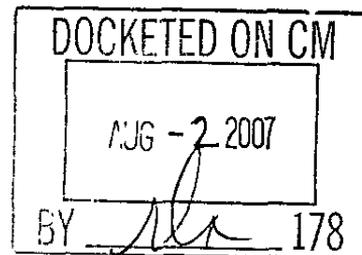


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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**B.S., a minor by and through his
parents, R.S. and P.S.,
Plaintiff,
vs.
PLACENTIA-YORBA LINDA
UNIFIED SCHOOL DISTRICT,
Defendant.**

Case No.: SACV 06-847 CJC (MLGx)
MEMORANDUM OF DECISION



I. INTRODUCTION

This is an administrative appeal from a decision by an Administrative Law Judge (“ALJ”) in the Office of Administrative Hearings (“OAH”). The ALJ determined that the Individualized Education Programs (“IEP”) offered by Defendant Placentia-Yorba Linda Unified School District (“the District”) to Plaintiff B.S. for the 2004/2005 and 2005/2006 school years amounted to a Free Appropriate Public Education (“FAPE”) in the Least Restrictive Environment (“LRE”), as required by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* Having reviewed the

(52)

1 administrative record, this Court reaches the same conclusion. The planning process
2 utilized by the District in creating his IEPs was procedurally proper, the IEPs offered by
3 the District for both the 2004/2005 and 2005/2006 school years were reasonably
4 calculated to provide B.S. with a meaningful educational benefit, and they were fully
5 and properly implemented during both years. Accordingly, the District provided B.S.
6 with a FAPE in the LRE for 2004/2005 and 2005/2006.

8 II. FACTUAL BACKGROUND

9
10 B.S. is a student in the District, and has been in the District's special education
11 program since he was three years old. He suffers from autism, and as a result, has
12 certain difficulties with language, reading comprehension, and some social interaction.
13 In order to address these difficulties, the District has prepared an IEP for B.S. for each
14 year of his education. The District holds meetings with B.S.'s parents, his general
15 education teachers, his special education teachers, and other members of the District's
16 special education staff to discuss and plan the best educational program for B.S. for the
17 coming year. During these meetings, the District reviews B.S.'s performance, assesses
18 the areas in which he has progressed most and the areas that still need targeted
19 attention, and sets forth specific goals for B.S. to reach over the course of the next year.

20
21 This action involves a review of the IEPs for B.S.'s third grade (2004/2005) and
22 fourth grade (2005/2006) years. For the 2004/2005 school year, B.S. received an IEP
23 that called for general education with certain secondary services and other
24 accommodations. B.S. spent each school day in his general education class with the
25 assistance of a shadow aide the entire time. His aide also helped instruct B.S. one-on-
26 one in certain areas, such as language arts, where he had particular difficulty. B.S. was
27 also provided with secondary services such as social skills training, adaptive physical
28 education, occupational therapy, and speech and language work with a speech therapist.

1 The IEP offered for the 2005/2006 school year was mostly identical, with one
2 exception. As B.S. moved from third to fourth grade, his teachers were concerned that
3 his language difficulties would make certain aspects of the fourth grade curriculum too
4 difficult for him, and that he would be better served by a dedicated special education
5 program. Accordingly, they proposed that he be placed in blended language arts
6 program that included instruction both from a special education instructor in a special
7 day class ("SDC") and from a resource specialist ("RSP"). This proposal would require
8 B.S. to leave his general fourth grade class for 90 minutes each day. His parents did not
9 consent to this proposal, and B.S.'s prior IEP remained in place under the IDEA's stay
10 put provision.

11
12 In addition to the services provided by the District, B.S. also received private
13 services from a speech pathologist, Katherine Bowman, and an educational
14 psychologist, Dr. Christine Davidson. Early in 2004, Dr. Davidson suggested that B.S.
15 be tested at a Lindamood Bell ("LMB") clinic. LMB is a private educational clinic that
16 offers education in reading comprehension through particular learning strategies, such
17 as Seeing Stars and Visualizing and Verbalizing. B.S. was tested in April 2004, and the
18 clinic recommended that he receive 300 hours of intensive (4 hours per day) instruction.
19 Dr. Davidson endorsed this recommendation, and presented it to the District at the IEP
20 meetings in the fall of 2004. However, B.S.'s teachers were concerned that the program
21 may be too abstract, and that B.S. may not be able to generalize the concepts and apply
22 them to other areas outside of LMB. They were also concerned that removing him from
23 campus and his general peers for four hours each day to do intensive one-on-one
24 instruction would hamper B.S.'s social development and deprive him of the benefits of
25 being in a class with his general peers as much as possible. Accordingly, the District
26 declined to provide the program as part of the IEP. The next summer, B.S.'s parents
27 enrolled him in LMB at their own expense. They requested reimbursement for
28 providing this service, but the District declined their request.

