

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2011060277

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2011100042

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Adrienne L. Krikorian, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter on December 5, 6, 7, 8, 12 and 13, 2011, in Van Nuys, California.

Attorney Ronald Faulk represented Student. Student's mother (Mother), and legal assistants Hamlet Yarijanian and Debi Pepai were also present for Student at various times during the hearing. Assistant General Counsel Donald Erwin represented Los Angeles Unified School District (District). District Due Process Coordinator Diana Massaria and District law clerk Natasha Crow attended all hearing days.

On June 3, 2011, Student filed a request for due process hearing (complaint) in OAH case number 2011060277 (Student's Case). On July 14, 2011, OAH continued Student's Case for good cause. On October 7, 2011, District filed a complaint in OAH case number 2011100042 (District's Case) and requested that the matters be consolidated. On October 11, 2011, OAH granted the consolidation request and ordered that the timeline for this decision would be based upon the filing date of Student's Case. At the end of the hearing, the ALJ granted a continuance until January 10, 2012, to allow the parties' time to file a closing brief. Upon timely receipt of the closing briefs, the record was closed on January 10, 2012.

ISSUES

STUDENT'S CASE¹

Did District deny Student a free appropriate public education (FAPE) for the 2011-2012 school year by failing to offer Student an appropriate placement in the least restrictive environment (LRE) and appropriate speech and language (SL) services?

DISTRICT'S CASE:

Was District's offer in Student's April 11, 2011 Individualized Education Program (IEP) of placement in a mentally retarded moderate (MRM) special day class (SDC) at District's Shirley Elementary School (Shirley) for the 2011-2012 school year and its offer

¹ Student's complaint contained other "problems" and related proposed resolutions not addressed in this Decision, as the parties agreed at the hearing that the only issues on which they sought findings are those stated in this Decision. The issues have been restated for the purpose of clarity and organization.

of 240 minutes per month of direct/collaborative school-based SL services an offer of FAPE in the LRE?

FACTUAL FINDINGS

1. At the time of hearing, Student, whose primary language is English, was ten years old and resided with Mother within the District. She attended the fifth grade in a general education classroom at her school of residence, District's Calahan Elementary School (Calahan). Student was eligible for special education as intellectually disabled with a medical diagnosis of Down's syndrome and autism.

2. When Student entered kindergarten, she was enrolled in a full inclusion general education classroom at Calahan with services that included full-time one-to-one non-public agency (NPA) behavior intervention implementation (BII), eight hours a month of NPA behavior implementation development (BID), and a District inclusion facilitator. She received instruction from an alternate curriculum modified by the inclusion facilitator and general education teachers to address her unique needs as determined by her IEP's.

3. Prior to hearing, Student's last signed and implemented IEP was dated October 30, 2009. The October 30, 2009 called for placement in a SDC MRM classroom, with 14 percent mainstreaming, related services and supports, including APE, OT, and school-based SL therapy twice a week for 60 minutes on a pullout/collaboration model. Mother signed the IEP, pursuant to a final agreement (FSA) from another due process request, agreeing to implement portions of the IEP, including the school based SL services. However, Mother disagreed with the placement offer and requested NPA speech. As part of the FSA, District and Mother also agreed that District would assess Student during the 2009-10 school year for the purpose of determining placement.

4. District inclusion facilitator Angelita "Helen" Vestuto (Vestuto) testified at the hearing. She has a bachelor of science degree in business administration, a master

of arts in special education for moderate to severe disabilities, clear credentials in multiple subjects and special education, and has completed course work for certification as a behavior analyst (BCBA). Vestuto has approximately eight years of work experience in education. She has worked for District as an inclusion facilitator since 2004. Her job duties include case management for students with IEP's who are fully included in general education classrooms. As part of her responsibilities, she collaborates with general education teachers, support providers, program assistants, and school administrators to provide the necessary supports to implement students' IEP's and access grade-level curriculum. Vestuto has worked with students with eligibility classifications of intellectually disabled and autism. She attended Student's October 30, 2009 IEP meeting, performed academic assessments on Student during the 2009-10 and 2010-11 school years, and was her inclusion facilitator for the fourth grade. Vestuto demonstrated that she was qualified to administer the assessments she performed for Student and to offer opinions relating to Student's educational program and unique needs.

5. Vestuto performed an academic assessment of Student on May 18, 20, and 25, 2010. As a result of her assessment she concluded that, although Student had made some progress toward incremental objectives, she made no meaningful academic progress in the general education setting. Student functioned academically at an early kindergarten level while her classmates studied a grade-level third grade curriculum.

6. Elissa Luecke (Luecke) testified at the hearing. Luecke has a bachelor of arts in psychology, a master of science in counseling, and is a credentialed school psychologist. She has worked as a school psychologist for approximately ten years, and with the District since 2003. Her job duties and experience include conducting psycho-educational assessments, developing case studies to determine educational needs, learning characteristics, and social behavior relevant to educational placement and

instruction planning. She has collaborated with school administrators, teachers, parents, IEP team members and service providers, including working with IEP teams to develop behavioral goals and behavior support plans. Luecke has attended approximately 800 IEPs and has performed approximately 600 school-based assessments. She has also provided related services in counseling individually and in groups for children with IEPs. Luecke twice assessed Student, in 2010 and 2011. She demonstrated that she was qualified to administer the assessments she performed for Student, and to offer opinions relating to Student's education program and unique needs.

7. Luecke conducted a psycho-educational assessment on Student on May 10, 2010. Based upon her assessment findings, Luecke concluded that Student functioned well below the average range of cognitive ability and in the "very likely" range for autism. She required constant prompting and supervision from her BII because of her limited language skills, to engage in and stay on most tasks, and because of her frequent elopement and other behaviors.

8. District behavior specialist Phillipa Wells (Wells) testified at the hearing. Wells is a BCBA with a bachelor of arts in theater arts, and a master of arts in special education. She is credentialed in cross cultural language and development, and as a special education specialist I and II mild/moderate. Wells has worked for the District since 2009 as a special day class teacher, an inclusion facilitator, a behavior support team teacher, an integration support specialist, and currently as a behavior specialist. Her job duties include integrating children with moderate to severe disabilities, including those with Down's syndrome and autism, into the educational setting. Wells conducted a functional analysis assessment of Student in May 2010. Wells demonstrated that she was qualified to administer the assessment tools, that her assessment of Student was appropriate and valid, and that she was qualified to offer opinions relating to Student's behavioral needs and her educational program.

9. Wells' assessment focused on Student's behaviors of frequent elopement on the school campus, particularly during transition periods, and when faced with an open or locked door that leads off campus. Mother expressed concern to Wells for Student's safety. Wells observed that Student's BII held her by the hood of her jacket during transitions to keep her from eloping. She did not observe Student participating in the classroom activities. Based upon her assessment results, Wells concluded that the function of Student's elopement behavior was to escape adult authority and directives. She also concluded that Student could only be expected to engage in limited participation in classroom activities based on her ability levels. She concluded that Student would benefit from direct academic instruction, with precision teaching that would increase her level of participation in her educational program.

