persuasively testified that she reviewed the continuum of programs during the intake meeting, and Mr. Viney similarly testified that he had reviewed the continuum of programs during the initial IEP meeting. On the other hand, Mother was unable to recall, or deny, what had been

discussed at either meeting. As a result, testimony provided by Irvine on this issue was more persuasive than that provided by Student.

20. Also during the 2011-2012 school year, Irvine convened an addendum IEP meeting for Student on March 21, 2012. Mother and Father participated during the meeting, along with a general education teacher and other Irvine staff. Mother and Father each meaningfully participated during the meeting by asked questions and making suggestions pertaining to Student's educational program. Irvine modified Student's IEP based upon Parent's input by adding two new goals, agreeing to collect data to develop two more goals, adding a weekly log, and agreeing to increase Student's mainstreaming.

21. Irvine convened additional addendum IEP meetings on April 16 and June 5, 2012. Parents meaningfully participated during each meeting. During the June 5, 2012 meeting, Parents were accompanied by an educational advocate and a private therapist, Ms. Sawitz, who also participated during the meeting. Based upon the requests of Parents, the educational advocate, and Ms. Sawitz, the June 2012 IEP adopted a new physical therapy goal and changed Student's placement for the following school year from a special day class to a general education class.

22. At each IEP meeting, Parents had the opportunity to and did ask questions and share their concerns as they related to Student's educational program. Their ability to participate in the development of Student's educational program was not inhibited in any manner by Irvine. To the contrary, Irvine staff was receptive to Parents' input and incorporated some of their requests into each IEP.

23. Student failed to establish by a preponderance of evidence that Irvine procedurally violated the IDEA by predetermining its offer of placement and services, or denied Parents the opportunity to meaningful participation in the development of Student's educational program, during 2011-2012 school year.

c) Failing to Discuss the Continuum of Placement and Service Options:

24. Student complains that he was denied a FAPE because Irvine failed to discuss a continuum of placement options, in particular, a general education placement, during the 2011-2012 school year. Irvine convened four IEP's for Student during this time frame, including meetings held on January 27, March 21, April 16, and June 5, 2012. Student asserts that the IEP's only considered placement in a special day class.

25. A school district is required to have a continuum of program options available for a child. (Ed. Code, § 56360.) The continuum of program options includes, but is not limited to regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction; and instruction using telecommunications in the home or hospitals or institutions. (Ed. Code, § 56361.)

26. Student did not meet his burden of establishing that Irvine denied him a FAPE by failing to discuss and consider a continuum of placements at the January 27, 2012 IEP meeting. Mr. Viney meticulously discussed the continuum of placements located at the Learning Center, including the general education preschool classes. Furthermore, Ms. Avzaradel, who has a general education credential and experience in the general education preschool curriculum, was present at the January 27, 2012 IEP meeting, and Mother was heavily involved in the development of the IEP.

27. Following the January 2012 IEP meeting, Parents requested, and were provided an opportunity to observe the various classes at the Learning Center, including a general education classroom.

28. Irvine convened addendum IEP meetings on March 21, 2012, and June 5, 2012, each which included general education teacher Suzanne Martinez. Mother and Father participated during the meetings, asked questions regarding the various

preschool classes at the Learning Center, and Irvine agreed to Parents request to increase Student's exposure to the general education class at each meeting. During the March 2012 meeting, Irvine agreed to Parents' request to increase Student's mainstreaming by adding four, 30 minute sessions of mainstreaming per week. During the June 2012 IEP, Irvine agreed to Parents' request to change Student's primary educational placement from a special day class to a general education classroom.

29. During the November 2011 in-take meeting and prior to Student's first IEP meeting, Irvine provided Mother a document detailing the continuum of placements, including the Head Start and State general education preschools, which were available at the Learning Center.

30. Consequently, the evidence overwhelmingly substantiated that Irvine provided Parents adequate information regarding its continuum of placements during the 2011-2012 school year.

ISSUE TWO: SERVICES AND THE LEAST RESTRICTIVE ENVIRONMENT DURING THE 2011-2012 SCHOOL YEAR:

31. An IEP must include related services that are required to assist a child in benefiting from special education. "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) Behavior Services:

32. Student first complains that Irvine failed to provide him adequate behavior services.

33. Student failed to meet his burden of persuasion. Irvine staff uniformly testified that Student did not demonstrate any behavior while at school which warranted

intervention. The classroom teacher, Ms. Ecarma, persuasively testified that Student was well mannered and not disruptive. Similarly, Ms. Gleason testified that, although easily distracted, she enjoyed working with Student and that he did not require behavioral intervention. Finally, during the 2012 multidisciplinary assessment, Mr. Viney comprehensively tested Student in areas of social, emotional, and behavioral development. Based upon formalized testing and observation, Mr. Viney credibly determined that Student's did not require behavioral intervention. Further observations conducted by Mr. Viney in February and March 2012 supported his prior testing.

34. In contrast, Student failed to present any documentary evidence or to elicit any persuasive testimony which established that Student experienced behavioral difficulty while at school which limited his access to, or benefit from, special education. To the contrary, Parents believed that Student's lack of disruptive behaviors supported their request that Student should be placed in a general education class instead of the special day class he was initially provided. Student's lack of behavioral difficulty also supported Parents' requests to increase Student's mainstreaming opportunities during the March and June 2012 IEP's. The IEP teams agreed with Parents' observation that Student was not an overly disruptive student; which, in part, formed the team's basis for increasing his mainstreaming at each IEP.

