

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

PARAMOUNT UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006110616

**DECISION**

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on June 25, 2007, in Paramount, California.

Marsha Brown, Director of Alternative and Special Education, and Kim Cole, Coordinator of Special Education, were present and represented Paramount Unified School District (District).

No one appeared on behalf of Student. Claudia Calle, a certified Spanish language interpreter from Interpreters Unlimited, was present at the beginning of the hearing to provide translation assistance to Student's parents.

On November 27, 2006, the District filed a request for a due process hearing regarding the Student. A continuance was granted on December 8, 2006.

At hearing, District presented witness testimony and documentary evidence. District's request for an extension was granted and the record was held open until July 6, 2007, for written closing arguments. On July 6, 2007, the record was closed, and the matter was submitted.

## ISSUE

Did District offer Student a free appropriate public education (FAPE) for the 2006-2007 school year in the individualized education program (IEP) of September 28, 2006, as it amended the March 10, 2006 IEP?<sup>1</sup>

## CONTENTIONS OF THE PARTIES

District contends that the September 2006 IEP, as it amended the March 10, 2006 IEP, offered Student sufficient special education and related services for him to receive some educational benefit in the Resource Specialist Program (RSP), and therefore offered Student a FAPE for the 2006-2007 school year.

According to Mother during the Prehearing Conference (PHC), Student contends that the special education program and related services offered in the March and September 2006 IEPs did not provide him any educational benefit, and that he was not progressing.<sup>2</sup>

## PROCEDURAL MATTERS

A telephonic Prehearing Conference was held on June 15, 2007, before ALJ Johnson. Ms. Brown participated on behalf of the District. Student's mother (Mother), who spoke Spanish, participated on behalf of Student. Jerry Wolf provided Spanish language interpretation services for Mother. Student did not file a prehearing conference statement, a witness list, or an exhibit list as ordered by OAH in the Order Setting Due Process Hearing and Prehearing Conference of May 11, 2007. Mother explained that Student, his parents, and District attended a due process hearing on April 19, 2007, in OAH Case No. N2007030664, which concerned the District's right to reassess Student.<sup>3</sup> Mother stated that she did not understand why a hearing was also set in the present case. The ALJ explained that District filed this action to prove that its September 28, 2006 IEP offer provided Student a FAPE. The ALJ explained that if Mother did not agree, it would be important for her to come to the

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<sup>1</sup> The issue for hearing has been reframed by the ALJ for purposes of clarity and organization. District's complaint identified the September 28, 2006 IEP meeting as an "addendum" meeting. Neither District's complaint nor its PHC statement identified what specific prior IEP was proposed to be modified. District's complaint did not notify Student that the appropriateness of the March 10, 2006 IEP was an issue in this case. Therefore, contrary to District's closing argument, the appropriateness of the March 2006 IEP is not an issue in this proceeding, in and of itself.

<sup>2</sup> In addition, District submitted evidence of Mother's oral and written communications to District staff.

<sup>3</sup> The ALJ at that hearing was Judith L. Pasewark, who ordered, in a decision dated May 3, 2007, that District was entitled to reassess Student in accordance with a February 2007 assessment plan. Official notice is taken of the decision in that case. Pursuant to Judge Pasewark's decision, District conducted assessments of Student in June 2007, and held an IEP meeting the week prior to this hearing. The appropriateness of the June 2007 assessments and IEP offer are not at issue in this proceeding.

hearing and testify about why she did not believe Student was benefiting from District's special education program. Mother stated that Ms. Brown knew how she felt and could tell the judge for her. Ms. Brown stated that she had a written statement from Mother and could add it to the District's exhibits. District was ordered to add the statement to its exhibits.<sup>4</sup>

The ALJ ordered the parties to serve each other with their final witness and exhibit lists, and exhibits, not later than five business days prior to the hearing, and issued a written Order Following Prehearing Conference. On June 25, 2007, at the outset of the hearing, District stated that Student had not produced any witness or exhibit list, or exhibits for hearing. District staff attempted to contact Student's parents by telephone at the beginning of the hearing without success. District and Mother met about a week prior to the hearing, and Mother informed the District that Student's parents did not intend to come to the hearing. The hearing commenced at approximately 10:30 a.m. with no participation by Student or his parents. The interpreter was released at 11:00 a.m.