1 B.S. filed a request for a due process hearing in connection with both the
2 2004/2005 and 2005/2006 IEPs. He argued that the failure to provide intensive LMB
3 instruction denied him a FAPE. He also argued that removing him from his general
4 education class for 90 minutes for a blended SDC/RSP class violated the IDEA's
5 requirement that he be educated in the LRE. Since the parents declined to consent to
6 the 2005/2006 IEP, the District was obligated to file its own request for a due process
7 hearing regarding that IEP. These requests were consolidated for one hearing before
8 the ALJ. The ALJ took evidence from the parties and heard eight days of testimony.
9 On August 22, 2006, he issued a decision ruling in favor of the District, finding that the
10 offers for 2004/2005 and 2005/2006 provided B.S. with a FAPE in the LRE. This
11 administrative appeal followed.

12 13 III. STANDARD OF REVIEW

14
15 "When a party challenges the outcome of an IDEA due process hearing, the
16 reviewing court receives the administrative record, hears any additional evidence, and,
17 'basing its decision on the preponderance of the evidence, shall grant such relief as the
18 court determines is appropriate.'" *R.B. ex rel F.B. v. Napa Valley Unified Sch. Dist.*, ---
19 F.3d ----, 2007 WL 2028132 at *3 (9th Cir. Jul. 16, 2007) (quoting 20 U.S.C. §
20 1415(i)(2)(B)). In reviewing the administrative record, courts are to give "due weight"
21 to the state administrative proceedings. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.*
22 *5J*, 481 F.3d 770, 775 (9th Cir. 2007) (quoting *Bd. of Educ. of Hendrick Hudson Cent.*
23 *Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206 (1982)). Courts must be
24 careful not to "substitute their own notions of sound educational policy for those of the
25 school authorities which they review." *Id.* (quoting *Rowley*, 458 U.S. at 206). Where
26 the hearing officer's findings are "thorough and careful," the court gives those
27 findings "particular deference." *R.B.*, 2007 WL 2028132 at *3 (quoting *Union Sch.*
28 *Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994)). A hearing officer's findings will be

1 treated as thorough and careful “when the officer participates in the questioning of
2 witnesses and writes a decision ‘contain[ing] a complete factual background as well as a
3 discrete analysis supporting the ultimate conclusions.’” *Id.* at *8 (quoting *Park v.*
4 *Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006)).
5

6 Here, the ALJ’s findings were thorough and careful, and thus entitled to
7 particular deference. The record reveals several occasions on each day of the eight-day
8 due process hearing where the ALJ asked clarification or follow-up questions of the
9 various witnesses who testified. In his order, the ALJ set forth a detailed factual
10 background and made extensive findings of fact. He identified all issues properly
11 raised by B.S. in his request for a due process hearing and engaged in a careful analysis
12 of each issue for each of the two academic years in question. Thus, the Court will give
13 the ALJ’s order particular deference. Such deference is especially appropriate in areas
14 where the ALJ weighed conflicting evidence or witness testimony or characterized
15 certain evidence presented by either B.S. or the District.
16

17 **IV. LEGAL ANALYSIS**

18

19 The Court’s role in this case is to determine whether the District’s offers to B.S.,
20 as set forth in the respective IEPs, amount to a FAPE in the LRE for the 2004/2005 and
21 2005/2006 school years. B.S. has alleged defects with the IEPs that fall into three
22 general categories. First, B.S. contends that the District committed procedural
23 violations by failing to consider the reports prepared by Ms. Bowman and Dr. Davidson
24 during the IEP process. Second, B.S. alleges that both IEPs were substantively
25 inadequate because they did not include the intensive LMB program recommended by
26 Ms. Bowman, Ms. Zakaryan, and Dr. Davidson. B.S. also alleges that the 2005/2006
27 IEP was substantively inadequate because it proposed to remove him from his general
28 class for 90 minutes each day. Third, B.S. alleges that the District failed to properly

1 implement his IEP for the 2004/2005 year. The alleged failures include a three-month
2 delay in providing an LMB CD, two missed sessions of adaptive PE, and dismissing
3 B.S. from social skills class 20-25 minutes early on a handful of occasions.¹ The Court
4 will consider each of these categories in turn.