35. Student failed to establish by a preponderance of evidence that he required behavior services during the 2011-2012 school year to receive a FAPE.

b) Speech and Language Services:

36. Student next contends that the speech and language services which Irvine offered during the 2011-2012 school were inadequate to meet his unique needs. Student asserts that he required 60 minutes per week of speech and language services in contrast to the 30 minutes, six times monthly, of services which Irvine offered.

37. Student's primarily relied upon the testimony of Ms. Woller to support his claim that he required additional speech and language services. Ms. Woller is an experienced speech and language pathologist, however, her testimony failed to account for the educational placement which was provided as part of Student's January 27, 2012 IEP. In addition to the 30 minutes weekly of speech and language services, Student was provided a structured, language intensive special day class. Although he was transitioned to a less restrictive general education classroom in the fall, the general education classroom teacher continued to utilize the same language intensive General Language General Speech Patterns program which was employed in Student's special day class. As a result, Student received a language rich classroom which supplemented his direct services. The importance of addressing Student's language needs while in a classroom was supported by Irvine's speech and language therapists Ms. Hill and Ms. Haynes; and was consistent with Ms. Woller's testimony that Student required a classroom to supplement his direct instruction and to generalize his skills.

38. Given Irvine's offer of a language intensive classroom during the 2011-2012 school year, in conjunction with the direct speech and language therapy, Student failed to establish by a preponderance of the evidence that Irvine denied him a FAPE by failing to provide him adequate speech and language therapy during the 2011-2012 school year.

c) Physical Therapy:

39. Student asserts that the amount of physical therapy provided by Irvine during the 2011-2012 school was insufficient to meet his unique needs.

40. The parties do not dispute that Student experienced delays in areas related to physical therapy. He had low muscle tone, poor coordination, difficulty ascending and descending steps, and ambulating over uneven terrain. To address these concerns, Irvine provided Student an evaluation in the area of physical therapy by an

experienced assessor, Ms. Barton. Pursuant to her observations and testing, Ms. Barton recommended that Student receive physical therapy, and her recommendations were adopted by the January 27, 2012 IEP team. In accord with her recommendations, Irvine offered Student individual physical therapy services for 30 minutes per week. In addition to the direct physical therapy, physical therapy goals were embedded in the classroom and worked on with Student by his teacher and aides. Parents consented to this offer and no other information was made available to the IEP team regarding Student's physical therapy needs.

41. At the end of the 2011-2012 school year, on June 5, 2012, Parents first provided Irvine an independent physical therapy report. The assessor, Ms. Sawitz, found identical delays to those found by Ms. Barton, yet recommended an increase in services, which Irvine declined.

42. The evidence established that Student had benefited from the level of physical therapy services offered by Irvine. During the June 2012 IEP meeting, information provided by school staff showed that Student had meaningfully progressed in this area of deficit, and staff reported that Student had been observed successfully navigating the campus. Ms. Ecarma observed Student develop physically based upon the physical therapy provided, and he required less support during recess and toileting as the year progressed. Ms. Hunter found that Student had made progress on his physical therapy goals, and he had met his benchmarks pertaining to stair navigation and campus navigation.

43. Student primarily argued that Irvine was required to adopt the recommendations presented by his independent assessor. Contrary to Student's argument, a school district has the right to select a program and services for a special education student, as long as the program and the service providers meet the student's needs; the IDEA does not empower parents to make unilateral decisions about

programs or services funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist.* No. 2580 (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Here, the evidence substantiated that Student benefited from the level of physical therapy services provided by Irvine, and did not require additional physical therapy services to receive an educational benefit.

44. Student did not establish by a preponderance of the evidence that Irvine denied Student a FAPE by failing to provide him adequate physical therapy during the 2011-2012 school year.

d) Occupational Therapy:

45. Student contends that Irvine denied him a FAPE by failing to provide occupational therapy during the 2011-2012 school year. For Student, this year began in January and ended in June 2012. Student's operative IEP for the 2011-2012 school year, the January 27, 2012 IEP, did not offer direct occupational therapy; however, Student's special day class had occupational therapy embedded in the classroom program.

46. Student correctly argued that multiple assessors found that Student demonstrated serious delays in the area of occupational therapy. Irvine's occupational therapist, Ms. Cornell observed that Student exhibited weak muscles and had difficulty manipulating objects with his hands and he had difficulty maintaining a functional grasp on a writing utensil. Based upon her observations and testing, Ms. Cornell concluded that Student required occupational therapy to access and to participate in his daily school program. Student's independent occupational therapy assessor, Ms. Francis, found that Student had hypotonia, vestibular and proprioceptive processing delays, and fine and gross motor deficits. As a result, he had poor postural control, body awareness, safety awareness, balance, and fine motor delays. She recommended that Student receive direct occupational therapy one-to-two hours per week, in a clinic setting, along

with classroom intervention. Finally, Student's independent psychoeducational assessor, Dr. Robin Morris, persuasively testified that Student's fine motor skills were a particularly deficient and she recommended direct occupational therapy in addition to classroom consultation. Dr. Morris found that Student qualified for special education under other health impairment due to Developmental Coordination Disorder, along with eligibility under speech and language impairment. The evidence presented by both Student and Irvine credibly established that Student required occupational therapy to benefit from special education.