## FACTUAL FINDINGS

### *Background*

1. Student is twelve years old, and lives with his family within the boundaries of the District. Student is eligible for special education and related services with a Specific Learning Disability (SLD), based on deficits in basic auditory processing skills accompanied by a severe discrepancy between his intellectual ability and achievement in one or more academic areas. District refers to his category of eligibility as Learning Disabled (LD). Student is currently in sixth grade at Los Cerritos Elementary School (Los Cerritos) and has attended the school since second grade.

2. For fourth grade, Student's January 25, 2005 IEP placed him in a general education classroom setting, with three hours of RSP support per week "in the form of in-class, pull-out and/or consultation with the general education classroom teacher." Student also received one 30-minute speech and language session per month with a speech pathologist for an articulation deficit. The January 2005 IEP is the last agreed-upon IEP between the parties.

### *District's 2006-2007 IEP Offers*

#### *The March 2006 Offer*

3. The September 2006 IEP was an offer to modify the March 2006 IEP. An analysis of the appropriateness of the September 2006 offer must include an inquiry into the March 2006 IEP. On March 10, 2006, the IEP team met for Student's triennial review. Mother was present. Linda Padilla, District's bilingual speech and language pathologist,

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<sup>4</sup> A typed hearsay English translation of Mother's statement made to District staff in January 2007 was admitted into evidence as Exhibit 8.

translated the discussions for her. In Student's primary language, Spanish, Student's language skills were within functional limits for his age, commensurate with his cognitive levels, and no longer involved an articulation deficit. The team proposed to eliminate Student's speech and language services. Although the IEP comments noted that Mother did not want Student to receive any further "pull-out" special education services, Kim Cole, District's Coordinator of Special Education, testified that Mother wanted Student exited from special education. Mother stated that she was not happy with Student's lack of progress in reading and writing and that Student did not want to be singled out for special education services.

4. The March 2006 IEP offered Student a continued placement in the "RSP environment," with all academic subjects in the general education setting, and two RSP program services: a 35-minute Open Court workshop three times a week, and a 25-minute English Language Development (ELD) class five times a week. The offer also included classroom accommodations.<sup>5</sup> The workshop and the ELD class were to be "pushed-in" to the classroom so Student would not have to be pulled out. The proposed goals included three goals to address Student's needs in ELD reading comprehension, reading decoding, and writing.

5. District contends that Mother consented to the March 2006 IEP, "except for" the goals and the RSP services. Mother signed the IEP to acknowledge that she read and understood her rights. However, Mother did not sign the consent portion of the IEP.<sup>6</sup> The IEP team agreed to continue the IEP meeting for one week to "finalize" the annual goals and RSP services, and explained to Mother that Student needed special education services. The March 2006 IEP was not an executed agreement between the parties.

6. Student's parents did not respond to District's many subsequent attempts, by telephone messages and notes between March 15 and June 29, 2006, to discuss the proposed goals. District did not present any evidence of attempts to communicate further about the RSP services during that time period. There is no evidence that District sent Student's parents written notice of any further IEP meeting.

#### *The September 2006 Meeting*

7. To determine whether the District offered Student a FAPE in September 2006, the IEP must meet both procedural and substantive requirements. The first question is whether District complied with the procedural requirements. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to

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<sup>5</sup> The classroom accommodations were charted on a form attached to Student's March 10, 2006 multidisciplinary assessment report, and the form was not attached to or expressly incorporated into the IEP. District believed that the accommodations were part of the IEP offer.

<sup>6</sup> While there is a signature in the parent's space in the consent portion of the IEP, it is obviously not the signature of Mother, as it bears no resemblance to the signature identified as Mother's located in the advisement of rights portion of the document. The unidentified signature appears to be that of a District teacher.

a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits.

### *IEP Meeting Notice*

8. The local educational agency (LEA) must provide the parent adequate advance notice of an IEP team meeting to ensure an opportunity to attend. The meeting notice must include the purpose of the meeting and the right of the parent to bring other people to the meeting who have knowledge or special expertise regarding the child, among other matters.