5 6 **A. Procedural Violations**

7
8 In drafting the IDEA, “Congress placed every bit as much emphasis upon
9 compliance with procedures . . . as it did upon the measurement of the resulting IEP
10 against a substantive standard.” *Rowley*, 458 U.S. at 205-06. Thus, procedural
11 compliance with the IEP process is important in ensuring that a student is receiving a
12 FAPE. However, not all procedural violations result in denial of a FAPE. *See Park*,
13 464 F.3d at 1033 n. 3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d
14 1086, 1089 (9th Cir. 2002); *see also M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 652
15 (9th Cir. 2005) (Gould, J., concurring) (“IDEA procedural error may be held
16 harmless.”). “A child is denied a FAPE only when the procedural violation ‘result[s] in
17 the loss of educational opportunity or seriously infringe[s] the parents’ opportunity to
18 participate in the IEP formation process.’” *R.B.*, 2007 WL 2028132 at *4 (quoting
19 *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th
20 Cir. 1992)).

21
22
23
24 ¹ B.S. has also claimed that the District failed to provide 25% of his scheduled RSP during the
25 2005/2006 school year. This issue was not raised in B.S.’s request for a due process hearing, and did
26 not even arise until after the testimony of Karen McCoy on the final day of the hearing. The ALJ
27 determined that the issue was not properly before him, and declined to consider it in making his ruling.
28 This Court agrees. The issue was not properly before the ALJ below and is therefore not properly
before the Court on administrative appeal. The District had no notice that this would be an issue until
after the administrative hearing concluded, and thus had no opportunity to introduce evidence or
witness testimony to rebut B.S.’s allegations. Nor has B.S. properly exhausted his administrative
remedies in regard to this issue. Accordingly, the Court will not consider the District’s alleged failure
to provide RSP during the 2005/2006 school year in its analysis.

1 The regulations promulgated under the authority of the IDEA require IEP teams
2 to consider parent-obtained independent educational evaluations. 34 C.F.R. § 300.502.
3 Specifically, if a parent “shares with the public agency an evaluation obtained at private
4 expense, the results of the evaluation . . . [m]ust be considered by the public agency . . .
5 in any decision made with respect to the provision of FAPE to the child.” 34 C.F.R. §
6 300.502(c)(1). B.S. argued that the District did not satisfy this procedural requirement
7 by failing to consider reports prepared by Ms. Bowman and Dr. Davidson during the
8 IEP process. This argument is unsupported by the evidence in the record. The IEP
9 team fully considered and discussed each report submitted by Ms. Bowman and Dr.
10 Davidson.

11
12 *I. Letter from Katherine Bowman*

13
14 Ms. Bowman prepared a letter on April 30, 2004, in which she noted that Dr.
15 Davidson suspected that B.S. might have “a component of ADD coexisting with his
16 autism.” Ex. 26 at 297.² Accordingly, she recommended several possible options for
17 attempting to improve his attention, focus, and processing. *Id.* The District considered
18 the recommendations made by Ms. Bowman at the May 10, 2004 IEP meeting. Ex. 28
19 at 328-29. The District noted that the attentional issues mentioned in the letter were a
20 “new area of concern” for B.S., and the school team proposed an assessment plan to
21 evaluate B.S.’s potential needs in that area. *Id.* When subsequent evaluation of B.S.
22 revealed that he did not have ADD or ADHD, *see* Ex. 23 at 244, 264, 273, the District
23 deemed it unnecessary to further consider the recommendations of Ms. Bowman. This
24

25
26 ² The Court agrees with the finding made by the ALJ that the letter from Ms. Bowman was not an
27 independent educational evaluation, within the meaning of 34 C.F.R. § 300.502. Ms. Bowman did not
28 evaluate B.S. for potential attention deficit disorders herself, nor did she provide any information
about whether attentional issues were impacting B.S.’s progress with her program. Although the
evidence shows that the District did give this letter due consideration, any lack of consideration would
not amount to a procedural violation under 34 C.F.R. § 300.502.

1 level of scrutiny by the District satisfies the regulation's requirement that the District
2 consider Ms. Bowman's letter in connection with the provision of FAPE to B.S.

3
4 2. *Evaluations by Dr. Davidson*

5
6 Dr. Davidson conducted three formal evaluations of B.S. These evaluations took
7 place in April 2004, April 2005, and September 2005. Dr. Davidson's April 2004
8 report was not made available to the District until the September 13, 2004 IEP meeting.
9 Dr. Davidson was present at this meeting, and she and the IEP team engaged in an
10 extensive discussion of the results and recommendations from her evaluation. Ex. 38.
11 As a result of this discussion, several of the goals set forth in B.S.'s IEP for the
12 2004/2005 year were altered at the suggestion of Dr. Davidson. *Id.* at 364-65. The
13 District engaged in further discussion with Dr. Davidson regarding her evaluation at the
14 October 13, 2004 meeting, and again formulated strategies for B.S. only after
15 considering the recommendations made by Dr. Davidson. Ex. 43. Dr. Davidson's
16 April 2005 report produced the same level of discussion. It was presented to the
17 District on April 19, 2005 and discussed extensively at the April 25, 2005 IEP meeting.
18 Ex. 72. The Court finds that the District engaged in meaningful consideration and
19 evaluation of Dr. Davidson's April 2004 and April 2005 reports. Such extensive
20 attention easily satisfies the requirements of 34 C.F.R. § 300.502.

21
22 Dr. Davidson's third report, prepared in September 2005, was provided to the
23 District on November 22, 2005. ALJ Decision ¶ 17. The District included Dr.
24 Davidson's report on the agenda for the November 28, 2005 IEP meeting; however, the
25 parents declined to discuss it at that time. Ex. 100. Accordingly, the report was not
26 discussed at that meeting. *Id.* At no time thereafter did B.S.'s parents request a
27 meeting or suggest another date on which it would be appropriate to discuss the report,
28 and thus Dr. Davidson's report was never discussed at an IEP meeting. ALJ Decision ¶

1 19. The ALJ found, and this Court agrees, that the District's attempt to discuss the
2 report at the November 28 IEP satisfies its obligations under the IDEA. Accordingly,
3 there were no procedural violations present in the formation of B.S.'s IEP.³

4 5 **2. Substantive Violations**

6
7 Among the goals of the IDEA is to "ensure that all children with disabilities have
8 available to them a free appropriate public education that emphasizes special education
9 and related services designed to meet their unique needs and prepare them for further
10 education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). In
11 evaluating the appropriateness of an IEP, courts are careful to note that the standard is
12 not the "absolute best or 'potential-maximizing' education for the individual child."
13 *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (quoting
14 *Rowley*, 458 U.S. at 197 n. 21). Instead, the IDEA obligates states to provide "'a basic
15 floor of opportunity' through a program 'individually designed to provide educational
16 benefit to the handicapped child.'" *Id.* (quoting *Rowley*, 458 U.S. at 201). In evaluating
17 the sufficiency of a district's educational offering, courts look to the "goals and goal
18 achieving methods at the time the plan was implemented and ask whether these
19 methods were reasonably calculated to confer [the student] with a meaningful benefit."
20 *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *see also Gregory K.*, 811 F.2d
21 at 1314 ("We must uphold the appropriateness of the District's placement if it was
22 reasonably calculated to provide Gregory with educational benefits."). IEP's are not to
23 be judged in hindsight, but evaluated as of the time they were drafted and implemented.
24 *Adams*, 195 F.3d at 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d

25
26
27 ³ In the alternative, any error in the District's decision to defer discussion of the September 2005 report
28 until the parents so requested is harmless. B.S. has not articulated why this decision either deprived
him of educational opportunity or seriously infringed his parents' opportunity to participate. In
contrast, the District provided B.S.'s parents with the opportunity to participate, and it was the parents
who declined to discuss the report.

1 1031, 1041 (3d Cir. 1993)). Moreover, in reviewing the sufficiency of the district's
2 offering, the focus must be "primarily on the District's proposed placement, not on the
3 alternative that the family preferred." *Gregory K.*, 811 F.2d at 1314.⁴

4
5 Here, B.S. identifies two alleged substantive deficiencies with the IEPs offered to
6 him by the District. First, B.S. argues that his 2004/2005 and 2005/2006 IEPs did not
7 provide him with a FAPE because they failed to include the intensive LMB training
8 recommended by Dr. Davidson and Ms. Zakaryan of the LMB clinic. Second, B.S.
9 argues that the 2005/2006 IEP was further inappropriate because it proposed to place
10 him in a 90-minute per day blended SDC/RSP program for language arts. He contends
11 that this violates the IDEA's requirement that disabled students be educated in the least
12 restrictive environment. Giving due weight to the ALJ's thorough and careful decision,
13 the Court agrees with the ALJ and finds that the District's 2004/2005 and 2005/2006
14 IEPs offered B.S. a FAPE in the LRE.

15
16 *1. Denial of Intensive Lindamood Bell Instruction*

17
18 B.S.'s IEPs provided for general education with additional secondary services,
19 including social skills. Ex. 18 at 146; Ex. 65 at 422.⁵ Monday through Friday, B.S. was
20 in his third grade class with his general education peers from 7:50 a.m. until 2:10 p.m.
21 ALJ Decision ¶ 3. B.S. had a shadow aide the entire time he was in his general
22 education class who helped keep him on task and provided some individual one-on-one
23

24
25 ⁴ In *Gregory K.*, "Gregory's parents believe[d] emphatically that Lois Lewis's tutoring has helped him
26 learn." 811 F.2d at 1314. However, the court noted that "[e]ven if the tutoring were better for
27 Gregory than the District's proposed placement, that would not necessarily mean that the placement
28 was inappropriate." *Id.*

⁵ The offers made for the 2004/2005 school year and the 2005/2006 school year were substantially
similar both in terms of the type and amount of secondary services provided. The only major
difference between the two was the recommendation in the 2005/2006 IEP that B.S. be placed in a
blended SDC/RSP for 90 minutes per day.

1 instruction. Ex. 18 at 147; Ex. 65 at 422. Tuesday through Friday, B.S. attended a
2 social skills program at his elementary school from 2:10 p.m. until 5:10 p.m. ALJ
3 Decision ¶¶ 3, 29. During his school day, B.S. received 30 minutes of speech and
4 language education with a speech pathologist four times a week. Ex. 18 at 146; Ex. 65
5 at 422. He also received one hour per week of adaptive physical education, and one
6 hour and twenty minutes per week of occupational therapy. Ex. 18 at 146; Ex. 65 at
7 422. B.S.'s IEP also provided for continuing education and social skills programs
8 during the summer, or extended school year. Ex. 18 at 146-47; Ex. 65 at 422. The IEP
9 included an extensive list of goals for B.S. in areas such as communication, social-
10 emotional, reading comprehension, and oral and written comprehension, among others.
11 ALJ Decision ¶ 4.

12
13 During the preparation process of B.S.'s IEP for the 2004/2005 school year, his
14 parents decided to have him pre-tested by the LMB clinic to see if he might benefit
15 from their program. On August 30, 2004, Ms. Zakaryan of the LMB clinic prepared a
16 report for B.S.'s parents. Ex. 36. The report provided the results of B.S.'s pre-testing at
17 the clinic, as well as a recommendation that he receive "intensive sensory-cognitive
18 instruction 4 hours daily, 5 days per week for 15 weeks, for an estimated 300 hours."
19 *Id.* at 358. These 300 hours were to be divided between two LMB programs -- Seeing
20 Stars, and Visualizing and Verbalizing for Language Comprehension and Thinking. *Id.*
21 Dr. Davidson's 2004 evaluation of B.S. also recommended that he receive LMB
22 instruction; indeed, it appears from the record that Dr. Davidson was the first to suggest
23 to B.S.'s parents that they consider LMB. *See* Ex. 38 at 363. The District thoroughly
24 considered the program recommended by Ms. Zakaryan and Dr. Davidson. Ex. 43.
25 Members of the IEP team expressed concern about the "abstract" nature of the LMB
26 program, and worried that taking him away from his class and his set curriculum for
27 four hours per day would result in "splintering." *Id.* at 374-75. They also expressed
28 concern that he would not obtain the benefit of being in a learning environment with his

1 general peers if he spent four hours each day off-campus undergoing intensive one-on-
2 one LMB, with little to no interaction with other students. *Id.* However, the District
3 agreed that the strategy of teaching reading comprehension through visualizing and
4 verbalizing methods, which were not unique to LMB, could aid B.S. if they were
5 adapted to his level. *Id.* Accordingly, the District agreed to incorporate some of the
6 strategies into his RSP and speech and language programs, and, at Dr. Davidson's
7 request, provided B.S.'s parents with software to help implement some of the strategies
8 at home. *Id.* at 375-76.

9
10 The District's IEPs provided a comprehensive and well-integrated academic
11 program targeted at the specific goals listed in the IEP. As the ALJ found, there were
12 very few students in the entire district who had the same level of designated
13 instructional services and social skills training. Tr. Vol. VI, 167:10-13 (Testimony of
14 Connie Polivka). His goals were crafted by the District's full inclusion specialist, with
15 input from B.S.'s parents and Dr. Davidson. ALJ Decision ¶ 37. B.S. worked with
16 well-trained educators who had extensive experience in special education, including
17 working with autistic students. Some of these educators had known and worked with
18 B.S. since he first entered the District's special education program at age 3. Moreover,
19 the IEPs were the result of extensive meetings and discussions between the District's
20 IEP team and B.S.'s parents. They held seven IEP meetings for the 2004/2005 IEP
21 alone, covering nearly 15 hours in total, to ensure that B.S. received a comprehensive
22 educational program targeted to achieving appropriate goals. ALJ Decision ¶ 4. The
23 District was also responsive to the specific requests of the parents. Although it
24 concluded that 300 hours of intensive LMB performed exclusively off-campus at the
25 LMB clinic would be inappropriate for B.S., the District agreed to integrate some of
26 those strategies into his existing program, and modify those strategies to best target
27 B.S.'s unique abilities and needs. ALJ Decision ¶ 21.

28

1 Despite this comprehensive program, B.S. argues that his IEP was substantively
2 deficient because it did not provide the intensive LMB education recommended by Dr.
3 Davidson and Ms. Zakaryan. However, the IDEA does not require the District to
4 provide B.S. the best possible education, or even the better of two options. *See Rowley*,
5 458 U.S. at 197 n. 21; *Gregory K.*, 811 F.2d at 1314. Thus, even if the intensive LMB
6 program preferred by B.S.'s family would have provided a better education to B.S., the
7 IEPs prepared by the District is still a FAPE if it is reasonably calculated to confer a
8 meaningful educational benefit.⁶ *Adams*, 195 F.3d at 1149. Given the intensive
9 planning process, the extent of the services made available to B.S., the focus on crafting
10 goals and services to meet B.S.'s specific abilities and needs, and the involvement of
11 experienced and highly trained educators throughout B.S.'s school day, the District's
12 offers were reasonably calculated to confer a meaningful educational benefit. The
13 Court concludes that the District's offers to B.S., which provided one of the most
14 comprehensive special education programs in the District, provided him with a FAPE
15 for the 2004/2005 and 2005/2006 school years.

16

17 2. *Placement in the Blended SDC/RSP Program*

18

19 The District recommended that B.S. be placed in a blended SDC/RSP program
20 for 90 minutes a day during the 2005/2006 school year. Ex. 65 at 422. Under this
21 offer, B.S. would get all of his language arts instruction from the SDC and RSP
22 instructors, with the assistance of aides. The remainder of his school day would be
23

24
25 ⁶ The Court is skeptical that the intensive LMB would actually have provided B.S. with a better overall
26 education. Neither Dr. Davidson nor Ms. Zakaryan could articulate how the program would be
27 integrated with his existing curriculum, nor did they meaningfully account for the detriment to B.S. of
28 spending 4 hours each day away from his general peers in a one-on-one environment with the LMB
instructor. Additionally, LMB focuses on just one aspect of learning – reading comprehension – and
neglects other important areas, such as math and science, provided by B.S.'s general curriculum.
Nonetheless, an analysis of the relative merits of intensive LMB instruction compared to the District's
IEP offers is unnecessary, and the Court makes no finding as to the relative merits of LMB.

1 spent in his fourth grade class with his general education peers. *Id.* The SDC had three
2 instructors for a class of approximately 12 students, and RSP was one-to-one
3 instruction. Thus, by doing his language arts in the blended program, B.S. would be
4 able to learn more directly from his teachers. Both the SDC teacher and the RSP
5 teacher had training in special education and experience working with autistic children.
6 ALJ Decision ¶ 31. Both also had extensive knowledge of a variety of reading
7 strategies employed by the District to help increase comprehension. *Id.* They utilized
8 these various strategies in their classrooms, and changed strategies as necessary to
9 maximize the educational benefit to B.S. *Id.*

10
11 B.S. and his parents refused to consent to placement in the SDC/RSP blended
12 program because it removed him from his general peers for a portion of the class day.⁷
13 B.S. argues that the blended program violates the LRE requirement of the IDEA. The
14 IDEA requires that “special classes, separate schooling, or other removal of children
15 with disabilities from the regular educational environment occurs only when the nature
16 or severity of the disability is such that education in regular classes with the use of
17 supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §
18 1412(a)(5)(A). “This provision sets forth Congress’s preference for educating children
19 with disabilities in regular classrooms with their peers.” *Sacramento City Unified Sch.*
20 *Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994) (“*Rachel H.*”). The
21 Ninth Circuit has adopted a four-factor balancing test to determine whether a district’s
22 placement offers education in the LRE: (1) the educational benefits of placement full-
23 time in a regular class; (2) the non-academic benefits of such placement; (3) the effect
24 the student has on the teacher and children in the regular class; and (4) the cost of
25 mainstreaming the student. *Id.* at 1404.