47. However, the IEP team did not receive Ms. Cornell's assessment until September 14, 2012. It did not receive Ms. Francis's report until the February 6, 2013 IEP meeting. Similarly, Dr. Morris's findings were not reviewed by the IEP team until February 6, 2013. Thus, the information contained in each report was not yet made available to Student's IEP team during the 2011-2012 school year.

48. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) Here, there was no information available to the January 27, 2012 IEP team which indicated that Student required occupational therapy services, outside of what was already embedded in Ms. Ecarma's special day class. This service included collaboration between Irvine's occupational therapist Ms. Cornell, and the teacher, with services delivered in the classroom on a weekly basis. Information that Student required a greater level of occupational therapy intervention was not made available to the IEP team until the following school year.

49. Consequently, given the information which was available to the IEP team at that time, a preponderance of evidence failed to establish that Irvine denied Student a FAPE by failing to offer him adequate occupational therapy services during the 2011-2012 school year.

e) The Least Restrictive Environment:

50. Student asserts that his initial IEP of January 27, 2012 denied him a FAPE by failing to provide placement in the least restrictive environment. Student claims that the special day class Irvine provided him was too restrictive, and that he instead required a general education class.

51. Both Federal and State law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006); Ed. Code, § 56040.1.)

52. In light of this preference for the least restrictive environment , and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit Court of Appeals, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403 (*Rachel H.*), adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. An alleged violation of least restrictive environment is analyzed under the

substantive FAPE analysis. (*Ms. S. v. Vashon Island School Dist.* (9th Cir.2003) 337 F.3d 1115, 1136-1137.)

53. Student did not meet his burden of persuasion on this issue. As to the first factor of *Rachel H.*, information available to Irvine at the time of the January 27, 2012 IEP identified Student as a pupil with developmental delays that the IEP team determined, and necessitated the provision of specialized academic instruction in a special day class. For example, independent information from Mother and Nyansa reported that Student experienced delays in functional communication, social-play interactions, pragmatic abilities, overall muscle strengthening, interactions with others, eye contact, response to name, fine motor skills, adaptive skills, and sensory processing. Student had difficulty progressing on goals despite being provided one-to-one instruction. Moreover, Mother expressed concern that Student may be autistic, thereby requiring more, not less, intervention, which would not have been appropriate in the general education setting. Recent testing also determined that Student exhibited pre-emerging skills that were behind his chronological age and which required a greater level of intervention than what could be delivered in a general education setting. Multiple assessors concluded that Student had poor eye contact, difficulty orienting to the examiner, and he required frequent prompting and adult assistance to complete the testing. Mr. Viney found that Student's adaptive skills were delayed, and Student demonstrated serious delays in the areas of communication, social skills, and self-care. Ms. Brown determined that Student exhibited delays in the areas of attention and memory, visual perception, problem solving, and number concepts. Ms. Hill reported that Student demonstrated delays in the area of pragmatic communication, gestural communication, and social conventions. She found Student's expressive language "to be significantly below age expectations." The school assessors credibly concluded that Student required a greater level of intervention than that which could be provided in a general education class.

54. The evidence therefore established that the January 27, 2012 IEP team appropriately concluded that Student required a placement with intensive specialized academic instruction in a special day class, and which, while more restrictive to what was afforded in a general education classroom, was the least restrictive environment for Student. Because evidence established that, as of the January 27, 2012 IEP, Student required a special day class to benefit educationally from his placement, it is not necessary to examine the remaining *Rachel H.* factors

55. On March 21, 2012, Irvine again reviewed the restrictiveness of Student's classroom placement. Student's teacher, Ms. Ecarma, persuasively testified that Student had been appropriately placed in her mild-to-moderate special day class. Student was receptive to his classroom placement and responded well to teacher-led instruction. The team also considered how well Student had responded during his mainstreaming opportunities and agreed to increase his mainstreaming to almost daily occurrences. Irvine's offer for placement in the mild-to-moderate SDC, where Student could receive specialized instruction, along with additional mainstreaming opportunities in the regular education class, was a deliberative and thoughtful reconciliation of Student's unique impairments and abilities.

56. On June 5, 2012, Irvine yet again reviewed the restrictiveness of Student's classroom. Information available to the IEP team at that time revealed that Student could benefit from specialized academic instruction delivered in a general education classroom; which the team offered, along with other related services.

57. Accordingly, the evidence established that, at all times, Irvine carefully considered the restrictiveness of Student's classroom placements and appropriately placed him in a special day class. Consequently, a preponderance of the evidence substantiated that Irvine offered Student placement in the least restrictive environment during the 2011-2012 school year.

ISSUE THREE: RESPONSE TO PARENTS' REQUESTS FOR IEE'S:

58. Student complains that Irvine failed to respond to Parents requests for IEE's. Student's allegation pertains to two separate requests for IEE's; the first occurred on February 17, 2012, and the second occurred on June 5, 2012.

59. When a parent disagrees with a school district's assessment, he or she may request an IEE at public expense. The school district must either provide the IEE at public expense, or initiate a due process hearing without unnecessary delay. (34 C.F.R. § 300.502(b).)