9. There is no evidence that District attempted to contact the parents after the start of the 2006-2007 school year to discuss Student's educational program or to set up an IEP meeting. On September 28, 2006, Mother called Ms. Cole and came to Los Cerritos to talk with her about Student's program. Ms. Cole met with Mother. When Ms. Cole realized that Mother still wanted Student exited from special education, Ms. Cole immediately called in other District IEP team members to hold what the District termed an IEP "addendum" meeting.<sup>7</sup> Mother proceeded to participate in the meeting. Program Specialist Julie Hernandez, Resource Specialist Eileen Stevens, Ms. Cole, and District's Administrator Designee Freda Rossi attended the meeting. Ms. Stevens speaks Spanish, and translated the discussions for Mother. District did not provide advance notice to Student's parents of this IEP meeting but took advantage of Mother's presence at school to convene the meeting.

10. Mother informed the IEP team that Student had not made any progress in the RSP program, and requested that he be exited from all special education services and placed solely in the general education program. District's team members explained to Mother that they believed Student needed more services than those he was receiving, in a more restrictive environment, and should not be exited. District provided Mother with her procedural rights and advised her that she had the right to request a due process hearing.

11. District's failure to give Student and his parents advance written notice of the September 2006 IEP meeting constituted a procedural violation. In theory, had Mother wanted to, she had no opportunity to learn District's purpose for the meeting and plan for it, to consult with Student's father or arrange for him to attend, to bring a representative, or to bring or request the presence of someone with knowledge or expertise regarding Student's disability, needs, or education. However, the evidence does not establish that this violation resulted in a denial of FAPE. Although there is no evidence that Mother waived her right to advance notice, there is also no evidence that Mother objected to the meeting. Mother had not met with the District since the March 2006 IEP meeting, and had not returned District's phone calls or replied to its notes. Mother initiated the September contact by asking to meet with Ms. Cole. Mother actively participated in the meeting, communicated her concerns and desires, and did not consent to the IEP offer. There is no evidence that lack of advance

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<sup>7</sup> The March 2006 IEP was never agreed to by Student's parents, so the September meeting was not one to negotiate an addendum to an existing IEP.

notice significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, impeded Student's right to a FAPE, or caused a deprivation of educational benefit. Therefore, the District's notice violation was harmless error.

#### *General Education Teacher*

12. The IEP team must include specified participants, including not less than one regular education teacher, if the child is, or may be, participating in the regular education environment. In addition, the parents must be allowed to meaningfully participate in the development of the IEP.

13. For the 2006-2007 school year, Student had six different sixth grade teachers for his various classes. None of Student's general education teachers was present at the September 2006 IEP meeting.<sup>8</sup> The absence of one or more general education teachers from the meeting was not explained. The requirement that the IEP team include at least one general education teacher, if the pupil is or may be participating in a general education classroom, is mandatory. Since Student was participating in the general education classroom setting, the absence of at least one of his general education teachers significantly deviated from the law's requirements. The failure to have a general education teacher on the team constitutes a procedural violation.

14. District's procedural violation deprived the IEP team of important knowledge and information about the general education curriculum, the general educational environment, and Student's struggling performance within it. The general education teachers had vital information about how Student was doing in the classroom, or how his unique needs could or could not be met in that environment. Mother had a right to be informed of the input of at least one of them. The evidence is insufficient to determine whether the violation impeded Student's right to a FAPE or caused a deprivation of educational benefit because there is no way to determine whether the IEP team would have developed a different program after considering the views of a regular education teacher.<sup>9</sup> However, the rights of Student's parents to meaningfully participate in the IEP process were significantly impeded by the absence of valuable input from the general education teacher. Accordingly, District's violation denied Student a FAPE.

15. Because District procedurally denied Student a FAPE, it is not necessary to evaluate whether District's substantive offer provided a FAPE. However, in the interest of thoroughness, the offer will be examined.

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<sup>8</sup> At the March 2006 IEP meeting, the general education teacher participated in the meeting, and Mother consented to his late arrival and early departure.

<sup>9</sup> As set forth in Factual Findings 29-32, *infra*, other members of the IEP team who were present at the meeting knew that Student needed additional or different special education services to progress.

*September 2006 IEP Offer*

16. The second prong of the evaluation of District's offer is whether the IEP developed was substantively appropriate. An IEP for each child with a disability must include a statement regarding the child's present levels of academic achievement and functional performance; measurable annual goals designed to meet the child's educational needs and enable the child to make progress; a statement of the special education and related or supplementary aids and services to be provided; an explanation of the extent to which the child will not participate with nondisabled children; any individual accommodations necessary to measure performance on state and districtwide assessments; and other information, including the anticipated frequency, location, and duration of the services.

17. The September 2006 IEP was, in effect, a proposed amendment to the March 2006 offer. It referenced the March 2006 IEP, and much of the information required to be in an IEP was in the March 2006 IEP. The March 2006 IEP contained statements of Student's levels of performance and functioning, including triennial assessment information, three new annual goals, a statement of the services offered, and a separate list of classroom accommodations. The services offered included the RSP program, a general education class setting five times a week pursuant to the IEP of March 2006, a 35-minute RSP language arts class three times a week, and a 25-minute RSP ELD class five times a week, three annual goals in ELD reading comprehension, reading decoding, and writing, classroom accommodations, and consultation with Mother.<sup>10</sup>

18. The September 2006 proposed IEP amendment changed the 35-minute Open Court workshop offered in the March 2006 IEP to a 35-minute language arts class,<sup>11</sup> and added the consultation services. No mention was made in the September 2006 IEP of any changes to the three March 2006 proposed annual goals or the classroom accommodations. Neither the March or September 2006 IEPs defined the RSP services further. There was no information about the type, duration or frequency of any RSP services aside from the two RSP classes, or how the services would be delivered, either directly to the Student, as consultation to Student's teachers, or both.

*Student's Unique Needs*

19. At the March 2006 triennial meeting, after review of District's triennial assessments, observations, and records, the IEP team concluded that Student still demonstrated a SLD.

20. In March 2006, the school psychologist reported that Student's reading and writing scores on the California English Language Development Test (CELDT) had declined

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<sup>10</sup> The team offered "consultation services" to Mother, whereby District staff would help Mother to personally meet Student's teachers and make sure she was satisfied that support was in place in the classrooms. However, no specific consultation services were added to the IEP's services page.

<sup>11</sup> No evidence established what the Open Court workshop involved or addressed.

since the last assessment, and his listening and speaking levels had increased. According to the CELDT, Student was still at the beginning level of English skills, and his proficiency scores on the CELDT had not significantly changed since the last triennial.

21. The fifth grade general education teacher, Art Luna, reported to the March 2006 IEP team that Student had a low retention rate, needed a lot of reinforcement and repetition, and had difficulty with transitions. The teacher believed Student was more “responsive and involved” in the smaller group setting provided by his small classroom and the ELD class. The teacher expressed concern for Student’s sixth grade program, which would involve six different teachers and transition difficulties. Mr. Luna used the Burks’ Behavior Rating Scales and reported behaviors of significant concern, including withdrawal, poor coordination, and poor attention, with a passive and reserved demeanor.<sup>12</sup>

22. The multidisciplinary assessment report of March 10, 2006 found that a significant discrepancy continued to exist between Student’s cognitive ability and his academic achievement in basic reading, reading comprehension, and written expression due to deficits in auditory short-term memory and auditory processing skills. Student demonstrated a nonverbal cognitive ability within the low average to average range. His levels of academic performance were about at the second grade level or lower. In the area of reading, his skills were within the below average “borderline” range with a score of 65, in the first percentile, and an age equivalent of 6 years 6 months old. In math, an area of strength, Student’s skills were within the low average range. In writing, Student scored in the “mild delay” range and an age equivalent of 6 years 3 months. The assessments were done primarily in Spanish, and Student’s deficits manifested themselves in both languages. Ms. Lopez’s June 2007 assessments were consistent with the March 2006 results.

23. In March 2006, Student’s unique needs as a result of his disability were in the areas of auditory processing and short term memory, ELD reading comprehension, reading decoding, writing, understanding and following directions, classroom accommodations including audio-visual supplements, help with transitions, and learning study/organizational skills.

24. For the 2006-2007 school year in sixth grade, Student’s needs remained the same. Carlos Reyes was one of Student’s general education classroom teachers, teaching language arts.<sup>13</sup> Mr. Reyes had an emergency credential and was bilingual in English and Spanish. The classroom had about 14 students who were primarily typically developing children and English language learners, including three students who were in the RSP program. Mr. Reyes had no special education experience and had never seen Student’s IEPs.

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<sup>12</sup> In September 2005, Mr. Luna had referred Student to school-based, at-risk counseling.

<sup>13</sup> The RSP classes per the March 2006 IEP offer were an Open Court workshop and an ELD class. The September 2006 IEP offered a language arts class as an RSP class, but it was not agreed upon. The record is not clear whether Mr. Reyes’s class was a component of RSP services or not, but the record is clear that Mr. Reyes was not a special education teacher.

Mr. Reyes persuasively testified that Student struggled “mightily” on a daily basis, and had such difficult retention problems that it was as if the lesson given the day before had not occurred. Mr. Reyes would give the class a homework assignment during the first period, then Student would go off to other classes, and have another class with Mr. Reyes at the end of the day. Student regularly could not remember the homework assignments by the end of the day. Mr. Reyes discussed Student’s needs with the Resource Specialist, Eileen Stevens, but could not recall any special classroom accommodations in place for Student and had never received any written instructions for accommodations. Mr. Reyes taught the entire class as one group and there were no break-out groups or opportunities for individual attention or instruction. There were no special education classroom accommodations implemented for Student in Mr. Reyes’s classes.

### *Annual Goals*

25. The March 2006 IEP team’s determinations of Student’s continued eligibility, assessment results, and levels of performance were recent enough to be relied upon by the IEP team in September 2006 in making another offer. The March 2006 IEP offered three goals to address Student’s needs in ELD reading comprehension, reading decoding, and writing. For reading comprehension, the annual goal was for Student, after reading a story aloud, to identify the main idea “using key words, drawings, phrase as measured by criterion reference tests maintaining 4 out of 5 trails for a period of 4 weeks.” For reading decoding, the annual goal was for Student, when reading a passage at the second grade level, to “use sound/symbol relationships from knowledge of alphabet to decode words as measured by teacher observation maintaining 4 out of 5 trials for a period of 4 weeks.” For writing, the annual goal was for Student, after reading a passage, to write simple sentences “about the experience generated from the story as measured by teacher observation and work samples maintaining 4 out of 5 trials for a period of 4 weeks.”

26. The proposed goals did not include, either separately or jointly, goals dealing with his auditory processing and short-term memory needs, including those regarding following directions, needing audio-visual supplements, handling transitions, or learning study/organizational skills such as how to remember homework assignments. To the extent the March 2006 goals were continued unchanged as part of the September 2006 amendment’s offer, the three annual goals did not address all of Student’s unique needs, and consequently denied him a FAPE. There is no evidence that any new goals were offered at the September 2006 meeting.

### *Placement and Services*

27. The March 2006 assessment team jointly recommended that Student needed regular education for part of the day; continued at-risk counseling; clear and simple directions; audio-visual supplements to use more than one sensory modality in learning; lessons presented with key points in the beginning and summaries at the end; on-going feedback and positive reinforcement; instructions sequenced in small steps; opportunities to browse through books at his reading level just for enjoyment; and modeling and explanation

of basic facts. However, the team's recommendations in the multidisciplinary report were not attached to, or expressly adopted as part of the March 2006 IEP.

28. The March 2006 report also included two pages of classroom accommodations determined to meet Student's needs, including simplifying, rereading or clarifying test directions; reducing the number of items per page; using markers, masks to attend to test items; adding arrows, stop signs or highlight answers; using a dictionary or other aid; reducing the number of essay questions; testing in a small group; providing extra time; allowing him to demonstrate mastery by performance; giving directions through several (unspecified) channels; underlining or highlighting major points in assignments; using a buddy system; setting clearly defined limits; positively reinforcing acceptable behaviors; seeing the counselor as needed; seating him near the teacher; and giving frequent reminders of the rules. The above classroom accommodations were not attached to, or expressly adopted as part of the March 2006 IEP.<sup>14</sup> However, District believed the accommodations were included in the March 2006 IEP offer, and did not modify them in the proposed amendment of September 2006.

#### *Least Restrictive Environment*

29. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced, including the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate.

30. Three District witnesses testified that Student needed increased special education services in a "more restrictive environment" than a general education classroom with unspecified RSP services, as offered in either the March or September 2006 IEPs. Linda Harju-Stevens was Student's principal from second through fifth grade at Los Cerritos School. Ms. Harju-Stevens concurred with Mother that Student did not make much educational progress. Ms. Harju-Stevens believed Student needed more or different special education services but did not specify what kind.

31. Eileen Stevens, Student's Resource Specialist for the 2006-2007 school year, has completed coursework to obtain a master's degree in Special Education, and has been a resource specialist for eight years. In general, Ms. Stevens persuasively testified that the RSP program was not working for Student. Overall, Student was still academically at about the second grade level.<sup>15</sup> Student needed visual aids instead of just auditory information. He

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<sup>14</sup> The March 2006 IEP did have accommodations for districtwide and California State Standards testing.

<sup>15</sup> District did not introduce any report cards in evidence and the only evidence of Student's academic achievement is contained in District's March 2006 and June 2007 assessments.

was not able to progress in a general education classroom, as when there were too many pupils, he “shut down.” Student was embarrassed to receive special education services in the general education classroom. He needed written notes and a lot of manipulatives. Ms. Stevens did not believe RSP services in a general education classroom was the LRE for Student. At the September 2006 meeting, she concurred with the team that Student needed more help in a more restrictive environment. However, instead of offering more services, the team tried to offer the same services in consultation with Mother, in order to persuade Mother to keep Student in special education. Ms. Stevens testified that Student needed more help, but did not explain what she meant or had in mind.

32. Kim Cole, Coordinator of Special Education, is working on her thesis for a master’s degree in Special Education. Ms. Cole has been teaching for about 20 years, including four years in special education, and has been an administrator for a year and a half. Ms. Cole believed that in March 2006, the team established that Student had made some limited progress but the basis for that belief was unclear. She conceded that in September 2006, the IEP team tried to offer a basic level of consultation services to Mother in order to try to regain her trust and keep Student in special education. In Ms. Cole’s opinion, the RSP program as offered in the September 2006 addendum did not meet Student’s unique needs. Student needed a more restrictive environment where he could receive more individualized attention, and he needed new annual goals. Ms. Cole believed that the September 2006 offer would have given Student some “minimum” level of benefit where the team could monitor his progress and then offer more services later.

33. The September 2006 IEP team knew that Student had unique needs that could not be met in the general education classroom as set forth above. The sixth grade general education structure of six different classes and teachers with no individualized attention was not working for Student. The team knew that Student was making de minimis educational progress and that he needed more or different services to progress.

34. The September 2006 IEP offer, as it amended the March 2006 IEP, in light of the information available to the District at that time, was not appropriate. The offer was not designed to address Student’s unique needs, and was not reasonably calculated to allow Student to receive some educational benefit in the LRE. Because Student had made only de minimis educational progress, if any, there was no academic benefit to remaining in the general education class setting, at least without additional or different special education supports or services. The offered supports and accommodations were insufficient to provide an opportunity for Student to make educational progress. There was no evidence that Student’s presence in the classroom adversely affected other students, as he was quiet and reserved. Rather, Student was embarrassed in front of them when he was singled out for special education. There was no evidence addressing the nonacademic benefits of Student’s placement in the general education classroom, without additional or different services. Student needed a smaller class setting, or, if he remained in the general education class environment, he at least needed more individual attention, supplementary aids and services, annual goals that addressed all of his unique needs, and further accommodations to address

his auditory processing deficits and other needs. District's September 2006 IEP, as it amended the March 2006 IEP, therefore denied Student a FAPE.