10. District held an IEP meeting for Student in June 2010 IEP that was continued to September 2010. Mother, who disagreed with the placement and SL offer, did not sign or consent to implementation of any portion of the IEP.

2010-11 SCHOOL YEAR

11. Student was enrolled in Kathleen Marquez's (Marquez) fourth grade general education classroom at Calahan in the 2010-11 school year. Marquez testified at the hearing. Marquez has a bachelor of arts in liberal studies, and holds a California multiple subject cross-cultural language and academic development (CLAD) credential-clear. She has worked for the District as an elementary school teacher for eleven years. Her teaching experience includes working with special education students with autism and attention deficit disorders who were included in her general education classroom. Marquez demonstrated that she was qualified to offer opinions relating to Student's educational program and her unique needs.

12. Student's full-time NPA BII was Damirez Aleman (Aleman). Aleman also testified at the hearing. Aleman has worked for Inclusive Education and Community

Partnership (IECP) since 2007. She has a bachelor of arts in psychology and a master of arts in marriage and family therapy. Her training and experience includes working with licensed psychologists, continued education from professors at California State University at Northridge and through IECP. Aleman has worked with Student as her BII for at least the past two years. Aleman demonstrated that she was qualified to offer opinions relating to Student's behavioral needs in the educational setting.

13. Student's BID, Sharon Harrel (Harrel), testified at the hearing. She has a bachelor of arts, a master of arts in corrective therapeutic exercise, and a master of science in "learning handicapped." She has credentials in adapted physical education (APE), learning handicapped, CLAD, and is certified in beginning teacher and support assessment (BTSA) and administrative services. She has completed the training for certification as a BCBA. Harrel has worked with IECP since 2007. Her work experience includes working as a special education coordinator and director, program specialist, resource specialist and APE teacher for various school districts. Harrel first started working with Student as her BID in the third grade (2009-2010 school year). She attended Student's October 30, 2009 IEP meeting, which established the behavior goals that she and Aleman worked on through the third and fourth grades. She also attended Student's September 2010 IEP meeting. She regularly collected and kept data on Student's behaviors in the fourth grade based upon her own observations and feedback from Aleman. Harrel demonstrated that she was qualified to offer opinions relating to Student's educational program and her behavioral needs in the educational setting.

14. Marquez's class had 33-35 students, including Student. The classroom was small and the students were seated in groups close to each other. Student sat at the back of the class near the exit door, flanked on the side closest to the door by Aleman and on the other by a classmate. Marquez rotated the seating of the other classmates periodically to address the mild disturbance caused by Student's need for constant

whispered instruction and prompting from Aleman, her behavior in grabbing at other students bodies and desktop possessions, and her need for frequent breaks, which included leaving the classroom during Marquez's instruction.

15. Marquez collaborated with Vestuto at least twice a week during class breaks to discuss Student's alternate curriculum, the general education curriculum she was teaching to the other students, and strategies and accommodations needed for Student to participate in the classroom. Vestuto prepared a weekly folder for Student that included worksheets, which Aleman, under Harrel's supervision and in collaboration with Vestuto, implemented with Student. Vestuto occasionally instructed Student in Aleman's absence. Marquez spent very little time on a regular basis directly instructing Student because doing so required her to take time from the other students in the class in order to address Student's need for intensive prompting and constant supervision. However, Marquez interacted with Student in the classroom while attempting to engage her participation during small group work.

16. Student's alternate curriculum was based upon her unique needs and learning levels as determined by her 2009 IEP and 2010 assessment results. Other students in Student's class worked on a grade-level fourth grade general education curriculum, while Student functioned academically at a kindergarten level. Aleman worked on Student's IEP goals as directed by Vestuto, although her primary focus was Student's behavior. She brought kindergarten level storybooks, puzzles and other materials into the classroom for her behavioral work with Student.

17. In math, Aleman and Vestuto worked on number recognition and one-to-one correspondence. Student learned to correlate a group of items with a specific number and she recognized numbers up to 20. At the same time, the other students were learning decimals, multiplication and division of fractions, factors, and geometry, none of which was meaningful to Student. While Marquez delivered instruction on the

general education math curriculum to the other students, Aleman worked directly with Student on the worksheets developed by Vestuto, whispering instructions, using visuals, manipulatives, and other methodologies to engage Student in learning basic addition and subtraction.

18. In language arts, Student worked on recognizing upper and lowercase letters, identification of letters, sounds, consonant vowels, and learning words with pictures. She worked on recognition of "at" "it" and "an" and other high frequency words for decoding. She could not hold a pencil without hand-over-hand prompting. She learned to "write" her name by using three-part Velcro strips that required her to place in order the portions of her name. Aleman incorporated numerous strategies for delivery of language arts including a variety of visuals, high frequency word bingo, and chalk marks on the ground during recess. The rest of the class worked on the Open Court Reading program that incorporated vocabulary words, choral reading, discussions, testing for comprehension, and taking turns reading the story followed by reinforcement by listening to audio tapes. Because Student's limited language skills prevented her from understanding the story being presented by Marquez, Vestuto modified the Open Court Reading program for Student by using pictures to correlate with the subjects the other students were learning. For example, when the rest of the classroom worked on a story intended to teach the meaning of the word "desolate," Student worked with a picture showing a sad face designed to teach her the word "sad."

19. During recess and lunch, Aleman physically held onto Student's clothing in order to help prevent her from running or eloping as she transitioned to and from the eating area or playground. Student required frequent prompting and assistance by Aleman to obtain her food, unwrap food packages, and eat. Once seated with her food, Student spent most of her recess and lunchtime eating alone and she did not meaningfully interact with her peers. She required frequent prompting from Aleman to

finish eating so she could return to class on time. During recess and lunch, Aleman positioned herself within two to five feet from Student, depending on the level of prompting Student needed at any given time.

20. Student often returned to class late from breaks, recess and lunch. Student was also often tardy to class in the morning, which disrupted the classroom activities. When Student was late to class in the morning, Marquez frequently stopped her instruction to make arrangements for Student to obtain a tardy slip from the office if Mother had not first obtained one before bringing Student to class.

21. Student's peers liked her and liked having her in class and on the schoolyard with them. They demonstrated caring, looked after her during transitions from the classroom to other parts of campus and while in line to purchase her snack or lunch, and they offered their assistance in opening her food wrappers and containers. Although Student looked forward to working and playing in small groups with her peers, Student's verbal interaction with her peers was limited to one-to-three word phrases such as "what is your name." She occasionally but infrequently initiated group play with her peers.