60. On February 17, 2012, Father sent Ms. Hunter a letter wherein he requested an unspecified IEE at public expense. On May 5, 2012, Ms. Hunter met with Parents to discuss their IEE request, and other concerns. She explained to Parents a school district's obligation to either pay for the IEE, or to quickly initiate a due process hearing. Following the meeting, Father sent an email to Ms. Hunter wherein he withdrew Parents' IEE request.

61. Student does not dispute that Parents withdrew their IEE request. Rather, Student asserts that Parents' withdrawal by itself was an insufficient basis for Irvine to forgo further responding to the IEE request because Ms. Hunter had explained Irvine's right to initiate a due process hearing. However, Student failed to provide a legal basis for why it was impermissible for Irvine to explain this right to Parents; or why Irvine should not have relied upon Parents' written notice withdrawing the IEE request. As a result, Irvine's conduct, including its reliance on Parents' withdrawal of their request for an IEE, was proper; and no further action on the part of Irvine was required.

62. During the June 5, 2012 IEP, Parents requested that Irvine fund an IEE in the area of physical therapy. Parents were unclear whether they desired for Irvine to fund the independent physical therapy evaluation, which was conducted by Ms. Sawitz, or to fund a new physical therapy IEE. On June 18, 2012, Ms. Hunter sent a letter to

Parents wherein Irvine agreed to fund an IEE for physical therapy. She requested that Parents provide her the name and contact information for their desired independent assessor so Irvine could fund the report. However, Parents failed to cooperate with Irvine's request. Moreover, no evidence, or allegation, was offered or admitted establishing that Irvine would refuse to pay for the IEE if Parents did respond to Ms. Hunter's letter. Given these circumstances, it would be inequitable to find that Irvine denied Student a FAPE by failing to properly respond to Parents' request for a physical therapy IEE.

63. Based upon the foregoing, Student failed to meet his burden of establishing that Irvine denied him a FAPE by failing to properly respond to Parents' request for IEE's.

ISSUE FOUR: PROCEDURAL VIOLATIONS DURING THE 2012-2013 AND 2013-2014 SCHOOL YEARS:

64. Legal Conclusions six is incorporated by reference.

a) Parents' Input and Consideration of IEE's Obtained by Parents:

65. Student complains that Irvine failed to consider Parents' input and the results from Student's IEE's primarily because Irvine failed to completely adopt the recommendations of Student's independent assessors.

66. Per Legal Conclusions 18, a school district is required to ensure that parents of disabled children are provided the opportunity to meaningfully participate in the development of their child's IEP. However, as found in Legal Conclusions 45, the IDEA does not empower parents, or their independent assessors, to make unilateral decisions about programs or services funded by the public.

67. The evidence established that Irvine did not deny Student a FAPE by failing to consider input from Parents or by failing to consider the results of IEE's. To the

contrary, Irvine devoted substantial time to the consideration of Parents and their private assessors.

68. On June 5, 2012, Irvine convened an addendum IEP meeting pursuant to Parents' request for an IEP meeting. The primary purpose of the meeting was for the IEP team to review a recent physical therapy report which had been completed by Student's independent assessor, Ms. Sawitz. Ms. Sawitz attended the IEP meeting and shared the results of her report with the team. Parent's, Ms. Sawitz, and Irvine staff engaged in a robust dialogue pertaining to the independent evaluation and Student's educational program. Irvine did not prevent Parents or Ms. Sawitz from discussing the report and asking questions regarding Student's related needs and educational program. Irvine did not agree to increase Student's physical therapy as recommended by Ms. Sawitz; however, based upon the independent evaluation, Irvine agreed to add a new physical therapy goal, in the area of upright posture. Based upon Parents input, Irvine also agreed to significantly increase Student's level of mainstreaming and, beginning in July 2012, transferred Student from a special day class to a general education preschool.

69. Irvine convened another addendum IEP meeting for Student on September 14, 2012. The purpose of the meeting was to review an Irvine occupational therapy assessment. Parents attended and participated meaningfully during the meeting. Mother and Father each had an opportunity to ask questions and provide input regarding Student's educational needs and program. Based upon Parents' request, the September 2012 IEP team adopted a new goal for Student, in the area of toileting.

70. Irvine convened a three part annual IEP meeting for Student on January 23, 2013, January 28, 2013, and February 6, 2013. Mother and Father each attended this meeting. During the meeting, Irvine carefully reviewed the results of two independent reports, an occupational therapy report completed by Ms. Francis, and a psycho-educational report which had been completed by Dr. Morris. The results of each

assessment were recorded in the IEP document and considered by the IEP team. Mother and Father each meaningfully participated in a vigorous dialogue with Irvine staff regarding the independent reports, Student's unique needs, and his educational program.

71. During the hearing, Student failed to present any evidence or to elicit any testimony which showed that Parents, or their assessors, were neglected in their ability to attend and participate at any IEP meeting. To the contrary, voluminous evidence, including audio recordings of the IEP meetings, overwhelmingly showed that Parents, their advocates, and assessors, were provided sufficient opportunity to meaningfully participate in the development of Student's IEP's.