26
27 ⁷ The Court notes that at the same time the parents refused consent to the blended program on grounds
28 that it would remove B.S. from class with his general peers for ninety minutes, they were requesting an
intensive LMB program that would have taken B.S. away from school and his general education class
for at least four hours each day.

1 The Court has considered the four *Rachel H.* factors as they apply to this case,
2 and concludes that the District's offer of a blended program satisfies the IDEA's LRE
3 requirement. The District's offer provided B.S. with placement in his regular class with
4 his general education peers for a substantial majority of the day. With regard to
5 subjects such as science, math, and social studies, B.S. was obtaining the educational
6 and non-academic benefits of placement with his typical peers. However, several
7 District witnesses testified that, because of his language difficulties, B.S. could not do
8 the same language arts curriculum as the rest of his class. For example, his fourth grade
9 teacher noted that, during language arts instruction, B.S. was like an "island" in his
10 class because he was primarily working one-on-one with his aide, utilizing a different
11 level of curriculum than his general peers. Tr. VI, 283:4-17 (Testimony of Stephanie
12 Gayron). Thus, B.S. was not receiving academic or non-academic benefits from
13 language arts instruction in his general class because the level of instruction was too
14 advanced and he was not interacting with his classmates during language arts
15 instruction. See *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989)
16 (noting that there is no benefit to placement in a general class where "the only
17 advantage to such an arrangement would be that the child is sitting next to a non-
18 handicapped student").

19
20 In contrast, the proposed blended program would place B.S. in an environment
21 where he could work more closely with both his teachers and the other students in the
22 class. The District presented evidence that this program would be less restrictive and
23 more socially beneficial than staying in his general class, where his language arts
24 instruction was done exclusively one-on-one with his aide. Tr. VII, 209:5-12, Tr. VII,
25 17:7-19:22 (Testimony of Ellen Hooper). It also provided evidence that the level of
26 instruction in the blended program would be better suited to meet B.S.'s unique abilities
27
28

1 and needs, and thus provide for more improvement in his reading comprehension. *Id.*⁸
2 Thus, the evidence shows that the blended program would provide B.S. with the
3 academic and non-academic benefits of language arts instruction that he was not
4 obtaining in his regular class. For the remainder of the day, B.S. would be provided the
5 academic and non-academic of participating in his general class in subjects where he
6 could handle the level of the curriculum and thus interact with his fellow students
7 during instruction. Accordingly, the Court finds that the District's placement offer for
8 the 2005/2006 school year met the IDEA's requirement that B.S. receive a FAPE in the
9 LRE.

11 C. Implementation Violations

13 "The IDEA defines a free appropriate public education as 'special education and
14 related services that . . . are provided in conformity with the [child's] individualized
15 education program.'" *Van Duyn*, 481 F.3d at 779 (quoting 20 U.S.C. § 1401(9)).
16 Failure to implement an IEP may deny a child a FAPE. *Id.* Courts will find a violation
17 of the IDEA only where there is a *material* failure to implement the IEP. *Id.* at 783. "A
18 material failure occurs when the services a school provides to a disabled child fall
19 *significantly short* of the services required by the child's IEP." *Id.* (emphasis added).
20 There is, however, no statutory requirement of perfect adherence to an IEP, "nor any
21 reason rooted in the statutory text to view minor implementation failures as denials of a
22 free appropriate public education." *Id.* at 779.

26 ⁸ B.S. argues that the other children in the SDC were not as academically or socially advanced, and that
27 placement with such students would be detrimental. However, B.S.'s only experience with the SDC
28 was a single observation by his mother and Dr. Davidson that lasted only 45 minutes. Their
impressions from one brief observation pale in comparison to the substantial evidence presented by
several District witnesses attesting that the level of education in the SDC was appropriate for B.S. and
that his classmates in the SDC had academic capabilities comparable to B.S.

1 B.S. argues that the District failed in the implementation of his IEPs in three
2 respects. First, he allegedly missed sessions of adaptive physical education during both
3 the 2004 and 2005 summer sessions. Second, he was released early from social skills
4 class on a handful of occasions. Third, the District did not provide the LMB CD agreed
5 upon at the October 13, 2004 IEP meeting until January 2005. None of these slight
6 deviations from perfect adherence to his IEP, either individually or collectively, amount
7 to a material failure in implementation resulting in service that fell significantly short of
8 that called for in his IEP.

9
10 *I. Adaptive Physical Education*

11
12 B.S. missed four sessions of adaptive PE in the summer of 2004. ALJ Decision ¶
13 28. In September of that year, B.S.'s mother notified the District that the sessions had
14 been missed, and the District made up the missed sessions during the fall of 2004. *Id.*
15 Thus, B.S. received all of the adaptive PE called for in his 2004/2005 IEP. The fact that
16 four sessions were initially missed and made up at a later date does not amount to a
17 material failure of implementation. During the administrative hearing, B.S.'s mother
18 also claimed that he missed sessions of adaptive PE during the summer of 2005. *Id.*
19 However, the District had no record of either missed sessions during that summer, or
20 any notice from the mother that B.S. had missed sessions that summer. *Id.* Moreover,
21 when asked during the hearing where she learned that B.S. had missed adaptive PE
22 sessions, the mother identified aides who worked with B.S. during the summer of 2004
23 only, and not the summer of 2005. *Id.* Accordingly, the ALJ found, and this Court
24 agrees, that B.S. had not presented sufficient evidence to establish that he missed
25 adaptive PE sessions during the summer of 2005. *Id.*⁹ The District did not fail to
26 implement B.S.'s IEP with regard to the provision of adaptive PE.

27
28 ⁹ "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, --, 126 S.Ct. 528, 537 (2005).

1 2. *Social Skills Class*

2
3 B.S.'s program included 3 hours of social skills instruction a day, four days a
4 week, amounting to roughly 400 hours of social skills instruction over the course of a
5 school year. During the hearing, B.S.'s mother testified that, on at least three occasions
6 in September 2005, B.S. was released from social skills 20-25 minutes early. ALJ
7 Decision ¶ 26. The Court finds that the loss of approximately one hour of social skills
8 instruction from a program of roughly 400 hours on the year is not a material failure in
9 implementation. This is especially true given the overall success B.S. displayed in his
10 social skills class that year. *Id.* ¶ 27. Even with the loss of 60-75 total minutes of
11 instruction, B.S. was able to make significant progress in developing social skills,
12 particularly humor, during the 2005/2006 year. *Id.*

13
14 3. *Lindamood Bell CD*

15
16 During the October 13, 2004 IEP meeting, Dr. Davidson recommended that the
17 District provide B.S. with a CD from LMB that he and his mother could use to
18 implement the visualizing and verbalizing strategies at home, and the District agreed to
19 provide the CD. Ex. 43 at 376. However, the software was incompatible with the
20 computer that B.S. and his family had in their home. Ex. 58 at 406. The District
21 ordered a new version of the software directly from the manufacturer, but did not
22 receive it until January of 2005 because the product had been temporarily out of stock
23 and had to be back ordered. *Id.* The Court finds that the District did not fail to
24 implement the portion of the IEP providing an LMB CD for home use. Although
25 problems with compatibility and back ordering issues delayed B.S.'s receipt of the CD,
26 the District took all reasonable efforts to obtain it for him as soon as possible. The

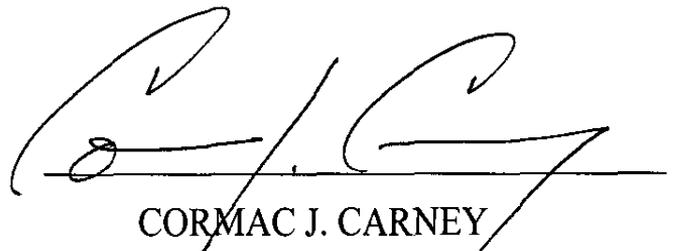
27
28 As B.S. sought relief based on the failure to properly implement his 2005/2006 IEP, he bore the burden
of proving a material failure in implementation.

1 issues that caused the delay were not the fault of the District, and the delay did not
2 amount to a material failure to implement B.S.'s IEP.

3
4 **V. CONCLUSION**

5
6 The District's offers to B.S. for the 2004/2005 and 2005/2006 school year
7 provided him with one of the most comprehensive special education programs of any
8 student in the Placentia-Yorba Linda school district. They were the product of an in
9 depth meeting process that extensively discussed the appropriate goals for B.S. and the
10 proper strategies to be used to reach those goals. The District provided the parents with
11 a meaningful opportunity to participate, and incorporated suggestions from the parents
12 into B.S.'s IEPs. The resulting offers from the District were designed to provide B.S.
13 with a substantial educational benefit while keeping him with his general peers to the
14 greatest extent possible. Such offers provided B.S. with a FAPE in the LRE as required
15 by the IDEA.

16
17 DATED: July 31, 2007

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19 

20 CORMAC J. CARNEY
21 UNITED STATES DISTRICT JUDGE
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