22. Student required frequent breaks both in class and outside of class. In class, she often placed her head on her desk to avoid working on a task, requiring prompting from Aleman to resume her work. Vestuto and Mother brought in books and other tools as supports for teaching Student. Aleman used those materials, which included stories that Student enjoyed, as rewards for Student when she earned a short break. Student's breaks outside of the classroom included trips to the restroom, where she required intensive prompting from Aleman to complete personal hygiene tasks. Student occasionally took breaks in the library, where she gravitated to children in kindergarten and first grade instead of children in her own age range. Student

participated more actively with younger aged students, and appeared to be more interested in the level of tasks participated in at the time.

23. At the beginning of the 2010-11 school year, Student grabbed classmates' hair and aggressively hugged them and her teachers, sometimes causing the recipient pain. Vestuto, Aleman and Marquez interpreted Student's grabbing and hugging as Student's way of getting attention and showing affection. She did not realize that her behavior was uncomfortable or unpleasant for others. She grabbed pencils and other objects from her classmates' desks, and occasionally ate crayons, which resulted in Marquez removing crayons from the classroom.

24. As the 2010-11 school year progressed, Student continued to elope but less frequently. Aleman continued to hold the hood of Student's jacket as she moved around on the schoolyard to keep her from eloping. Student became more responsive to instructions and prompts from Vestuto, Aleman, and Marquez, particularly when given in a playful manner, and she learned to approach Marquez to ask for permission to leave the classroom for breaks. Student's grabbing behaviors improved with intensive prompting from Aleman and occasionally Marquez, and occurred approximately once a week.

25. In or about December 2010, District assigned specialist Vivian Perez-Kennedy (Kennedy) to coordinate and prepare for Student's April 11, 2011 IEP as part of a District pilot program to facilitate complex IEPs. Kennedy testified at the hearing. Kennedy has a bachelor of arts in English, a master of arts in special education and educational administration and is a candidate for a doctorate in education leadership. She holds a multiple subject teaching credential professional clear, a credential as a special education specialist for severely handicapped, and a professional clear administrative services credential. Her work experience includes employment by District since 1998 as a project coordinator in centralized IEP processes, an LRE specialist,

assistant principal, assistive technology assessor, behavior support facilitator, and inclusion facilitator. She has attended IEP's, worked with IEP teams to determine placement, and has worked directly with students with moderate to severe disabilities, including those with Down's syndrome, since 1994. Kennedy demonstrated that she was qualified to offer opinions relating to Student's educational program and her unique needs.

26. Kennedy reviewed Student's records, including IEP's, psycho-educational assessments, and due process settlement agreements. She was familiar with Student's October 2009 IEP. In or about January 2011, while on campus to meet with District staff to prepare for Student's upcoming IEP, Kennedy and her team partner Suzy Blair (Blair) observed Student in the classroom. During those observations, Student did not actively participate in what Marquez taught, even when Marquez attempted to engage Student. Student engaged in parallel activities during Marquez's lessons, and the materials Student worked on were at a pre-school level. Student required a considerable amount of prompting to engage with Aleman, and she frequently placed her head on the table and said she was tired. The classmate seated to her right appeared distracted from Marquez's lessons because the child focused her attention on Aleman's interactions with Student. Kennedy and Blair also observed Student in the lunch area at brunch time and at lunch. They observed that Student required prompting from Aleman while in the lunch line, she did not interact with her classmates, and she required prompting to finish eating in order to return to her classroom.

27. Kennedy collaborated with Marquez regarding Student's participation in the general education classroom. Kennedy was concerned that Student received little if any educational benefit from classroom instruction from Marquez because Student was not cognitively capable of understanding the curriculum Marquez taught, requiring Aleman to deliver most of her educational instruction. In addition, the class size and

structure offered little opportunity for Student to move freely and to engage in small groups, and Student's need for breaks outside of the classroom during instruction time sometimes lasted up to 30 to 40 minutes. Kennedy concluded that Student required instruction from a teacher with a moderate to severe credential, as opposed to the instruction she received from Aleman, who was not credentialed.

2011 ASSESSMENTS

28. District assessed Student in preparation for her April 11, 2011 IEP, including in the areas of academics, psycho-educational, SL, occupational therapy (OT) and APE².

29. Vestuto academically assessed Student on March 14, 17, 24 and April 4, 2011, and recorded her results and conclusions in an April 5, 2011 report. Aleman was present during the entire assessment. In addition to her own observations of Student during the school year, and collaborations with Marquez, Aleman and Harrel, Vestuto attempted to administer the standardized Brigance Diagnostic Comprehensive Inventory of Basic Skills (Brigance) as part of the assessment. She was unsuccessful due to Student's lack of response to the standardized testing procedures and materials provided by the test developer. Student responded better to larger color pictures and animated presentation or play-like approach during testing. Because of the modifications she made to the Brigance, Vestuto was unable to use the standardized

² The OT and APE assessments and associated related services were not at issue in this matter except as they impacted the overall determination of FAPE in District's case. The APE assessor, who testified at the hearing, attended the IEP meeting and offered opinions as to Student's interactions with her peers during playtime, which will be discussed below.

norms for scoring purposes. However, she received valid results from the modified testing that were indicative of Student's needs and abilities.

30. Based upon her assessments in reading, comprehension, writing and math, and in comparison to Student's 2010 academic assessment, Vestuto concluded that Student had improved in the areas of left-to-right directionality, number identification, and identification of body parts. She maintained the same level of ability from 2010 in the areas of identification of upper-case letters, shape identification, rote counting and name recognition (with prompts to focus). She regressed in the areas of lowercase letter identification and comprehension in quantitative, directional and positional concepts. She could count manipulatives by rote but had not yet learned the concept of one-to-one correspondence. Vestuto incorporated her conclusions into Student's April 11, 2011 IEP, and wrote goals and objectives based on the results.

31. Luecke assessed Student in the area of social/emotional needs on April 4, 2011. Luecke reviewed Student's school records, including reports from the school nurse, attendance records, previous psychological assessments and IEPs. Luecke also observed Student in the classroom, during breaks on the playground, and during lunch, and she interviewed Marquez and Vestuto. She administered the Behavior Assessment System for Children Second Edition (BASC-2) to Marquez and Mother. Marquez rated Student as clinically significant in atypicality (sometimes doing strange things, being out of touch with reality and acting confused) and in functional communication. She rated her at-risk in learning problems and attention problems. Mother did not respond to the BASC-2. Luecke's tests were properly administered and the results were valid.