72. For the foregoing reasons, Student failed to substantiate by a preponderance of the evidence that Irvine denied him a FAPE by failing to consider input from Parents or to consider the results of Student's IEE's.

b) Input from a General Education Teacher Regarding Placement and Services:

73. Irvine included the attendance of a general education teacher for each IEP meeting which was held for Student during the 2012-2013 and 2013-2014 school years. For example, general education teacher Suzanne Martinez attended the June 5, 2012 IEP addendum, which established Student's placement for the 2012-2013 school year. A Head Start general educational teacher attended the September 14, 2012 addendum IEP meeting, and Fabiola Torres, a State preschool general education teacher attended all three parts of Student's February 6, 2013 annual IEP.

74. Student failed to submit any evidence or to elicit any testimony establishing that Parents were inhibited from discussing Student's program with the general education teachers during the IEP meetings. To the contrary, as discussed

above, evidence established that Parents were meaningful participants at each IEP meeting.

75. Consequently, Student did not meet his burden by the preponderance of evidence that Irvine denied him a FAPE based upon its failure to include input from a general education teacher regarding Student's placement and services during the 2012-2013 and 2013-2014 school years.

ISSUE FIVE: SERVICES AND SUPPORTS DURING THE 2012-2013 AND 2013-2014 SCHOOL YEARS:

76. For the 2012-2013 and 2013-2014 school years, Student alleges that he was denied a FAPE based upon Irvine's failure to provide various services. Student asserts that these failures led to an unsafe environment, are causally related to Student's injury while at school, and denied him an educational benefit.

Sub-issues (a) and (b): Behavior Services and Safety Supports:

77. The evidence does not support Student's claim that he required additional behavior supports or services during the 2012-2013 or 2013-2014 school years. Student failed to submit any evidence, or to elicit any testimony which substantiated that he required behavior intervention services. To the contrary, Student was well-behaved, responded to his teacher's instruction and redirection, and was not disruptive. In part, Student's lack of behavioral deficit formed the basis for the lesser restrictive placement, the general education class, which Irvine offered prior to the start of the 2012-2013 school year.

78. Similarly, Student failed to substantiate that he required additional services or accommodations to ensure his safety throughout the school. It is undisputed that Student had fine and gross motor delays which made him vulnerable to falling. As a consequence of these delays, Irvine provided Student direct physical therapy and

consultative occupational therapy. In sum, IEP's offered four goals which were specifically designed to target Student's gross and fine motor delays, toileting, and related delays. Each goal worked to decrease Student's vulnerability for injury. During his time at the Learning Center, Student progressed in balance, coordination, and his ability to safely navigate throughout the campus.

79. Additionally, Ms. Hunter met formally and informally with Parents to address their concerns pertaining to Student's safety at school. On this basis, Ms. Hunter instructed Irvine staff to uniquely accommodate Student. Teachers, aides, and Student's independent facilitator were directed to vigilantly watch over Student and to keep him within arm's length at all times. Notwithstanding the various steps Irvine took to remediate Student's susceptibility to falling, on one occasion, on October 25, 2012, Student did fall at school and was injured. However, the accident was not indicative of Irvine neglecting Student's safety or unique educational needs.

80. Parents' testimony that Irvine staff was not instructed to accompany Student while using the restroom was not as persuasive as Ms. Gleason's, who credibly testified that she was present at the time of Student's accident. Ms. Gleason's testimony was also corroborated by other Irvine staff, including the school nurse Janet Penny-Cook, who cared for Student immediately following the accident and who witnessed Ms. Gleason rush Student into the nurse's office. Ms. Hunter, Ms. Ecarma, and Student's classroom aide Mr. Lee, also testified that Ms. Hunter had instructed school staff to be within arm's length of Student at all times, including when was utilizing the restroom.

81. Student failed to show by a preponderance of the evidence that Irvine substantively denied him a FAPE by failing to utilize appropriate behavior strategies to address toileting issues at Student's Head Start placement, or by failing to provide appropriate supports and services in the general education environment to allow Student to safely participate in the program at all times.

c) Speech and Language Services:

82. The parties do not dispute that Student had serious expressive language delays which impacted his educational development. Student's primary handicapping condition was speech and language impairment, and each IEP offered Student at least direct speech and language services.

83. Student did not meet his burden of persuasion that Irvine denied him a FAPE based upon its offer of speech and language services per the February 6, 2013 IEP. The IEP offered speech and language services in a clinic setting for 45 minutes each week. Student's independent expert, Ms. Woller, recommended that Student receive 60 minutes of direct speech and language therapy each week. However, she conceded that Student had gained some progress on his speech and language skills when he was receiving the present level of services offered (previously offered at 30 minutes, six times per month), when the services were accompanied by a classroom placement. The classroom itself was an apparatus of Student's speech and language, where he received repeated instruction from the teacher, peer models, and an opportunity to generalize his skills. Irvine's speech and language therapists Ms. Hill and Ms. Haynes each credibly testified that Student had benefitted from his speech therapy, when it was accompanied with a classroom placement. Therefore, it stands to reason that Student would have benefitted from 45 minutes of speech and language, which was just nominally less than the 60 minutes Ms. Woller recommended, had a classroom placement been included with the IEP offer. As a consequence, as more fully discussed in Issue Six, Irvine's failure to offer Student a classroom placement in the February 2013 IEP denied him a FAPE, not the duration of the speech and language services.

d) Occupational Therapy Services:

84. Student next complains that Irvine denied him a FAPE during the 2012-2013 and 2013-2014 school years because the school district failed to provide him adequate occupational therapy.