## LEGAL CONCLUSIONS

1. District, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9); .) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. If a parent in the past consented in writing to the child's receipt of special education and related, but then refuses all services in an IEP, the LEA shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

### *Contents of the IEP*

4. School districts receiving federal funds under IDEA 2004 are required pursuant to 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

5. There are two parts to the legal analysis of whether a school district or its local educational agency (LEA) offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The

second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

### *Procedural Violations*

6. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(E)(i) and (ii).) (See also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

7. IDEA 2004's procedural mandates also require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley*, 458 U.S. at pp. 207-208.) The LEA must provide the parent with adequate advance notice to ensure an opportunity to attend. (Ed. Code, § 56341.5, subd. (b).) The meeting notice must include information about the purpose of the meeting, and the parent's right to bring other people to the meeting who have knowledge or special expertise regarding the child.

8. As set forth in Factual Findings 8 through 11, District's failure to provide Student's parents advance notice of the September 2006 IEP meeting constituted a procedural violation. Mother had no opportunity to consult with Student's father or arrange for him to attend, to learn District's purpose for the meeting and plan for it, to bring a representative, or to bring or request the presence of someone with knowledge or expertise regarding Student's disability, needs, or education. The procedural violation was harmless error, and did not result in a denial of FAPE, as there is no evidence that it significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, impeded Student's right to a FAPE, or caused a deprivation of educational benefit. Mother participated in the meeting and made her concerns known.

9. A student's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. (Ed. Code, § 56341, subd. (b); 20 U.S.C. § 1414(d)(1)(B).) The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. (See, *W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra* at 1484; *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) The Ninth Circuit has determined that the failure to have a general education teacher on the IEP team in these circumstances invalidates the IEP. (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634.) The general education teacher need not be the Student's present teacher. (*R.B. v. Napa Valley Sch. Dist.* (9th Cir. July 16, 2007) 2007 U.S. App. LEXIS 16840.) The IEP is invalidated either as a structural defect or under the harmless error standard. (*Ibid.*)

10. As set forth in Factual Findings 12 through 15, District's failure to have a general education teacher present at the September 2006 IEP meeting constituted a procedural violation. The rights of Student's parents to meaningfully participate in the IEP process were significantly impeded by the absence of valuable input from at least one general education teacher at the IEP meeting. Given Student's daily struggles, that input could have resulted in a different offer or could have impacted Mother's willingness to cooperate to find services that would provide Student educational benefit. Accordingly, District's procedural violation was not harmless error, and denied Student a FAPE.

#### *Substantive FAPE*

11. For a school district's IEP to offer a student a FAPE under the substantive component of the analysis, the proposed program must be specially designed to address the student's unique needs, and reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) According to the United States Supreme Court, a FAPE must meet a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Rowley*, 458 U.S. at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (*Ibid*, at pp. 198-200.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

12. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley*, *supra*, at p. 198.) The Ninth Circuit refers to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or at least "meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

13. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that "[a]n IEP is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Or. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307 at 1314.)

### *Least Restrictive Environment*

14. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. (Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5); 20 U.S.C. § 1412(a)(5)(A).) When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

15. As set forth in Factual Findings 16 through 34, District's September 2006 IEP offer, as it amended the March 2006 IEP offer, was not designed to address Student's unique needs, and was not reasonably calculated to allow Student to receive some educational benefit in the LRE. The annual goals, as incorporated into the September offer, were not appropriate because they did not address all of his unique needs, including auditory processing deficits, following directions, needing audio-visual supplements, handling transitions, or learning study/organizational skills such as how to remember homework assignments. Because Student had made only de minimis educational progress, if any, there was no academic benefit to remaining in the general education classroom setting, at least not without additional or different special education supports and services. Student needed a smaller class, or, if he remained in the general education classroom setting, he at least needed more individual attention, supplementary aids and services, annual goals that addressed all of his unique needs, and accommodations to address his auditory processing deficits. District's September 2006 IEP offer therefore denied Student a FAPE.

### ORDER

1. All of the District's requests for relief are denied.
2. Within thirty days of this Decision, District shall convene an IEP meeting to make an appropriate offer of placement consistent with this Decision.

### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the sole issue for hearing in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: August 3, 2007



DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division