32. Marquez and Vestuto reported to Luecke that Student was a friendly student, who liked peer interactions, and required frequent prompts to acknowledge peers and to remain gentle. She was able to sit with a few movement breaks, had a short attention span, and required many prompts to complete her tasks. She responded well

to adult directions but required close supervision. She was able to ask for a break, but required extensive support to continue class work. She occasionally initiated play on the yard and occasionally initiated greetings to those with whom she was familiar. However, on nine out of the 20 days Vestuto observed Student on the play yard for this report, Student had no social interaction with her peers. Student's elopement behaviors improved although Vestuto reported that she observed Student running away approximately 35 percent of the time she was observed. Student was able to stop and slow down when asked and reminded of the consequences of elopement. Student was also able to navigate the school grounds with a larger distance between herself and Aleman. Vestuto reported that during a five-week duration totaling 23 days, Student's peer interaction was 46 percent, inappropriate interaction was five percent, and no peer interaction was 49 percent. During the same time frame, Student's proximity to Aleman was within two feet 71 percent of the time, five feet 12 percent of the time and over five feet 17 percent of the time. Student continued to require continuous verbal and visual prompting to start, continue working on, and finishing her modified curriculum. Her language comprehension and processing delays due to her disabilities made it difficult for her to follow class rules, understand directions, engage in conversations and discussions, and establish and maintain friendships, which impacted her ability to progress at the same rate as her general education peers and meet grade level standards. Student functioned within the well-below-average range of cognitive ability. Based upon the assessment results, Luecke recommended several strategies and supports, including a behavior support plan addressing Student's elopement and grabbing behaviors, to enable Student to access her education and peer interaction.

33. Speech pathologist Sandra van Wijk (van Wijk) assessed Student on March 14, 28, 29, April 4, and 5, 2011. She testified at the hearing. Van Wijk has a bachelor of arts and master of science in communicative disorders, a certificate of clinical

competence, a clinical rehabilitative services credential, and is a California registered audiometrist and speech pathologist. She has been employed by District as a SL itinerant teacher since April 2000. Her job duties and experience include conducting educational-based SL assessments, speech therapy, collaboration with IEP team members, including parents, evaluating PLOPs, developing goals and strategies in articulation language, voice and fluency. Van Wijk demonstrated that she was qualified to administer assessment tools to Student and to offer opinions relating to Student's unique needs in the area of communication and SL. The assessments were properly administered and the results were valid.

34. The SL assessment included a review of Student's school records including past SL assessments, classroom and clinical observations, interviews with Aleman, and modified testing. During observations, Student engaged in self-talk and mumbling, and used unrecognizable jargon. She initiated interaction with kindergarten and first grade students when observed in the library. She appeared happier when doing so and attempted to take her turn in group play on her own. When observed on the schoolyard, Student sat on a bench with her behaviorist but did not respond when classmates came over to her and initiated conversation.

35. Articulation was a significant area of concern and negatively affected Student's intelligibility. Van Wijk administered the Goldman-Fristoe Test of Articulation-2. Student was 50 percent intelligible to the untrained or unfamiliar listener when context was unknown, and 60 percent intelligible with known context. On the Oral Peripheral Examination, which consisted of a visual inspection of the structures pertaining to speech production, Student's mechanisms, including range of motion, were adequate for speech production. On the Receptive One-Word Picture Vocabulary Test, Fourth Edition, and on the Expressive One-Word Picture Vocabulary Test, Fourth Edition, Student scored below the first percentile. She was able to identify common

nouns and a few verbs when asked to point to one of four pictures to identify a word provided. She was slower to respond, if at all, when she was unsure or did not know the answer.

36. Van Wijk also attempted to administer the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4), which was chronologically appropriate for Student. However, Student was unable to respond accurately to all but one of the tasks in the core subtests. Finding the CELF-4 too difficult for Student, van Wijk administered The Preschool Language Scale, Fourth Edition (PLS-4). Although the test was not age appropriate, and standard scores could not be obtained based on Student's age level, it provided valuable information regarding Student's receptive and expressive language skills. Student's scores on the subtests of the PLS-4 ranged from performance at the two years-three months level to the three years-six months level. She did not demonstrate any skills at the four years to four years-five months levels, which included responding to "where" questions, completing analogies and naming an object when it was described. Her expressive language skills and her use of pragmatic language were also delayed. Student was cooperative during the assessment and the results were a valid indicator of Student's performance.

37. Student had strengths in the area of voice and fluency, her language skills had improved from her 2010 SL assessment, she consistently used words and two word phrases to express her needs, she had a working vocabulary, could follow one step instructions and asked simple questions. She sought interactions with others, particularly younger students, and could use her words to gain a listener's attention. Her language skills did not include understanding of spatial relationships, pronouns, or quantity concepts. In addition, she could not follow two-step directions, and required prompting to use longer utterances and to interact with her peers during structured games.

38. APE teacher Elise Zimmerman assessed Student in the area of APE on March 24, 2011. Zimmerman testified at the hearing. Zimmerman has bachelor and masters degrees in therapeutic recreation. She is a credentialed physical education teacher with a specialty in APE and has been teaching children with special needs for District for 15 years. She began teaching Student in APE in the first grade. She periodically collaborated with Student's teachers and BII when she was on campus. Zimmerman attended Student's April 11, 2011 IEP. Zimmerman demonstrated that she was qualified to offer opinions relating to Student's educational program and unique needs.

39. Zimmerman observed Student's behaviors during the third and fourth grades while in APE, occasionally during transition times and during assessments. Although Student occasionally engaged in play with her typically developing peers, Zimmerman never observed Student initiate interaction with peers. Student was usually with Aleman outside of the classroom. Zimmerman observed that Student's elopement behaviors decreased during the fourth grade, although she continued to elope occasionally, requiring Aleman's intervention. Aleman also assisted Student to motor through certain movements during APE as directed by Zimmerman. During Zimmerman's attempts to assess Student, Student became irritable and difficult to coax into complying with verbal directions. Student had difficulty comprehending all of the testing items and needed demonstrations and re-directing to tasks. At times she became easily distracted and had a short attention span.

APRIL 11, 2011 IEP MEETING

40. Student's IEP team met on April 11, 2011. The IEP team consisted of Mother, administrator Alvin Conteh, Vestuto, Marquez, Luecke, school nurse Eileen Mitchell, Zimmerman, van Wijk, occupational therapist Mildred Afshin (Afshin), Harrel,

Kennedy, Blair, and Shirley's special education teacher Sandra Quintanilla. The meeting lasted approximately three hours.

41. The IEP team reviewed and discussed Student's present levels of performance (PLOPs), including the findings from assessment reports and recommendations by Vestuto, Luecke, van Wijk, Zimmerman, and Afshin. Mother received a copy of all of the assessment reports, actively participated in the discussions and had the opportunity to ask questions and comment during the meeting. The IEP team found that Student had met two of her 2009 behavior goals and her speech goal. She made some incremental progress toward some of the remaining eight goals but did not meet any of those goals. The IEP team identified Student's areas of need, including SL and behavior, which included continued elopement, grabbing, hugging, minimal interaction with peers, and heavy reliance on prompting. Mother reported that Student's behaviors had improved because of the intervention of the BII/BID and related supports. The IEP team also identified areas of need in behavior, reading, writing, math, vocational education, articulation, and social/emotional functioning, and developed 10 annual and measurable goals to address the identified areas of need. The IEP team determined that Student no longer required OT services, but would continue to benefit from APE, SL and a behavior support plan addressing elopement issues.

42. The IEP team discussed the continuum of placement options, including full inclusion in the general education setting, a private non-public school special education setting, and a SDC MRM classroom. The team determined that Calahan did not have an appropriate SDC MRM classroom, and therefore considered placement at Shirley for the SDC MRM program. The team considered that Student had been mainstreamed at Calahan for five years without demonstrating meaningful academic progress. It considered the opportunities available for Student to mainstream at Shirley while enrolled in the SDC MRM class. The team compared the significant amount of

modifications required to the general curriculum for Student against the proposed alternate curriculum in the SDC program at Shirley. It considered the amount of incorporated specialized services in SL in the SDC MRM class, including increased opportunities for Student to engage in more expressive and receptive language and more movement around the class. It compared the opportunities for more social interaction between the general education classroom and SDC. The team also discussed transition, felt that continuity for Student was important, and discussed whether her BII would transition with her to the new placement.

43. Quintanilla, who testified at the hearing, has a bachelor of arts in liberal studies, a master of arts in special education, credentials in preliminary multiple subject, clear multiple subject, and clear multiple subject Level II Education Specialist Instruction. She has worked as an educator for approximately 15 years. She is currently a program specialist and special education teacher employed by District. Her work experience includes teaching special needs students, including those with autism. Quintanilla demonstrated that she was qualified to offer opinions relating to District's proposed placement, educational program and SL services for Student.

44. Quintanilla's 2010-11 SDC MRM class at Shirley consisted of approximately 14 students, 13 of whom were verbal. Most of the students functioned between kindergarten and second grade levels but were of ages appropriate for the third, fourth and fifth grades. The students generally had eligibility categories of moderately intellectually disabled and autism-like characteristics. In addition to Quintanilla, three trained educational assistants worked with the students in the classroom. The classroom staff taught students to follow rules and school policies and to engage in self-help skills.

45. Students worked in small groups on materials based on Quintanilla's initial informal assessments of their cognitive abilities and needs, and IEPs. They also worked individually with Quintanilla. The curriculum was a language-based alternate curriculum

that was modified to the needs of each student and designed to work on each student's IEP goals and objectives. The program supplemented the individual and group SL services that students received according to their IEPs. Quintanilla used a variety of approaches with non-verbal students to help them increase their verbal communication skills, including creating a picture exchange with visuals, communication books for parents, "share out loud" group work, songs, chants, and shared songs. Students were encouraged to share ideas with a partner or small group, to clap for classmates, and to give and receive feedback from peers.

46. Children in Quintanilla's classroom mainstreamed with the general education students on campus for field trips, during Open Court reading, in student council, arts, music, and science, and during lunch and recess. As an example of the amount of time spent with general education students, physical education typically occurred one hour once a week; science lab was three times a week for 45 minutes to one hour; field trips lasted all day; and student council met once a week for one hour. The amount of mainstreaming depended on the student's IEP and on what the rest of the class was doing for the day. Each of Quintanilla's students had a buddy from a fifth grade general education class who provided modeling during physical education and other schoolyard activities when appropriate.

47. The IEP team discussed concerns about Student's reliance on the BII. She was overly reliant on her BII and she could not be left alone for any meaningful length of time. Vestuto and Marquez were also concerned that Student had not made any meaningful educational progress in the general education classroom, a concern that was corroborated by Student's 2010 and 2011 academic assessments reports. Student continued to require constant prompting during instruction from the BII, she was engaged in parallel activities in the classroom, and was instructed in a modified alternate curriculum that bore no relationship to the level of instruction that Marquez

delivered to the other students. Student's presence in the general education classroom with the BII created distractions for the other students, and deprived her of the ability to work in small groups to develop less reliance on prompting. At the time of the IEP meeting, Student did not engage in meaningful social interaction with her age appropriate peers in the classroom or during recess or at lunch, and she continued to gravitate to younger children.

48. Mother expressed her concerns and disagreement with District's proposal to change Student's placement from the general education setting to a SDC/MRM class at Shirley.

49. The IEP team offered Student the following placement and accommodations, supports and related services effective upon signature of the IEP and for the 2011-12 school year: placement in a SDC MRM at Shirley; an alternate curriculum; 10 measurable and annual goals in behavior support, social behavior, reading, writing, math, vocational education, articulation, and perceptual motor; extended school year; instructional accommodations, modifications and supports which included an alternate curriculum and individual and small group instruction; a behavior support plan addressing Student's elopement and grabbing behaviors; mainstreaming for continued interaction and socialization with typical peers in the areas of English language development (ELD), Open Court, science lab, physical education, art, student council, recycling team, field trips, and lunch/recess; 240 minutes a month of school-based direct service collaborative SL therapy; 30 minutes a week of APE; extended school year (ESY); and transportation. To address Mother's concerns about transitioning to a new school and her request for continued behavior support, District also offered Student NPA BID service for 240 minutes a month and NPA BII service 1800 minutes a week. Although the offer of full-time one-to-one behavior services had no termination date and was intended to continue through the end of the school year, the IEP team

contemplated that Student would become less dependent on the BII services as she transitioned into small group learning during the school year, and that if Student was successful, the frequency and duration of behavior services could be revisited by the IEP team.

50. Mother did not give District consent to implement any portion of the May 9, 2011 IEP. On the IEP, Mother indicated her disagreement with the placement offer, requested an unspecified amount of additional speech services, and also requested continuous BII/BID services through the school year.

EXPERT OPINIONS

51. Wells, whose 2010 FAA is discussed above, concurred with Student's April 11, 2011 IEP team that the SDC MRM program at Shirley was an appropriate placement for Student. She was familiar with the program at Shirley, and agreed with Vestuto, Marquez, Quintanilla and Luecke that, as designed, the proposed placement, as described above, would be more appropriate than Student's current placement based upon her unique needs. Wells plausibly believed that long-term, continued full-time BII support was detrimental to Student and prevented her from learning to become more independent of constant adult direction and supervision.

52. Harrel disagreed with Wells, Vestuto and Marquez as to whether an SDC placement was appropriate. In her opinion, Student's fourth grade demeanor and behavior seemed to be connected to her classroom peers and teacher; she did well with structure, was not interruptive, sat quietly, and had a peer as a role model sitting next to her. Student received feedback and compliments from Marquez and "progressed well" in the fourth grade. She made progress toward her academic goals, worked on activities with peers, ate appropriately at lunchtime, was learning to play tag, and her peers liked her. Her elopement behavior could have been interpreted as Student running to something instead of away from something. Harrel felt that Student's behaviors were

not an impediment to the rest of the class accessing its education. Based upon Aleman's reporting and her own observations of Student, Harrel also felt that Student could gain an educational benefit from full inclusion in a fifth grade classroom with continued one-to-one BII support.

53. Student's expert, educational specialist Lila Schob (Schob) has a bachelor of science in therapeutic recreation and a credential as an education specialist moderate to severe. She testified at the hearing. She is currently employed by the Pasadena Unified School District as a special education specialist working with inclusion students. She was familiar with Student through a non-profit program, Club 21, designed to work with children with Down's syndrome. In preparation for her testimony, Schob reviewed District's exhibit binder, including Student's October 30, 2009 IEP goals, and her PLOPs from the April 11, 2011 IEP. Schob also observed Student for 45 minutes in her current classroom placement on the Friday before her testimony. Schob did not talk to Marquez, Vestuto or any of Student's service providers, she did not assess Student formally or informally, she did not read whether Student was offered BII/BID services in the April 11, 2011 IEP offer, she did not observe Student at Calahan before her April 11, 2011 IEP, and she was unfamiliar with how Vestuto modified Student's curriculum prior to the April 11, 2011 IEP. Although Schob believed, based upon her experience and review of documents, that Student's behaviors as reported in her IEPs would not impede her from participating in a fifth grade inclusion classroom, she had no opinion on the appropriateness of District's placement offer in the April 11, 2011 IEP.

54. Speech therapist Julie Diep (Diep) testified at the hearing. She has a bachelor of science and a master of science in speech language pathology and audiology. She is qualified to take the exam for BCBA certification and is a certified SL pathologist. Her work background includes speech therapy in educational and non-educational settings. Diep has never met, observed or assessed Student, or talked to any

of the District or NPA staff who worked with or assessed Student, including van Wijk. Her opinions were based solely upon her review, conducted shortly before her testimony, of Student's 2010 and 2011 SL assessments and on limited portions of the April 11, 2011 IEP, which were the only documents she reviewed in preparation for her testimony. Diep generally criticized van Wijk's assessment report as incomplete in some areas, which resulted, in her opinion, in incomplete communication goals, particularly in articulation, in the April 11, 2011 IEP. She concluded that the District's offer of 240 minutes of SL was not appropriate. She surmised that the general education placement might be more difficult for Student to access her speech based upon the deficits reported in the assessments she reviewed. However, Diep had no opinion as to what amount or frequency of services would be appropriate for Student, or as to whether or not the IEP offer of SL services was calculated to provide Student with some educational benefit. Diep also offered no opinions on the appropriateness of the SDC MRM classroom with language-based instruction.

LEGAL CONCLUSIONS

1. Student contends in her case that District denied her a FAPE by offering an inappropriate placement that was not the LRE, and by offering inadequate speech therapy services. District contends in its case that its May 9, 2011 IEP offer provided a FAPE, particularly because the placement and speech therapy services were appropriate. Because the issues raised in Student's Case and District's Case substantially overlap, they will be analyzed together. The placement issue has been analyzed first, followed by an analysis of the related services and supports.

PLACEMENT IN THE LRE

2. Student contends that District denied her a FAPE in the LRE for the 2011-2012 school year by offering placement in a SDC MRM class at Shirley instead of

continued placement at Calahan. She argues that District's placement offer was a more restrictive environment than her current placement because it did not offer sufficient time for mainstreaming, which Mother asserts should be at least 50 percent of the school day. Although not raised in Student's complaint, Mother also asserted at hearing in opposition to District's complaint that the IEP was inappropriate because it did not specifically state the exact amount of time or percentage of time that Student would be mainstreamed in the proposed placement. In addition, she asserts that Student can function in a full inclusion setting if District provided her with more difficult work and modified her curriculum to be more closely associated with the general education curriculum. Also, she contends that, while making some academic progress given her cognitive levels was important, Student benefitted substantially in the area of social interaction when fully included with familiar same age typically developing peers. Student also argues that she can remain in a general education classroom with additional academic supports to help her make meaningful academic progress among typically developing peers. Moreover, Mother asserted during the hearing that District intended to discontinue Student's BII/BID services after she transitioned to Shirley, and that changing Student's placement from an environment in which she has become familiar to a new unfamiliar setting posed safety risks to Student because of her history of elopement. As such, Student seeks an order that her placement should be a full inclusion setting at Calahan with the full-time support of a BII and BID services for the 2011-12 school year.

3. District contends that Student's April 11, 2011 IEP constituted an offer of a FAPE in the LRE. District contends that its offer was appropriate because Student made no meaningful academic progress from kindergarten until the time of the April 11, 2011 IEP despite having a full-time BII, and a modified alternate curriculum supervised by an inclusion facilitator; that Student consistently engaged in parallel learning and little

meaningful social interaction with her peers; and that Student functioned at a cognitive level so significantly below her peers that she gained no meaningful academic benefit from full inclusion. In addition, District asserts that Student's placement in a SDC MRM, with a credentialed special education teacher and three educational aides, continued support of the BII and BID through the fifth grade, a language based curriculum and smaller class size, and mainstreaming in several areas for part of each school day, was the LRE for Student. As such, District seeks an order that Student's April 11, 2011 IEP was a FAPE.

4. The petitioning party has the burden of proof in an IDEA due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Thus, Student has the burden of proof in Student's Case regarding whether District denied Student a FAPE in the LRE by offering placement in a SDC MRM classroom at Shirley. District has the burden of proof in its case on the issue of whether the placement offer in Student's April 11, 2011 IEP was a FAPE in the LRE.

5. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

6. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists

of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, and not on whether the existing program was more appropriate. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

8. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209;

Roland M. v. Concord Sch. Committee (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

9. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

10. School districts are required to provide each special education student with a program in the LRE. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular 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); Ed. Code, § 56031.)

11. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the

IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116)³.

12. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following 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] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].

13. If a District determines that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) 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 in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

³ All future references to the Code of Federal Regulations are to the 2006 edition.

14. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

15. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006)⁴; Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications and, the anticipated frequency, location and duration of services and

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

16. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

17. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) An IEP team is required to include: one or both of the student’s parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§

56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

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

19. If a parent refuses services in an IEP that had been consented to in the past, or the school district determines that the refused services are required to provide a FAPE, the school district shall file a request for a due process hearing. (Ed. Code, § 56346, subds. (d) & (f).) When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley*, *supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

20. As discussed below, the preponderance of the evidence established that District's April 11, 2011 IEP offer of placement was a FAPE in the LRE. First, District met its burden of establishing that it procedurally complied with IDEA. Prior to the April 11, 2011 IEP, District appropriately assessed Student in all areas of need, including APE, OT, SL, academics, and behavior. All of the required District staff members were present at the IEP meeting. Mother attended the meeting and fully participated. The IEP team discussed Student's PLOPs in conjunction with the assessment reports, and drafted 10 appropriate measurable annual goals addressing Student's unique needs in behavior, reading, writing, math, vocational education, articulation, and perceptual motor. The IEP team discussed a continuum of placement options including full inclusion, a District SDC MRM class, and a NPS special education program. The team also addressed Student's

behavioral needs and transition issues with regard to elopement behaviors. District's April 11, 2011 offer of placement, goals, accommodations, supports and services, was intended to start upon Mother's consent and to continue through the end of the 2011-12 extended school year. District's offer was appropriately recorded in the April 11, 2011 IEP and provided to Mother for her consent.

21. The determination of whether Student was offered a FAPE is focused on the appropriateness of the proposed placement under *Rowley*, not on whether the placement desired by parents is more appropriate. (See *Gregory K., supra*, 811 F.2d at p. 1314.) However, because the IEP offer in this case involved a change of placement from the LRE, general education, to a more restrictive placement, a part-time SDC, the ALJ has analyzed whether general education was appropriate. As discussed above, determination of whether a general education placement is appropriate involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. (See *Rachel H., supra*, 14 F.3d at p. 1404.) Here, the overwhelming weight of the evidence, particularly through the credible testimony of Marquez, Vestuto, Kennedy, Quintanilla, Luecke, van Wijk, Wells, and Zimmerman, established that general education was no longer appropriate and that District's placement offer was a FAPE.

22. Regarding the first *Rachel H.* factor, the preponderance of the evidence established that Student would not receive any significant educational benefit from full-time placement in a general education class. Student's history demonstrated that after five years in a general education setting, with the assistance of a full-time BII, Student made very little educational progress. Specifically, beginning from kindergarten and continuing to the April 11, 2011 IEP, District provided a multitude of accommodations,

supports and strategies to Student in the general education classroom to help her access her education, including a modified alternate curriculum, a full-time BII with BID supervision, an inclusion facilitator, and regular breaks in and out of the classroom. Nevertheless, the 2011 assessment results established that the supports and services provided by District were not successful in helping Student to achieve meaningful academic progress in that setting, even though her behaviors improved slightly with heavy prompting and BII support. Marquez, Aleman, and Vestuto credibly testified that, because of her unique needs, educational instruction at Student's cognitive levels was delegated for the most part to her full-time aide, who was not a credentialed teacher, and only occasionally to Vestuto in Aleman's absence. Student was frequently absent from the classroom because she was tardy in the mornings, required breaks that lasted twenty to forty minutes, and prompting to return to class after breaks, lunch and recess. She did not learn the curriculum taught to her peers, or at a level even close to them. Instead, Vestuto heavily modified Student's alternate curriculum using kindergarten level materials from the special education curriculum. Thus, the evidence overwhelmingly established that Student could not receive any meaningful educational benefit from a general education setting.

23. Regarding the second *Rachel H.* factor, the evidence established that, although Student received some non-academic benefit from her general education placement at Calahan, the benefit was not significant enough to justify continued placement in a general education class. Marquez, Vestuto, Aleman, Harrel, van Wijk, Kennedy, and Luecke credibly testified that Student's peers liked her, and they attempted to socially engage with her by helping and directing her on various tasks. However, Student's limited language skills impeded her from having any meaningful social interactions with her general education peers. Because Student required seating at the back of the classroom to accommodate her full-time instruction from an aide, she

would have few meaningful opportunities to learn in small groups with her peers if she were to continue to be placed in general education. She gravitated to and played with children of a much younger age when the opportunity presented itself, demonstrating the limits of non-academic benefits when Student was with her same-aged peers. Overall, the evidence established that socially, Student would continue to have little meaningful non-academic benefit in a full-time general education setting, given her cognitive disabilities and unique needs.

24. The third *Rachel H* factor is the effect Student's full-time presence would have on the teacher and children in a regular education class. As to this factor, the evidence established that Student's presence in a general education setting would negatively impact her teacher and classmates, given how impactful her presence in the general education classroom had been in the past. Specifically, as Marquez credibly testified, Student's frequent tardiness in the mornings disrupted the class. Her need for frequent breaks in and out of the classroom distracted other students and Marquez. Aleman constantly whispered to Student while giving instructions, at the same time Marquez tried to teach the rest of the classroom, which caused distraction to students sitting next to or near Student. Marquez needed to rotate the seating of the general education students because of the distraction of sitting by Student. The evidence also showed that because the classroom itself was small, but populated with a large number of students, the students were seated close together, which resulted in Student compulsively grabbing the bodies and possessions of her classmates, which posed a disruption to the classroom environment. Aleman, Harrel, Vestuto and Marquez credibly testified that Student required constant adult attention to keep her safe and other students from being disrupted. Consequently, Student's presence in a general education setting would require significant teacher attention, even with the support of a full-time aide.

25. Finally, regarding the fourth *Rachel H.* factor, neither party presented any evidence concerning the cost of educating Student in the general education setting versus a special education setting.

26. When considering all of the *Rachel H.* factors, the evidence established that Student was not an appropriate candidate for placement in the general education setting.

27. On the other hand, the preponderance of the evidence established that at the time the IEP team developed Student's IEP in April 2011, District offered an appropriate placement in a SDC/MRM class at Shirley given the extent of Student's unique needs. Specifically, the evidence established that Student required a smaller classroom environment that provided specialized, small group instruction. Quintanilla credibly testified that the SDC MRM class at Shirley consisted of less than half the number of students in the inclusion classroom, and was staffed by a credentialed special education teacher and three additional District educational aides trained to work with students with special needs, in addition to Student's full-time BII. Quintanilla's and Kennedy's testimony, in particular, was strongly persuasive in establishing that the proposed SDC MRM classroom was designed to provide Student with more functional instruction, small group learning with a small student to teacher ratio, and supports and strategies that were designed to address all of Student's unique needs and provide her with more opportunities to make meaningful academic progress than in her full inclusion setting. Wells and Kennedy credibly concurred that Student's overdependence on her BII in a full inclusion classroom prevented her from becoming more independent and from more actively engaging in her academic program. The evidence established that the methods of instruction in the SDC MRM were geared to each student's unique needs and learning abilities as well as their cognitive abilities. In addition to SL services as required by their IEPs, Quintanilla used a variety of approaches to help her students

increase their verbal communication skills, including creating a picture exchange with visuals, communication books for parents, "share out loud" group work, songs, chants and shared songs. Quintanilla also encouraged students to share ideas with a partner or small group, to clap for classmates, and to give and receive feedback from their peers.

28. Quintanilla's and Kennedy's testimony credibly established that placement in the SDC MRM classroom was calculated by the IEP team to help Student achieve more independence, improve her social interactions with similarly situated peers during the learning process, and help her achieve her behavior and social skills goals, using the strategies discussed above. Despite Student's assertion that she had friends at Calahan and was better served remaining there, Student offered no evidence that she was not capable of making new friends at Shirley given the structure of the District's proposed program.

29. Vestuto, Kennedy, Luecke, and Quintanilla credibly testified that the April 11, 2011 IEP team designed Student's proposed educational program to include a variety of academic and non-academic mainstreaming opportunities, including ELD, Open Court, science lab, psychomotor (physical education), arts cadre, student council, recycling team, field trips, lunch/recess for continued interaction and socialization with typical peers. The fact that District did not state with specificity in the IEP the percentage or exact amount of time for mainstreaming was not a significant omission, particularly because the list of mainstreaming opportunities in the IEP was sufficiently comprehensive and each activity was specifically identified.

30. Student offered no credible evidence demonstrating that Student could not receive some educational benefit academically and socially from the offered SDC/MRM class. Student's expert, Schob, declined to offer an opinion on the appropriateness of District's placement offer of April 11, 2011. Although Harrel offered the opinion that Student could gain some social/educational benefit by remaining in the

general education setting, her opinion was overshadowed by the credible testimony of Kennedy, Wells, Vestuto and Marquez, who each, with the exception of Wells, had more work experience than Harrel, and who reasonably concluded, based on Student's assessment results and Student's history within the general education setting, that Student required placement in a SDC MRM.

31. The evidence also did not support Mother's assertion that placement in the SDC MRM class at Shirley posed a safety risk to Student. As discussed above, the placement offer contemplated substantially more adult supervision than in her current placement with one teacher and a BII in a classroom of 33-35 students. In addition, Harrel, Aleman, Marquez, and Vestuto credibly testified that Student's elopement behaviors had improved, and that she made progress in following directives when she demonstrated antecedent behaviors to elopement. Their testimony supported District's position that it had considered and addressed Student's unique needs in the area of behavior and elopement in making the offer of placement at Shirley.

32. The evidence also did not support Mother's assertion that District intended to completely discontinue the BII/BID services shortly after Student transitioned to Shirley because the IEP unambiguously stated that the offer of BII/BID services for the 2011-12 school year had no end date. Accordingly, contrary to Student's position, the District's offer included BII/BID until such time as modified by the IEP team. Thus, Student cannot plausibly contend that the District's offer did not include sufficient support to assist Student in her transition to a new placement.

33. The evidence also did not support Mother's assertions that Student would learn more if District provided her with a more challenging curriculum and associated materials. As discussed above, under *Rowley, supra*, 458 U.S. at p. 209, as long as District is providing an appropriate education, methodology is left to the District's discretion.

Student did not offer any relevant evidence that District failed to provide or offer Student an appropriate curriculum or materials.

34. In sum, District met its burden of showing that IEP was procedurally proper and that its offer of placement in the SDC MRM was appropriate and in the LRE. With so many educators and professionals agreeing that the number of opportunities for mainstream time proposed in Student's April 11, 2011 IEP was adequate and appropriate, and giving due weight to the views of the District on matters of sound educational policy, the District's placement offer for Student was a FAPE in the LRE within the meaning of the IDEA. (Factual Findings 1-54; Legal Conclusions 4-34).

RELATED SERVICES AND SUPPORTS

35. Student further contends that District denied her a FAPE in the April 11, 2011 IEP because its offer of 240 minutes of school-based speech therapy was insufficient to meet Student's needs. Student also contends that District should have offered her an unspecified amount of NPA SL services. On the other hand, District contends that the offer of related services in Student's April 11, 2011 IEP was a FAPE, particularly when considered in conjunction with the offered placement, which included a language-based curriculum that supplemented the direct/collaborative model of SL therapy provided for in her IEP.

36. On this issue, Student has the burden of proof on the issue of whether District's April 11, 2011 IEP offer of 240 minutes a week of school-based SL services denied Student a FAPE. In District's case, District has the burden of proof on the issue of whether all of the related services in Student's April 11, 2011 IEP was a FAPE. (See *Schaffer v. Weast, supra*, 546 U.S. at pp. 56-62.) For purposes of analyzing the appropriateness of the related services offered, Legal Conclusions 4 to 30, are incorporated by reference.

37. The preponderance of the evidence established that District's April 11, 2011 IEP offer, including 240 minutes a month of direct/collaborative SL services in combination with the placement offer that included language-based curriculum, was a FAPE. First, as discussed in detail above, District met its burden of establishing that it procedurally complied with the IDEA in connection with the April 11, 2011 IEP. (*Rowley*, supra, 458 U.S. at pp. 200, 203-204, 206-207.)

38. In regard to SL services, the evidence established that van Wijk, who was qualified to administer the SL assessment in 2011, appropriately assessed Student, and received valid results, which she reported to the entire IEP team. The IEP team discussed the report, and Mother had an opportunity to ask questions about the report. The IEP team determined that Student's language skills were minimal, and she could only communicate in one-to-three word phrases. While physically capable of speaking, Student's cognitive levels were low and she had articulation problems, which made effective verbal communication more difficult for her. The IEP team determined that Student made some incremental progress on prior communication goals based on the 240 minutes of SL therapy she had received through her October 2009 IEP. The IEP team developed two measurable annual articulation goals for the April 11, 2011 IEP. In addition, the credible testimony of Quintanilla and van Wijk established that District's offer of school-based SL services for 240 minutes a month using a direct/collaborative model, particularly when combined with the language-based curriculum at Shirley, was calculated to provide Student some educational benefit and access to her education. The net result of District's April 11, 2011 IEP offer of SL services associated with her IEP goals and the placement offer described above was that District offered Student more instruction in communication skills than she received in her prior full inclusion classroom. Student offered no credible evidence to the contrary

39. Student also offered no persuasive evidence supporting her assertion that she required NPA SL services in addition to or instead of the 240 minutes a month of school-based services offered by District. The only expert testimony Student offered to support her claim for more SL services was from Diep, who had no opinion on the nature, frequency or duration of the SL services Student required. In offering her very generalized opinion that the District's offer was insufficient because of incomplete articulation goals, Diep relied solely on the District's 2010 and 2011 assessment reports and on Student's April 2011 PLOPs. Diep's opinion that van Wijk's assessment was incomplete was not persuasive. She had no practical familiarity with Student, she never met, assessed or observed Student, she did not attend the IEP meeting, nor did she talk to Student's SL therapists, teachers, van Wijk, or other support staff about Student. She based her opinions solely on a limited records review which did not include all of the documents that the April 11, 2011 IEP team relied upon when making its offer. Van Wijk's testimony, on the other hand, was more credible and carried more weight than Diep's because it was based upon her April 2011 SL assessment and her presence and participation at the April 11, 2011 IEP meeting.

40. The evidence also established that District's offer of accommodations, supports, and other services was appropriate. Luecke and Zimmerman's credible testimony established that their assessment results were valid, that the IEP team discussed their assessment results at the April 11, 2011 IEP, and that the team developed measurable annual goals, including in the areas of behavior/social emotional and perceptual motor, to address Student's unique needs. In addition to an alternate curriculum in a classroom designed to give intensive individual and small group instruction, the IEP team appropriately offered Student a BSP to address her elopement and grabbing behaviors, 30 minutes a week of APE services, ESY, and transportation. The

IEP team also considered Afshin's OT report and appropriately determined that Student no longer needed OT services. Student offered no evidence to the contrary.

41. When considered in conjunction with the intensive and appropriate SDC/MRM program offered by District at Shirley, District's April 11, 2011 IEP offer of accommodations, supports, and related services constituted a FAPE. (Factual Findings 1-54; Legal Conclusions 4-41).

ORDER

1. The April 11, 2011 IEP offered Student a FAPE in the LRE.
2. All of Student's claims for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: February 6, 2012

/s/
Adrienne L. Krikorian
Administrative Law Judge
Office of Administrative Hearings