85. On September 14, 2012, additional information regarding Student's occupational therapy needs was brought to Irvine's attention. At that time, Ms. Cornell, concluded that Student required occupational therapy to access and to participate in his daily school program. The IEP team adopted an occupational therapy goal which was intended to increase Student's ability to use his hands to manipulate objects. The addendum IEP added 60 minutes of occupational therapy consultative services, to be used sequentially throughout the month. The people responsible for implementing the service and goal were the independent facilitator, the classroom teacher, and the occupational therapist. Irvine's occupational therapist, Ms. Cornell, described the occupational therapy as a classroom based service, whereby she would observe Student in the classroom, directly assist Student at times, and provide therapy instruction to the teacher and staff who would incorporate her instructions into the classroom throughout the day.

86. On February 6, 2013, the IEP team received additional information regarding Student's occupational therapy needs pursuant to Ms. Francis's occupational therapy evaluation. Ms. Francis is an experienced occupational therapist who testified persuasively during the hearing. She found that Student had hypotonia, vestibular and proprioceptive processing delays, and fine and gross motor deficits. As a result, he had poor postural control, body awareness, safety awareness, balance, and fine motor delays. She recommended that Student receive direct occupational therapy one-to-two hours per week.

87. Also on February 6, 2013, the IEP team had Dr. Morris's psycho-educational evaluation. Dr. Morris similarly found that Student required occupational therapy to benefit from special education. Dr. Morris is a highly qualified assessor with many years of experience assessing students with varying types of disabilities. She persuasively testified that Student's fine motor skills were a particularly deficient area of need, and she recommended direct occupational therapy. Based upon her testing and observations, Dr. Morris determined that the degree of Student's disability warranted an additional area of eligibility, that of Developmental Coordination Disorder.

88. Based on information which was available to the IEP team as of February 6, 2013, offering Student occupational therapy solely as a consultative service would not meet his needs to receive a meaningful benefit from special education, and therefore was a denial of FAPE. The unreasonableness of the consultative service was exacerbated in light of the IEP's elimination of Student's classroom placement and specialized academic instruction. As a consequence, Ms. Cornell had no staff in which to consult with regarding Student's occupational therapy remediation. As described by Ms. Cornell, the consultative service was a collaboration between the occupational therapist, the independent facilitator, and the classroom teacher, with services which were embedded into the classroom. Therefore, a solely consultative based service, without a teacher or staff to collaborate with or a classroom to in which to deliver the services, was illusory.

89. The information available to the February 6, 2013 IEP team, including Ms. Francis's occupational therapy report and Dr. Morris's evaluation, was not yet available to the September 14, 2012 IEP team, when the consultative model was originally added as an IEP based service. The additional evaluations by Ms. Francis and Dr. Morris informed the February 2013 IEP team of a level of severity of Student's related deficits which had not been previously presented to the IEP team. This new

information, coupled with Student's lack of progress on his prior occupational therapy goals as evidenced by the November 29, 2012 progress report, rendered Irvine's offer for exclusively a consult based service inappropriate at the time the February 6, 2013 IEP team convened.

90. Student established by a preponderance of the evidence that he was denied a FAPE due to Irvine's failure to offer adequate occupational therapy to receive a benefit from special education per the February 6, 2013 IEP.

e) Physical Therapy Services:

91. Student complains that he was denied a FAPE based upon Irvine's failure to provide him an adequate level of physical therapy during this time frame. Student relates this issue to Student's safety while at school, which was impacted by gross motor deficits which fall under the province of physical therapy.

92. Irvine does not dispute that Student experienced delays in areas related to physical therapy. Ms. Barton found that he had low muscle tone, poor coordination, difficulty ascending and descending steps, and ambulating over uneven terrain. To address these concerns, per the January 27, 2012 IEP, Irvine offered Student individual physical therapy services for 30 minutes per week. On February 6, 2013, Irvine offered this same level of services, and added 60 minutes per month of physical therapy consultation.

93. Student primarily relied on the recommendations of Ms. Sawitz's May 2012 physical therapy report to support his claim. Ms. Sawitz did not testify during the hearing and Student failed to present the testimony of another independent physical therapist, or a physical therapy report which followed her May 2012 report. Student therefore submitted the same arguments for the 2012-2013 and 2013-2014 school years as he relied upon for the 2011-2012 school year. However, Irvine did not deny Student a FAPE during the 2011-2012 school year by failing to provide adequate physical therapy.

94. Irvine did not decrease its offer of physical therapy following the 2011-2012 school year. The IEP team had carefully considered Ms. Sawitz' independent physical therapy evaluation, but determined to offer the same level of therapy, 30 minutes weekly, for the 2012-2013 school year. The present level of services had afforded Student the opportunity to make progress in this area of deficit. As of the February 6, 2013 IEP, Student had continued to progress in developing his gross motor skills, and he had made progress towards his related goals. School staff had also observed Student successfully navigating the campus. Ms. Cornell observed that he was now independently able to ascend and descend the six inch step to access the urinal. Although he fell once while toileting, this was an isolated incident. Overall, Student demonstrated increased balance and coordination, and he was able to safely and independently access class, recess, and in the restroom. As a result, Irvine's offer to maintain the same level of services was reasonable in light of the information available to the IEP team.

95. Student failed to show by a preponderance of evidence that Irvine denied him a FAPE by failing to offer adequate physical therapy services for the 2012-2013 and 2013-2014 school years.

ISSUE SIX: FAILURE TO OFFER AN EDUCATIONAL PLACEMENT FROM AND AFTER FEBRUARY 6, 2013:

96. Student complains that he required a classroom placement to receive a FAPE. Irvine contends that a school district is only required to provide a preschool classroom to disabled students who require a classroom to benefit from special education. Irvine asserts that, based upon the information available to the IEP team as of February 6, 2013, Student did not require a classroom placement in order to benefit from special education. Instead, the clinic based speech and language and physical therapy services, along with the consultative occupational therapy and physical therapy,

offered in the February 6, 2013 IEP was sufficient to remediate Students unique disabilities.

SPECIAL EDUCATION AND PRESCHOOL

97. Section 48200 of the Education Code, California's compulsory attendance law, generally requires that a student between six and 18 years of age attend school in the school district in which the residency of either the parent or legal guardian is located, with some exceptions. Under the IDEA and California special education law, school districts must offer an IEP to a pupil who turns three years of age. For the period between three and six years of age, California does not mandate compulsory education for typically developing preschool children. (Ed. Code, § 48200.) If, however, the preschool child requires special education and related services in order to receive a FAPE, school districts must offer appropriate services along the continuum of services. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56345.)

98. Where a school district does not operate regular preschool programs, the Office of Special Education Programs (OSEP) has long taken the position that the obligations to provide placement with typical children can be satisfied by considering alternative methods for meeting the preschool child's unique needs in the least restrictive environment, including:

- (1) providing opportunities for the participation (even part-time) of preschool support children with disabilities in other preschool programs operated by public agencies, such as Head Start;
- (2) placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
- (3) locating classes for preschool children with disabilities in regular schools.

(*Letter to Neveldine* OSEP Interpretive Letter (May 28, 1993), 20 IDELR 181.)

99. In February 2012, OSEP again reiterated this position in *Dear Colleague Letter*, OSEP (February 29, 2012), 58 IDELR 290, as follows:

The LRE requirements in section 612(a)(5) of the IDEA apply to all children with disabilities who are served under Part B of the IDEA, including preschool children with disabilities aged three through five, and at a State's discretion, two-year old children who will turn three during the school year. The statutory provision on LRE does not distinguish between school-aged and preschool-aged children and therefore, applies equally to all preschool children with disabilities.

100. Student met his burden of persuasion establishing by the preponderance of the evidence that he required a classroom, instruction from a classroom teacher, and an opportunity to generalize his skills and to model peers to benefit from special education.

101. On January 27, 2012, the IEP team reviewed a comprehensive multidisciplinary evaluation conducted by the school's psychologist, speech and language pathologist, academic assessor, and physical therapist. These assessors, along with other Irvine staff, determined that Student required specialized academic instruction in a mild-to-moderate special day class. The appropriateness of the classroom placement was affirmed by the Student's teacher, Ms. Ecarma, on March 21, 2012.

102. For the 2012-2013 school year, through February 6, 2013, Irvine provided Student specialized academic instruction in a general education preschool class. The evidence established that increasing Student's mainstreaming for the 2012-2013 school year was appropriate, and the general education classes similarly provided Student a

language intensive curriculum which he required to develop his expressive language. The class utilized the General Language General Speech Patterns program and Student benefited from the classroom based language instruction. Student benefited not only from the teacher's language instruction repeated throughout the day, but also from generalizing his skills and typical peer modeling which he was afforded in the Head Start and State preschool classes.

103. During the September 21, 2013 addendum IEP meeting, Parents inquired whether Student should be provided additional specialized academic instruction in the general education classroom. The team believed that the present level of services was appropriate because Student's goals and services were embedded in the classroom and being worked on not just by the education specialist, but also the classroom teacher. Nonetheless, the team agreed to revisit Parents' request after staff had time to review the results of a pending November 2012 progress report. However, the November 29, 2012 progress report determined that Student had attained just two of the 14 IEP goals which were designed to be attained by January 27, 2013. Moreover Student had not met a single remaining benchmark outside of the clinic setting.

104. As of the February 6, 2013 IEP, Irvine's most recent assessments found that Student demonstrated a severe lack of foundational skills for language. Student understood substantially fewer words than what was expected for his age. He did not demonstrate gaze shifting, joint attention, or consistent eye contact. He required instruction in some pre-academic areas; and that he required a language-intensive curriculum to develop his expressive language. More recent assessments also found that Student required specialized academic instruction in a classroom. In her report reviewed by the IEP team, Dr. Morris found that Student scored at the below second percentile in design copying and below the fifth percentile on comprehension of instructions. Student was unable to copy shapes or lines and could not manipulate a writing utensil.

In class, Student demonstrated difficulty in attending and complying with directions, demonstrated poor speech articulation and vocabulary, fine motor deficits, poor attention, and a need for redirection. These deficits fell beyond the scope of what could be successfully remediated through solely clinic-based services. Rather, Dr. Morris persuasively testified that Student required the assistance of an education specialist, teacher led instruction, a classroom to generalize his skills, and peer modeling to appropriately address his various deficits.

105. Irvine argued that Student progressed so rapidly during his short time at the Learning Center, with absences, that he no longer required specialized academic instruction or an educational placement. During her testimony, Ms. Hunter supported this argument and added that Student's classroom and services were eliminated based upon a lack of trust in the independent assessments and a desire for Irvine to update its own assessments.

106. Irvine's arguments fail for the following reasons. First, evidence did not demonstrate that Student had progressed substantially since his last IEP. To the contrary, Student had attained only two of the 14 annual goals.

107. Second, the information which was available to the February 6, 2013 IEP team was similar or identical to the information available to the prior five IEP teams, all which met within the previous 12 months. The prior IEP's each found that Student's delays could not be successfully remediated by services alone. Rather, it was the classroom placement, used as a learning apparatus, and the teacher's intentional instruction that contributed to Student's progress. Absent this apparatus, Student had difficulty benefiting from individual therapy alone, as evidenced by his difficulty progressing while receiving individual services from Nyansa. Evidence showed that Student required the inclusion of specialized academic instruction delivered through an independent facilitator in a classroom, and repeated instruction by a teacher and

generalization of skills, along with peer modeling to benefit from special education. This modality could not be replicated through clinic-based services alone.

108. Third, up to the February 6, 2013 IEP, Ms. Hunter had supported a classroom placement for Student to benefit from special education. She reported that the "specialized academic [instruction] insertion model supports children quite differently than what a child experiences when they participate solely in therapy sessions at a speech/language clinic and return to another environment in which penalization and practice of those skills is not constantly monitored, practiced and/or expected." She further stated the "IEP team continues to believe that the intensive language stimulation within the educational setting, the ongoing daily modeling of language and social interactions with his peers, and the direct speech/language therapy he will receive each week will support Student's ability to make satisfactory progress on agreed upon goals and objectives." Yet, the information available to the February 6, 2013 IEP team did not substantially deviate from what was available to the past IEP teams. As a result, it was not reasonable for Irvine to eliminate the specialized academic instruction and classroom component of remediating Student's delays at that time.

109. Fourth, other witnesses overwhelmingly supported a classroom placement. Ms. Ecarma testified that Student benefited from the intentional instruction delivered in the classroom. Ms. Gleason testified that Student responded positively to the specialized academic instruction which she delivered in Student's general education classroom. Dr. Morris persuasively testified that, due to the nature of Student's delays, he required a classroom placement to benefit from special education. Ms. Hill reported that her recommendation for speech services included placement in a classroom where Student could generalize his skills. Given the nature of delays, a clinic based setting by itself would have been insufficient to remediate his disability. Ms. Haynes, persuasively

repeated that Student required a general education preschool classroom to develop his expressive and pragmatic skills.

110. Finally, Irvine failed to substantiate why a lack of confidence in the independent reports, or a desire for updated school assessments, when its assessments were approximately a year old, resulted in a decision to eliminate Student's specialized academic instruction and educational placement.

111. Student established by a preponderance of the evidence that Irvine denied him a FAPE by failing to offer an educational placement for the 2012-2013 and 2013-2014 school years, beginning on February 6, 2013.

REMEDIES

112. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.).

113. Appropriate equitable relief, including compensatory education, can be awarded in a decision following a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 citing *Puyallup, supra*, 31 F.3d at p. 1496.) An award to compensate for past violations must rely on an individualized fact-specific analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must 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.” (*Ibid.*) Compensatory education is an equitable remedy designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d 1489, 1497.)

114. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).) In the instant case, Student substantiated that Immanuel was carefully chosen due to its small class size, structure, access to typically developing peers, and ability to accommodate Student’s physical handicaps. Evidence also established that Student progressed while at Immanuel.

115. Pursuant to Legal Conclusions 89-95, Irvine denied Student a FAPE by failing to offer adequate occupational therapy from February 6, 2013, through the date

of the hearing. Student requested monetary reimbursement for occupational therapy services which Parents privately funded through Launchpad. However, Student failed to provide proof of payment for services provided by Launchpad, other than for an independent occupational therapy assessment. Moreover, during testimony, Father described that he only intermittently provided Student private services, including occupational therapy, due to financial constraints. Consequently, Student's remedy will be limited to compensatory services. As a compensatory remedy, Irvine shall provide Student a total of 36, 60-minute sessions of individual occupational therapy services. This amount is consistent with the recommendations of Ms. Francis and Dr. Morris, and accords with the occupational therapy related deficits established by the evidence.

116. Pursuant to Legal Conclusions 101-119, Irvine denied Student a FAPE by failing to offer an educational placement in the February 6, 2013 IEP. As compensation, Irvine shall reimburse Student a total of \$1,400, which represents the amount Parents incurred to fund Student's educational placement at Immanuel following the February 6, 2013 IEP, through the date of the hearing. This amount was substantiated by proof of payment provided by Student related to his placement at Immanuel.

ORDER

1. Irvine shall provide a total of 36, 60-minute sessions of compensatory, individual occupational therapy services by a clinician experienced in serving students with hypotonia and fine motor delays.
2. Irvine shall pay Parents \$1,400, as reimbursement for costs they incurred in privately funding Student's educational placement.
3. All other requests for relief 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, Student prevailed on Issues 5(d) and 6. Irvine prevailed on Issues 1(a), 1(b), 1(c), 2(a), 2(b), 2(c), 2(d), 2(e), 3, 4(a), 4(b), 5(a), 5(b), 5(c), and 5(e).

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: April 21, 2014

_____/s/_____
PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings