

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

In the Matter of:

MODESTO CITY SCHOOLS,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007090587

**DECISION**

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on November 5, 6, 8 and 9, 2007,<sup>1</sup> in Modesto, California.

Marcy Gutierrez, Attorney at Law with Kronick, Moskovitz, Tiedemann & Girard, was present and represented Modesto City Schools (District).

Student's mother (Parent) appeared on behalf of Student by telephone.

On September 21, 2007, the District filed a request for a due process hearing regarding Student. District filed an amended request for a due process hearing (request) on October 9, 2007, and all applicable timelines recommenced.<sup>2</sup>

At hearing, oral and documentary evidence were received. The parties requested an extension to submit written closing arguments. An extension was granted and the record was held open until November 30, 2007, for written closing arguments. At 5:00 p.m. on November 30, 2007, the record was closed, and the matter was submitted.

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<sup>1</sup> Prior to the hearing, a one-day continuance was granted to accommodate Parent's family medical appointments for her children on Wednesday, November 7, 2007.

<sup>2</sup> See California Education Code § 56502, subd. (e) and 20 U.S.C. § 1415(c)(2)(E)(ii).

## PROCEDURAL MATTERS

### *Parent's Appearance at Hearing*

California Code of Regulations, title 5, section 3082, subdivision (g) provides that the hearing officer has discretion to permit the conduct of all or a part of the hearing by telephone provided that each participant has the opportunity to participate the hearing, to hear the entire proceeding, and to observe exhibits. Education Code section 56505, subdivision (e)(3) provides that each party has the right to confront, cross-examine, and compel the attendance of witnesses. District's Prehearing Conference (PHC) statement gave Parent notice that District intended to call her as a witness at the hearing.

A telephonic PHC was held on October 29, 2007. Ms. Gutierrez participated on behalf of the District and Parent participated on behalf of Student. Student filed a motion prior to the PHC for Parent to participate in the hearing by telephone due to an undisclosed medical disability. At the PHC Parent disclosed that she had specified medical conditions, and was also incapacitated by various medications.<sup>3</sup> District objected that good cause had not been established and that Parent's failure to appear personally and testify would prejudice District's ability to examine her. The ALJ denied the motion subject to reconsideration on the first day of hearing. The ALJ ordered Parent to appear in person at the hearing on November 5, 2007, or to establish good medical cause via a letter from a doctor or other evidence regarding the claimed medical disability on or before that date.

By the beginning of the hearing on November 5, 2007, Parent had not sent OAH or the District any documentary evidence of disability, and was not physically present in the hearing room. Parent was available at her home telephonically via a speaker telephone provided by the District, and the hearing commenced. Parent represented that she called her doctor after the PHC but got no response, that she tried to but could not arrange transportation to the hearing; that she could not sit through a hearing all day long every day due to her disability in any event, and that she had an annual medical record of disability that would show she was unable to appear physically at the hearing. Parent claimed that the medical record was confidential and did not want to produce it except on an ex parte basis to the ALJ. Parent was ordered to fax-file the record with OAH by noon on November 5, on an in camera basis, over District's objection.<sup>4</sup> Parent requested time to locate the record, and was ordered to produce it to OAH by 9:00 a.m. on November 6, 2007.

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<sup>3</sup> Parent's motion also requested that the hearing start at or after 12:00 p.m. daily based on an inability to function in the morning due to medications. Parent submitted no evidence to support that contention. The hearing began at 10:00 a.m. on November 5, and thereafter at 9:30 a.m. on November 6 and 9; and at 9:00 a.m. on November 8 due to the number of witnesses scheduled on that date.

<sup>4</sup> California Code of Regulations title 5, section 3084, subd. (a) generally prohibits ex parte communications from a party regarding "any issue in the proceeding" in special education hearings, and subd.(c) generally requires disclosure of such communications to the other party. However, under California Rules of Court, Rule 1.100, requests for accommodations from persons with disabilities for access to the judicial system may be

On November 6, 2007, prior to the hearing the ALJ received and conducted an in camera review of Parent's filing, which consisted of Parent's declaration under penalty of perjury and a one-page medical form signed by Parent's physician. The ALJ determined that most of the information in both documents was not confidential as to the District, redacted some information, and disclosed the redacted documents to the District.<sup>5</sup>

Parent placed her medical disability at issue by moving to appear telephonically on that basis. Parent's evidence established that Parent has a medical disability that may entitle her to some accommodations at the hearing. Parent did not establish a medical necessity to attend the hearing only by telephone. Parent admitted that, with transportation assistance, she picked up her children from school and took them to medical appointments.

As a proposed accommodation due to Parent's transportation difficulties, District offered to fund Parent's transportation to and from the hearing each day by taxi and Parent declined. The ALJ offered to move the hearing to Parent's home and Parent declined, stating that she did not have tables for everyone and could only participate by telephone. Parent did not explain why she could attend the hearing from her home over the telephone but could not attend it in the hearing room.

Since the applicable law gives the ALJ discretion to permit telephonic appearance at a hearing without regard to medical necessity, and in light of Parent's evident disability, the ALJ overruled District's objections and permitted Parent to participate in the hearing telephonically since she had received District's exhibits.<sup>6</sup> District's argument that it would be prejudiced by telephonic examination of Parent was not factually supported as of November 6. However, the ALJ ordered Parent's testimony to take place last, and that if problems manifested during Parent's testimony, the ALJ would reconsider ordering Parent to personally appear. District thereafter did not call Parent as a witness in its case in chief. Subsequent to Parent's testimony in Student's case on November 9, District cross-examined Parent telephonically, and did not request an order for Parent's personal appearance.

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presented ex parte. In addition, since all personal identifying information must be redacted from special education decisions, Parent's disability is not identified herein. (Ed. Code, § 56505, subd. (e)(5).)

<sup>5</sup> Most of Parent's declaration consisted of nonconfidential argument. Redacted was one partial paragraph describing a doctor's statement regarding the medical form, and the name of the public agency to which the form was sent. Most of the form consisted of nonconfidential medical information, to wit: that Parent has a chronic medical disability (undiagnosed or disclosed on the form) that renders the Parent unable to work. Redacted was Parent's birth date, social security number, the ages of her children, a public agency code number, the date of commencement of the condition, and the street address of the certifying doctor, although the name of the doctor was retained as nonconfidential information. The ALJ did not rely on the redacted information to rule on the motion. The medical form explained and supplemented Parent's declaration about her medical problems. Neither the form nor the declaration addressed what medications Parent was taking.

<sup>6</sup> In addition, District delivered a courtesy copy of Parent's own exhibits arranged in a binder by the District for the ALJ and witnesses on Monday morning, November 5.

## ISSUES<sup>7</sup>

1. Did District commit a procedural violation that resulted in the denial of a free appropriate public education (FAPE) by:

(a) Scheduling individualized education program (IEP) meetings in a manner that significantly impeded Parent's opportunity to attend and participate in them?

(b) Failing to provide Parent a complete and accurate copy of the May 2007 IEP offer?

(c) Failing to make a clear written offer in the May 2007 IEP for occupational therapy (OT) services and for one-to-one paraprofessional support services?

2. Did District offer Student a FAPE for the 2007-2008 school year in the May 2007 IEP, so that District may implement the IEP over Parent's objections?<sup>8</sup>

## CONTENTIONS OF THE PARTIES

District contends there were no procedural violations, that the May 2007 IEP offered Student a FAPE for the 2007-2008 school year, and that proposed reductions in Student's special education and related services were appropriate because they were based on assessments, and considered Student's present levels of academic and functional performance as well as his unique needs related to his disability. District also contends that the proposed annual goals, as well as a proposed referral of Student for county mental health services were appropriate.

Student contends that he is academically far below his typically developing sixth grade peers and needs his levels of special education and related services to remain the same in order to help prepare him to transition to middle or intermediate school for seventh grade next year. Accordingly, Student disagrees with any reduction of those services and contends that the May 2007 IEP offer denied him a FAPE in the following respects:

Student disagrees with District's proposed reduction of his resource specialist program (RSP) intervention time from 60 to 45 minutes a day, and with its proposed reduction of direct speech and language (SL) services from 20 minutes three times a week to 30 minutes once a week. Student disagrees with District's proposed reduction of

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<sup>7</sup> The ALJ has reframed and reorganized the issues for purposes of clarity in this decision. Two other issues originally identified for hearing in District's request for due process were dismissed by the ALJ on October 29, 2007, for the reasons set forth in the Order Following Prehearing Conference of the same date.

<sup>8</sup> This case does not involve whether District failed to implement stay put during the pendency of this proceeding or whether District has improperly implemented components of the May 2007 IEP offer even though Parent has not consented to it, as Parent claims in her closing argument. Parent has the right to file a request for due process regarding issues not included in the present case.

occupational therapy (OT) services from 30 minutes of direct OT services once a week to 20 minutes of direct OT services once a week for the first month of the school year, and thereafter reduced to 30 minutes of OT consultation services once a month. Student also disagrees with District's proposed reduction of his one-to-one paraprofessional services from five to four hours a day every school day, accompanied by a Fade Plan. Student contends that all these proposed reductions and the proposed Fade Plan to terminate his one-to-one paraprofessional services were inappropriate.

In addition, Student contends that Parent was denied meaningful participation in the IEP meetings because of the way they were scheduled; that District's final IEP offer was never provided to Parent before the hearing; that the OT offer was unclear and confusing; that the paraprofessional's duties were not specified in the IEP; that there was no transition plan for middle school; that the sixth grade general education teacher was unqualified; and that District's proposed referral of Student to the county for mental health services was also inappropriate.

## FACTUAL FINDINGS

### *Background*

1. Student, whose birthday is in November, is now twelve years old, and lives with Parent within the boundaries of the District. Student is eligible for special education and related services because of a Specific Learning Disability (SLD), based on deficits in visual processing skills accompanied by a severe discrepancy between his intellectual ability and achievement in one or more academic areas. Student is currently in sixth grade at John Muir Elementary School (John Muir) and has attended the school since first grade. Student is overall a kind, soft spoken person with good manners.

2. Student's placement for the 2004-2005 school year in third grade was agreed to in a May 19, 2004 IEP when he was in second grade.<sup>9</sup> The May 2004 IEP placed Student in a general education third grade classroom setting, with the following special education and related services: (a) 60 minutes of RSP intervention support per school day, (b) 20 minutes of direct SL services three times per week, (c) 30 minutes of direct OT services once per week, (d) one-to-one paraprofessional services for five hours per school day, and (e) accommodations and modifications.

3. District conducted IEP meetings to offer placement and services for the 2005-2006 school year in fourth grade on February 11, March 18, and June 6, 2005. District conducted IEP meetings to offer placement and services for the 2006-2007 school year in

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<sup>9</sup> Parent consented to the May 2004 IEP on August 27, 2004, when she checked the box for "I agree with the proposed IEP," added "in part," and signed her name. Parent did not consent to District's offers in the May 2004 IEP to discontinue OT services and to reduce one-to-one paraprofessional services to less than five hours daily.

fifth grade on January 10, April 11, and May 9, 2006. Parent never accepted District's IEP offers for either school year. The May 2004 IEP was the last agreed-upon IEP between the parties.<sup>10</sup>

### *Procedural Violations*

4. To determine whether the District offered Student a FAPE in May 2007, the IEP must meet both the procedural and substantive requirements of the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). The first question is whether District complied with the procedural requirements of the law. The first question is whether District complied with the procedural requirements of the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (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.

5. The local educational agency (LEA), here the District, must convene an IEP team meeting at least annually to review the student's progress, the IEP, the appropriateness of the placement, and to make any necessary revisions. The District must conduct a reassessment of the student at least once every three years (triennial assessment), unless the parent and the LEA agree in writing that a reassessment is unnecessary.

6. Student contends that District significantly impeded Parent's opportunity to meaningfully participate in the IEP meetings and decision-making progress because the District scheduled IEP meetings from February through May 2007: (a) when Parent was not prepared because District had not provided documents to her in advance of the meeting, (b) during a period in which a prior due process matter between the parties was pending, and (c) when Parent had a conflicting legal proceeding and a medical appointment.

### *Scheduling the May 18, 2007 IEP Meeting*

7. The school district must provide the parent adequate advance notice of an IEP team meeting to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate. The notice must be sent "early enough" to ensure an opportunity to attend. An IEP meeting may be conducted without a parent in attendance if the LEA is unable to convince the parent to attend. In that event the LEA is required to maintain a record of attempts to arrange a mutually agreed-upon time and place, including detailed records of telephone calls, copies of correspondence, records of visits to the parent's home or place of employment.

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<sup>10</sup> During those IEP team meetings, to the extent Parent attended and participated, she did so by telephone. Parent never personally attended an IEP team meeting, and only one District employee who testified at hearing has ever met her.

8. District was legally required to hold Student's annual IEP for the 2006-2007 fifth grade year by May 2007. In addition, District was legally required to conduct triennial assessments of Student in order to prepare for the May 2007 IEP.

9. Beginning in August 2006, District attempted to obtain Parent's consent to assess Student to obtain updated information as to his levels of performance and progress to formulate a new IEP because there had been no agreed-upon IEP since second grade. On August 25, and again on September 15, 2006, Virginia (Ginger) Johnson, who was then District's Supervisor for Elementary Special Education, sent Parent letters with proposed assessment plans for signature. Following Parent's refusal to consent, District filed a request for a due process hearing on February 13, 2007, which was given OAH Case No. N2007020388, to obtain an order entitling District to assess Student despite Parent's lack of consent. In April 2007, that case was resolved by settlement, and Parent consented to District's assessment plan in writing on April 24, 2007.

10. During the above period when District was attempting to obtain Parent's consent for assessments, District proceeded to try to schedule an IEP meeting. On February 8, 2007, District sent Parent written notice proposing three dates for an IEP team meeting: February 23, March 1, or March 2. Parent returned the form indicating she was available on February 23. Parent asked the District to provide her all documents for review before the February 23, 2007 IEP meeting.

11. There is no legal requirement that a school district must deliver documents, such as draft goals or assessment reports, to a parent in advance of the IEP meeting. Here, however, District had agreed to accommodate Parent's presence at the IEP meeting telephonically. The only way Parent could receive, read, and review necessary documents and meaningfully participate in the IEP meeting was to receive District's documents in advance of the meeting. In addition, due to Parent's disability, she needed time to review written materials. Therefore, District was obligated to ensure delivery of documents to Parent prior to each IEP meeting.

12. On February 22, the day before the IEP meeting, District attempted to fax Parent a draft of proposed annual goals and the May 2004 IEP for her review. Parent informed the District that her fax machine was out of ink. District believed that Parent would not accept personal delivery,<sup>11</sup> so District expedited delivery of the documents to Parent by Federal Express, and Parent received them on the morning of February 23. The documents consisted of a cover letter and three draft SL goals, each one page in length. On February 23, the IEP team convened with six District team members present, and Parent was

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<sup>11</sup> While Parent denies refusing to allow District staff to personally deliver the documents to her nearby home, the dispute about this point highlights the animosity between the parties that has been on-going for some years.

reached by telephone.<sup>12</sup> Parent stated she was not prepared for the meeting because she had just received the documents, and refused to proceed.<sup>13</sup> District personnel agreed to cancel the meeting and to send Parent new dates.

13. While it would have been better for District to deliver the draft goals to Parent at least several days before the meeting, District's delivery of three pages of draft goals the morning of the February 23, 2007 IEP meeting substantially complied with its obligation for advance delivery and did not constitute a procedural error. Parent failed to establish why receiving three single pages the morning of the meeting rendered her "unprepared" for the meeting. Parent did not establish that her disability was so debilitating that she needed more than an hour prior to the meeting to read three pages in order to meaningfully participate in the IEP meeting. Parent's right to participate in the IEP process was not significantly impeded.

14. On March 7, 2007, District sent Parent written notice for an IEP meeting which proposed two new dates of March 15 or 19. Parent rejected both dates, indicating on the returned notice form that neither date "will work" for her without explanation. Parent asked for three more dates "later in the month," or preferably, in April.

15. Parent believed it was inappropriate for District to hold an IEP meeting while there was a pending due process action regarding Case No. N2007020388, because during the pendency of the action, District had to provide Student with a "stay put" placement according to his last agreed-upon IEP, the May 2004 IEP. In addition, Parent contended that District should not proceed with an IEP without doing new assessments. However, in contradiction of that position, Parent continued to refuse to consent to assessments.

16. District contends that it was legally obligated to proceed to hold an IEP meeting.<sup>14</sup> District team members conferred regarding their schedules. On March 21, 2007, District sent parent written notice of an IEP meeting proposing three new dates of March 27 or 30, or April 2. Parent rejected all three dates without specifying a reason, and proposed either April 20 or 21. District agreed to the date of April 20. Thereafter, on March 27,

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<sup>12</sup> This meeting would have been to start evaluating Student's annual IEP in light of the fact that there had been no new agreed upon IEP since 2004; however, District staff were not prepared to address the triennial review without new assessments.

<sup>13</sup> Parent submitted in evidence her letter of February 23, 2007 to the District in which she claimed that she requested Student's "file" on February 8, and that District failed to deliver it within five days as required by law. However, Parent failed to establish when the draft goals were prepared or why proposed draft goals that had not been reviewed at an IEP meeting yet were or should be part of Student's "file."

<sup>14</sup> A district that postpones a child's annual IEP review until a pending dispute is resolved could find itself liable for a procedural violation of the law. *Letter to Watson*, Office of Special Education Programs (April 12, 2007) 48 IDELR, 284, 107 LRP 57097.

District mailed Parent written notice for the April 20 IEP meeting. Parent returned the form consenting to the date and time, and indicating she would participate by telephone.<sup>15</sup>

17. On April 20, 2007, the IEP team convened with seven District team members present, and Parent was reached by telephone. Parent indicated that she “forgot” about the meeting and was not prepared to proceed. The Director of the Special Education Local Planning Area (SELPA), Robin Searway, explained to Parent that it was imperative to hold the meeting, but Parent insisted on new dates. The team members consulted their calendars, and District advised Parent that it would send her a new meeting notice with the proposed dates of May 11, May 18, and May 25, from 12 noon to 2:00 p.m.

18. On April 23, 2007, District sent Parent written notice with the three new proposed dates for an IEP meeting, of May 11, 18 or 25. Over the course of the next weeks, through May 8, 2007, Parent did not consent to one of the dates, communicate with the District, or return the form. On May 8, District team members decided to proceed to hold an IEP meeting and selected the May 18 date to hold the meeting. On May 8, District mailed Parent a written notice scheduling the IEP meeting on May 18, 2007. Parent contends District should not have scheduled an IEP meeting on May 18, 2007, without her consent.

19. There is no evidence that District attempted to telephone Parent to obtain consent to the May 18 date. Nevertheless, Parent had proposed the April 20 date, then claimed not to be prepared because she had forgotten about it, requested three new dates, was given three new dates verbally and in writing, and thereafter did not respond to District’s fourth notice to schedule an IEP meeting. District had notified Parent by written notice of many dates available for all District IEP team members beginning in February 2007, and was facing a deadline because the school year ended around June 11, 2007. On May 9, almost three weeks from the time Parent had been informed of the dates verbally at the April 20 meeting, Parent signed the notice form rejecting all three dates, and requesting a date after May 25, preferably May 26, with no explanation.

20. After April 24, 2007, when Parent finally consented to an assessment plan, District had to expedite the triennial assessments to get them completed and hold an IEP meeting before the end the school year, after which IEP team members might not be available for an IEP team meeting until the fall start of the next school year. District’s apparent practice of proposing only three possible dates over a period of about thirty days in each notice, for Parent to choose from, was not explained. Nevertheless, in the above circumstances where District sent repeated notices, relied on Parent’s agreement to dates, and incurred the time and expense of convening busy District staff, only to cancel the meetings, District established that it made good faith efforts to work with Parent, give Parent advance notice, accommodate her schedule, and hold an IEP meeting. Therefore, the District did not

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<sup>15</sup> Parent noted on the form, in response to District’s proposal for two of the dates to convene at 10:00 a.m., that mornings were “not possible,” and requested a meeting time after 12:30 p.m. District noticed the April 20 meeting to convene from 12:00 to 2:00 p.m.

commit a procedural violation by scheduling the IEP meeting on May 18, 2007 without parental consent.

*Parent's Absence from the May 18, 2007 IEP Meeting*

21. Parent contends that District should not have held the May 18 IEP meeting without her attendance and participation. On May 10, Marcy Gutierrez, attorney for the District, sent Parent a letter summarizing its efforts to hold an IEP meeting and expressing hope that Parent would participate by telephone on May 18. On May 12 or 14, Parent faxed a letter to Ms. Gutierrez claiming that she was unable to attend the May 18 IEP due to a legal matter that would take an unknown number of days with no further explanation. Parent did not provide proof of a scheduling conflict either to the District's attorney or at hearing. Even if true, District had already spent four months trying to schedule a meeting. On May 14, Ms. Gutierrez and Parent spoke by telephone, but the conversation became hostile and nothing was resolved. District insisted on proceeding on May 18, and Parent failed to propose an alternate date on which she could proceed.

22. On May 12, in preparation for the IEP meeting on May 18, SELPA Director Searway mailed Parent the District's psychoeducational, OT, SL, and academic assessment reports for her review, and invited Parent to call if there were any questions.

23. On May 18, 2007, an IEP team meeting was convened. The nine District team members who attended the meeting were John Muir's Principal Rosizela Jordan, RSP teacher Melinda Muriel Murrett, general education fifth grade teacher Tiffany Watson, school psychologist Daphne Erwin, SL pathologist Claire Dial, school nurse Linda (last name illegible), SELPA Director Robin Searway, Special Education Elementary Education Supervisor Ginger Johnson, and OT therapist Rosemary Davis. Parent was not present at the meeting. The District telephoned Parent, reached her answering machine, and left a message requesting her to call and informing her that District would provide her with notice of three more dates in order to finalize the IEP.

24. At the May 18, 2007 annual and triennial IEP meeting, Student's history was reviewed and the District team members reviewed and discussed the assessment reports, along with Student's unique needs and proposed options. Annual goals in reading, math, handwriting or alternative means to produce written work via keyboarding, written language, and study skills were discussed. The team agreed to reconvene in order to discuss parental input and make an offer for Student's placement and services. Their team discussions were memorialized in the written May 18 IEP meeting notes.

25. In the above circumstances, District established that it made good faith efforts to work with Parent, to give Parent advance notice, accommodate her schedule, and hold an IEP meeting. District faced an imminent deadline for the end of the school year, prior to which it had to review multiple triennial assessments and make an offer of placement and services for the 2007-2008 school year. The District did not commit a procedural violation by holding the IEP meeting on May 18, 2007 without Parent's presence. Even if a

procedural violation were found, it would be harmless error, because District did not make an offer of placement but continued the IEP meeting to provide further opportunity for parental participation and input.

*Parent's Participation in the May 30, 2007 IEP meeting*

26. On an unknown date after May 18, 2007, District sent Parent an IEP meeting notice with three proposed dates, and Parent selected May 30. District also mailed Parent the May 18 IEP meeting notes to allow her the opportunity to review them prior to the next IEP meeting, and to inform Parent of the team discussions and recommendations during the May 18 IEP meeting. No documentary evidence of either correspondence was placed in evidence. Parent contends that the proposed annual goals were not provided to her in advance of the May 30 meeting.

27. On May 30, 2007, the IEP reconvened to meet from about 1:00 to 3:00 p.m.<sup>16</sup> The nine District team members who attended the meeting were Principal Rosizela Jordan, RSP teacher Melinda Muriel Murrett, general education fifth grade teacher Tiffany Watson, school psychologist Daphne Erwin, SL pathologist Claire Dial, Special Education Program Manager Michelle Wells, SELPA Director Robin Searway, Special Education Elementary Education Supervisor Ginger Johnson, and OT therapist Rosemary Davis. Parent participated by telephone.

28. During the May 30 meeting, Parent informed the District that she had not received the proposed annual goals in advance in order to read them and prepare for the meeting. Consistent with Parent's claim, the May 30 meeting notes reported prior delivery to Parent of the May 18 meeting notes and a revised copy of the psychoeducational assessment report, but did not mention the annual goals.

29. The conduct of the parties during the May 30 IEP meeting is also consistent with Parent's claim. District hung up the conference call (to free Parent's telephone to receive a fax) and attempted three times to fax Parent the draft annual goals, but received error messages. The IEP meeting recommenced with Parent's participation, and the psychoeducational and SL assessments were discussed. Parent found the SL goals attached to her copy of the SL assessment report sent to her by the therapist. When it came time for the OT report, Parent stated that she needed to read the proposed OT goal. Due to Parent's disability, she could not just hear it over the telephone and understand it. District staff again attempted a fax which failed. Because school was getting out for the day, District placed the goals in an envelope and gave them to Student to deliver to Parent.

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<sup>16</sup> District's IEP notes recorded calling Parent at 1:13 p.m. and Parent claimed she was not called until 1:20 p.m., resulting in a loss of 20 minutes of meeting time. Including the time spent faxing and waiting for Parent's receipt of the goals, over one hour of the meeting was lost.

30. At about 3:00 p.m. on May 30, 2007, District called Parent to continue the IEP meeting, and Parent confirmed that she received the draft goals from Student. However, Parent informed the staff that she needed to leave and wanted to reschedule the rest of the meeting for the following week. Parent had a medical appointment, and had informed District during the meeting of the appointment.

31. District set a two-hour time limit for the meeting. Both parties should have been prepared to be flexible to take more time, if necessary, to complete the triennial meeting. However, Parent was entitled to rely on the 3:00 p.m. end time. Parent stated that her medical appointment at 3:30 p.m., in connection with her disability, had been set for two months and could not be missed. Parent requested a continued IEP meeting to hear from the other assessors and to discuss the annual goals. Parent had a lot of questions and requested that the team allow her to understand the reports and the test scores and to provide her input as Student's parent. District staff reportedly consulted their calendars and determined that they were not available at any time to meet with Parent prior to the end of the school year. Ms. Searway telephoned Parent and informed her they could not reschedule the meeting with all team members, and that the meeting had to proceed. Ms. Searway made no attempt to work with Parent to establish another date. They hung up the phone and the meeting continued without Parent to finalize an offer.

32. Having agreed to a telephonic conference meeting with Parent, it was incumbent upon the District to have delivered all IEP documents to Parent prior to the May 30 IEP meeting. The evidence establishes that the only goals Parent had received prior to the meeting were the SL goals from the SL therapist. Parent did not receive the remaining goals until about 3:00 p.m. on May 30. There were eight additional goals Parent had to read and understand in order to meaningfully participate in the IEP. There is no evidence that Parent's medical appointment was untrue or that Parent was trying to evade the May 30 IEP. The District's frustration with Parent's unwillingness to remain in the meeting did not fairly take into account that District's failure to ensure Parent's advance review of all proposed goals disrupted the meeting, not Parent's medical appointment. District's failure to get the proposed goals to Parent ahead of time was unexplained.

33. No competent evidence was presented as to why the IEP meeting could not have reconvened after Parent's medical appointment. District made no inquiry into how long the appointment would take or whether they could assist her in trying to reschedule that appointment. No evidence was presented as to whether only one District team member could not thereafter meet, which ones could or could not meet, or whether Parent could waive the presence of any member as is provided for by law. No effort was made to offer Parent time to read and review the goals just delivered to her, the opportunity to waive the presence of any District member of the IEP team, or to do anything other than proceed with the meeting on May 30.

34. District should have continued the meeting one more time so Parent could hear more about District staff's proposals, review the goals, ask more questions, and provide further input. In failing to do so, District committed a procedural violation. The violation

was not harmless error because it significantly impeded Parent's opportunity to meaningfully participate in the IEP process. The procedural violation therefore denied Student a FAPE.

*Delivery of the IEP Offer to Parent*

35. Parent contends District never provided her with a complete and accurate copy of the May 2007 IEP. On or before June 6, 2007, SELPA Director Searway directed the District staff to take the final pages of Student's IEP and combine them all into one document, numbered sequentially from one to 68. The documents included the IEP meeting notes from February 23 and April 20, 2007, because they were part of one continuing IEP that culminated in an offer on May 30, 2007. She directed that a package of all the IEP and related documents be sent to Parent, and signed a cover letter on June 6, 2007, addressed to Parent listing the contents of the package, which included Student's present levels of performance, the meeting notes, annual goals, accommodations and modifications, a revised psychoeducational assessment,<sup>17</sup> the OT report, and the academic achievement report.<sup>18</sup>

36. Parent denied ever receiving the package, and denied receiving a sequentially numbered IEP of 68 pages from District. Parent's copies of certain IEP pages are different from District's and Parent contends that District has altered pages. For example, some of Parent's IEP pages do not have entries the duration of services to be given. However, the evidence establishes that Parent had IEP pages that did not have sequential numbering at the bottom of each page because they were earlier drafts of the IEP sent or faxed to Parent in advance of the May 18 and the May 30 IEP meetings, and were not the final pages.

37. Both Michelle Wells and Ginger Johnson testified that they saw the package being prepared by former SELPA Director Searway and her assistant and have no reason to doubt it was duly mailed to Parent. Supervisor Johnson, who is now the SELPA Director, testified that the package was sent on or about June 6, 2007, to Parent by Federal Express and that a confirmation of delivery was received. The testimony of the District witnesses is found to be credible. Each witness recalled Ms. Searway's directions and leadership in making sure there was a complete package for Parent, and making sure the pages were numbered so there would be no doubt.

38. The preponderance of the evidence establishes that District timely provided Parent with a complete copy of the final IEP consisting of 68 pages, including all assessment reports and the annual goals. In addition, Ginger Johnson credibly testified that, as the new SELPA Director, she again sent the complete 68-page IEP to Parent on September 25, 2007, along with Student's school records at Parent's request. Ms. Johnson had the package sent by Federal Express and received a FedEx confirmation of delivery. Parent's claim that she

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<sup>17</sup> At the May 30 IEP meeting, Parent objected to School Psychologist Erwin's inclusion of data from the SL pathologist Dial regarding a BASC-2 assessment, and Erwin thereafter revised her report to remove the reference.

<sup>18</sup> The SL assessment was not listed but it was numbered pages 57 through 60 of the IEP.

did not receive the sequentially numbered IEP is not supported by the evidence. District did not fail to provide the complete IEP and did not commit a procedural violation.

### *Clear Written Offer of Placement*

39. The IEP for a student must contain a clear written offer of placement. This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, a statement of the anticipated frequency, location and duration. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child. Failure to provide a clear written offer, if proved, is a procedural violation that may or may not result in a loss of FAPE.

40. Parent contends that the IEP did not contain a clear written offer for the OT services and for the one-to-one paraprofessional.

41. Page 2 of District's May 2007 IEP for the 2007-2008 school year offered to place Student in a general education sixth grade classroom setting at John Muir for ninety percent of the school day, with the following special education and related services: (a) RSP intervention support for 45 minutes per school day, (b) 30 minutes of direct SL services one time per week, (c) 20 minutes of unspecified OT services once per week for the first month of the new school year (through September 30, 2007), and a second offer for unspecified OT services for 30 minutes once per week beginning October 1, 2007, and (d) one-to-one paraprofessional services for four hours per school day in general education and in SL instruction. Page 32 of the IEP offered various classroom and testing accommodations and modifications, pages 28 through 34 (excluding page 32) offered annual goals, and page 21 offered a Fade Plan for the one-to-one paraprofessional services. In addition, pages 25 and 26 of the May 30 IEP meeting notes pages, contained a written summary of District's offer for placement and services.<sup>19</sup> The OT and paraprofessional services offers are evaluated below.

### *The Offer for OT Services*

42. As set forth above, District's offer for OT services on page 2 of the IEP was for 20 minutes of unspecified OT services once a week through September 30, 2007, and a second offer for unspecified OT services for 30 minutes once a week beginning October 1, 2007. Page 2 was a District form entitled "Services," with a grid of columns at the top that listed information including the name of the service, start and end dates, duration, frequency, and location code. The offers for RSP and SL services were both listed as from May 18, 2007 to May 18, 2008 because the IEP is for one year.

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<sup>19</sup> Although the meeting notes entitled this section "Placement and Service Options" there were no "options" for Parent to choose from, just District's offer.

43. The first entry for OT services, for 20 minutes once a week, does not specify whether it was to be direct or consultation services. The offered duration was from May 18, 2007, to September 30, 2007. Since no summer school or extended school year was offered, the net effect of the offer was that it would begin with the beginning of the 2007-2008 school year at the end of August and end on September 30. The second entry for OT services, for 30 minutes once a week, also does not specify whether it was to be direct or consultation services. The offered duration was from October 1, 2007, to May 18, 2008. Without further clarification, a parent could reasonably conclude that the District was offering OT services for 20 minutes a week for a month, and then increasing the same services to 30 minutes a week for the rest of the school year.

44. An entry on pages 25-26 of the IEP states: “Occupational therapy recommending consult services one time *per month* (minimum of 30 minutes) to implement the Writer Plus Program. For the first month services will be 20 minutes one time per week to implement and monitor progress in Writer Plus Program.” There is no other page in the IEP that resolves the evident conflict between the written summary and the services page as to the duration of services.

45. District’s Occupational Therapist Rosemary Davis credibly testified that the offer for OT for 30 minutes beginning October 1 was supposed to be *once a month*, not once a week, and that the entry on page 2 of the IEP was a “typo” (although it was handwritten, not typed).

46. According to the May 18 IEP meeting notes on pages 17 and 18, Ms. Davis reported her opinion to the IEP team (absent Parent) that Student should not be pulled out from the classroom for direct OT services any more, that he could continue to work on his fine motor skills in the classroom, and that he would benefit from learning keyboarding skills. Ms. Davis’ OT assessment report made the same recommendations. In addition, Ms. Davis drafted one OT goal for keyboarding. These documents did not specify dates, frequency, or duration.

47. The job of the IEP team was to consider the information from Ms. Davis and arrive at a consensus with due regard for Student’s unique needs, and make a clear written offer for services. The team was free to develop an offer not contained in the assessor’s recommendation. The offer for OT services on page 2 of the IEP was not a clear written offer. District admitted the offer was written incorrectly. In addition to the incorrect offer as to duration, the offer failed to clearly communicate to the Parent that it was an offer for consultation services only. District did not contend that its intent was to offer both direct and consultation services and reserve the discretion to specify how much of each. Here, District’s intent was to only offer consultation services and the offer on its face did not communicate that. District’s failure to make a clear written offer for OT services constituted a procedural violation.

48. The procedural violation is not harmless error because it significantly impeded Parent’s participation in the IEP process. Parent’s draft of the May 30 IEP services page

stated that the 30 minutes of OT beginning October 1, 2007, was to be one time *per month*. (Parent's Exhibit A.) At the May 30 IEP meeting, Parent was still present in the meeting when Ms. Davis spoke. Parent understood that Ms. Davis proposed one OT goal for keyboarding, and discontinuance of direct OT services. Parent insisted that the goal be delivered to her, rather than read to her over the telephone. She received the goal by 3:00 p.m. that day, at the termination of a semi-aborted meeting. However, the meeting notes do not reflect that Ms. Davis actually discussed the details of the proposed consultation/training services, which were not set forth in her assessment report. Parent had to leave the meeting, and District failed to reschedule another day. When Parent received the final IEP, the OT offer had been changed to 30 minutes one time a week. As of the hearing, Parent still did not understand what District's specific OT offer was. This procedural violation denied Student a FAPE.

### *The Offer for One-to-One Paraprofessional Services*

49. Page 2 of the IEP offers a one-to-one paraprofessional (paraprofessional) provided by the District to support Student for four hours per day during general education and SL services. Parent contends that the offer is not a clear written offer because the paraprofessional's services or duties should be listed in detail.

50. Student has had a one-to-one paraprofessional to assist him to access the educational environment since approximately second grade. The May 2004 IEP was agreed to and implemented to provide Student with a one-to-one paraprofessional for five hours per day. No specific duties were set forth in the IEP. Parent contends the May IEP 2007 IEP offer should contain specified duties for Student's paraprofessional but has provided no legal authority for this position. The IEP broadly describes the aide's function "to support" Student in general education and during SL services. The proposed Fade Plan provides two goals to be addressed through one-to-one assistance: (a) to interact with Student to monitor his academic performance, and (b) to model appropriate handwriting at all times.

51. Student's paraprofessional, Carolina Alvarado, has been his dedicated aide for five hours a day since fourth grade, and this is her third year with him. A dispute has arisen between the parties regarding the scope of Ms. Alvarado's duties that was caused primarily because she was providing inappropriate assistance to Student (suggesting a lack of adequate training). For example, in the past Ms. Alvarado would assist Student with his spelling by actually spelling each letter of the word for him, or going to the dictionary and looking the word up for him. Instead, she should have, and has now been instructed to sound the word out phonetically so that Student can develop better spelling skills, and to prompt and assist Student to use the dictionary.

52. District's methodologies and strategies for the use of a paraprofessional to support Student are a matter of discretion for the District, and should not be reduced to rigid directions in an IEP. The offer for aide services was a clear written offer.

*District's May 2007 Offer of Placement and Services*

53. The second test in evaluating District's offer is whether the IEP developed was substantively appropriate and reasonably calculated to provide Student with educational benefit. 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. Offers are to be evaluated as of the time the IEP team designed them, as part of the IEP, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

*Student's Unique Needs*

54. A student is entitled to receive specially-designed instruction and related services that meet his or her unique needs and are necessary to assist in benefiting from the education. To that end, a district must identify a student's unique educational needs.

55. Prior to the 2007 IEPs, District's last IEP offer for Student was on January 10, April 11, and May 9, 2006. At that time, Student was in fourth grade. However, Student had had no new agreed-upon IEP or annual goals since May 2004 when he was in second grade. The 2006 IEP offer reported Student's then-present levels of performance, but it is unclear to what extent they may have been based on out-dated goals that may not have reflected his true levels of performance. As of May 2004, Student's SLD was based on a severe discrepancy between his cognitive functioning and his academic achievement in reading decoding, reading comprehension, and written expression, but not in math. Student's deficits involved auditory processing and sensory motor disorders. However, the 2006 IEP offer indicated that the deficits involved verbal memory and visual processing deficits. District records reflect that Student was identified as having a secondary disability in speech and language.

56. In 2006, Student's overall level of performance was below fourth grade. He had unique needs in the areas of reading, writing, and math. In reading comprehension Student was reading at approximately a 2.5 grade level. Student did well with math calculations, but struggled with math word problems. Student had modified spelling assignments and modified homework. In speech, Student worked on auditory memory to learn to comprehend multiple sentences, and on language skills (synonyms, antonyms, comparisons, and irregular verbs).<sup>20</sup> By 2004, Student had met his OT goals and had age-

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<sup>20</sup> These were 2006 goals, as the speech pathologist testified she believed Parent had consented to them.

appropriate handwriting (but not letter size), and improved reciprocal arm-leg movement, but was still working on the same goals in 2006.

57. As of the May 2007 triennial meeting when Student was in fifth grade, the IEP team reviewed District's recent triennial assessments,<sup>21</sup> staff observations, and school records, and concluded that Student still demonstrated a SLD based on a severe discrepancy between his cognitive functioning and academic achievement in only one area, "basic reading skills." Page 35 of 68 of the IEP indicated only one related processing disorder, that of visual processing.

#### *Psychological Assessment*

58. On April 27, May 3, and May 4, 2007, District School Psychologist Daphne Erwin conducted a psychoeducational assessment of Student. Ms. Erwin obtained a Master of Science degree from California State University, Hayward, in education with a clinical child psychology option in 1989, and had previously obtained a Bachelor of Arts degree in psychology. She holds several clear teaching credentials, and a clear pupil personnel services credential with specialization in basic pupil personnel services and school psychology. She has been a school psychologist since 1989, and with the District since 2001. Ms. Erwin has attended periodic professional development courses, particularly in the area of behavior support, and has training and years of experience in conducting psychoeducational assessments involving many disabilities. Pursuant to federal case law,<sup>22</sup> since Student is African American, Ms. Erwin selected alternative test tools to measure Student's cognitive functioning, including the Wide Range Assessment of Memory and Learning (WRAML-2), the Adaptive Behavior Evaluation Scale (ABAS), and the Behavior Assessment System for Children 2d. Edition (BASC). The assessment materials were selected not to be racially, sexually or culturally discriminatory.

59. On the WRAML-2, Student's primary areas of weakness were in visual memory with a low score of 56, and visual recognition with a score of 68. Student's areas of strength included verbal memory (100), attention and concentration (117) and working memory (102). Average range in the standardized scoring was 90 to 109, and deficient was 69 and below. Ms. Erwin noted that Student's WRAML-2 results were significantly different than when last administered in February 2005. In 2007, Student showed significant improvement on four subtests (verbal learning, finger windows, sentence memory and story memory), but also scored significantly lower on design and picture memory.

60. On the BASC-2 rating scales, there are only three scoring ranges, acceptable, caution, and extreme caution. Ms. Erwin found that Student rated himself in the acceptable

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<sup>21</sup> The appropriateness of District's assessments is not an issue in this proceeding. However, the assessments are useful in identifying Student's unique needs.

<sup>22</sup> *Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp. 926, affd. in pt., revd. in pt., *Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969.

range overall. The fifth grade general education teacher Ms. Watson, the RSP teacher Ms. Murrett, and Student's paraprofessional Ms. Alvarado completed the rating surveys. Ms. Alvarado rated Student in virtually all subcategories of all areas (externalizing problems, internalizing problems, school problems, additional clinical, and behavioral systems index), in the acceptable range. In contrast, Ms. Watson's scores showed ratings of extreme caution for aggression, anxiety, somatization, and adaptability, and ratings of caution in most other categories, including withdrawal and attention problems, with only a few ratings of acceptable. Ms. Murrett's scores showed mostly ratings of acceptable with only one extreme caution for somatization and a few caution ratings in adaptive skills areas. There was a consensus on the IEP team that internalizing problems was an area of concern. Student has spent time out of class going to the restroom for thirty minutes or more, getting drinks of water, or having an upset stomach, although no data was presented.

#### *Academic Performance Assessment*

61. On May 3, 2007, RSP teacher Melina Murrett administered the Woodcock Johnson III Test of Achievement (WJ-III). Ms. Murrett has been Student's RSP teacher since 2003 when Student was in second grade. Ms. Murrett received a Bachelor of Arts degree in 1978, a clear multiple subjects teaching credential in 1986, and a clear special education teaching credential in 1987. She has over twenty years of experience in education as a special day class instructor and as a resource specialist, including designing special education curriculum and conducting academic assessments. She found Student's academic skills to be within the low average range over many grade levels compared to others of Student's age. In particular, on the cluster tests, Student's performance was high average in math calculation skills (7.9 grade level), average in mathematics (6.3 grade level), low average in broad reading (3.7 grade level), low average in written language (3.7 grade level), and low average in written expression (4.4 grade level). In addition, Student scored low in spelling (3.1 grade level), and letter-word identification (2.9 grade level). In reading fluency, Student was at a 4.5 grade level.

62. Student's performance was far lower. As of the May 2007 IEP meetings, Student's grades in relation to state standards in his core academics in the fifth grade general education class were a 2 for content and 2 for mechanics in writing (3 is passing); a 47 in reading (50 is passing); and a 37 in math (70 is passing).

63. As of the end of the 2006-2007 school year, for mathematics fact fluency, Student passed addition, subtraction and multiplication but failed division. For state standards, Student failed writing and reading,<sup>23</sup> and passed the math benchmark tests. In John Muir's letter grades, Student went from a C minus in the first trimester to an A minus in the last trimester in reading; from a C to a B minus in writing; from a C to a C plus in

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<sup>23</sup> Student's general education teacher testified that, based on her professional opinion, she reported Student passed reading even though his score was below 50, but acknowledged on cross-examination that in the state standards records the failing score of 47 would prevail.

mathematics; from an A minus to a C in social studies, and from a B minus to a B plus in science and health.

### *Occupational Therapy Assessment*

64. On April 30, May 4, and May 9, 2007, occupational therapist Rosemary Davis assessed Student's occupational therapy needs. Ms. Davis obtained a Bachelor of Arts degree in occupational therapy from San Jose State University in 1995 and a state license in 1996. She has been with the District for about six years, and has training and experience in the assessment of occupational therapy needs, including gross and fine motor skills, sensory needs, and visual motor skills. Student had very good gross motor skills and visual perceptual skills. Ms. Davis first met Student for an OT evaluation in kindergarten and has provided OT services to him since.

65. For the 2007 triennial assessment, Ms. Davis administered a battery of standardized tests and had problems getting Student to cooperate, as he did not want to be pulled out of class to be tested. Ms. Davis administered the Fine Motor Subtest of the Bruininks-Oseretsky Test of Motor Proficiency (BOT). Overall, Student scored in the 58th percentile, and did very well on most hand movement exercises, except he had some difficulty with stringing beads, sorting cards, and drawing vertical lines. On the Visual-Motor Integration Test (VMI) and supplemental perceptual and motor test, Student's standardized scores on the VMI and the perceptual supplement were in the above average range (113 and 121). His scores on the fine motor coordination test were significantly below average (73), in the 4th percentile. On the Test of Visual Motor Skills-Revised (TVPS-R), which measures visual tracking with forms, Student scored solidly in the average range. On the Test of Handwriting Skills, Student did not appear to be motivated to do his best, and the results are not reliable. While seven out of ten subtest scores were in the average range, several were low and below average (writing lower case letters, copying from a page, and copying words given verbally). Student exhibited a low ability to produce motor movements for a child of his age.

### *Speech and Language Assessment*

66. On May 10, 2007, Speech Therapist Claire Dial assessed Student's speech and language needs. Ms. Dial has been a speech and language pathologist with the District for 24 years. She received a Bachelor's degree in communication disorders from California State University, Stanislaus, in 1980, a Master's degree in the same field in 1982, and holds a clear clinical rehabilitative services credential as well as a state license. Ms. Dial administered alternative assessment tools: the Idioms Fun Deck (IFD) to assess Student's knowledge of figurative language; the Vocabulary Workshop Diagnostic Test (VWDT), third grade level, to determine vocabulary needs; and the Wigg Criterion Referenced Inventory of Language (WCRIL) to evaluate verbal proficiency (semantics and pragmatics) and identify targets for language intervention. In addition, she administered three tools to assess auditory comprehension of short paragraphs: the Improving Reading Comprehension, Developmental Reading Assessment, and the Auditory Memory for Quick Stories.

67. On the IFD, Student obtained a score of 75 percent (21 out of 28 pairs of idioms). On the VWDT, Student scored a 55 percent. On the pragmatics portion of the WCRIL, Student achieved 100 percent on eight subtests, 87 percent on three subtests, and 75 percent on two subtests. A score of 80 percent is necessary to demonstrate mastery of an area for independent use. The two subtests below mastery were greetings and farewells, and requesting clarification and repetition. Ms. Dial concluded Student still needed instruction to master those areas of linguistic skill. On the semantics portion of the WCRIL, Student showed a level of mastery in all areas with scores of 90 and 100 percent. A score of only 66 percent in auditory comprehension of short paragraphs read to Student demonstrated that this is an area of deficit for him.

68. In May 2007, Student's unique needs as a result of his disability were in the areas of reading, writing, math, visual memory processing, delayed fine motor skills, vocabulary, auditory comprehension, and internalizing problems.

#### *Annual Goals*

69. An IEP must include academic and functional goals and special education and related services designed to meet all of the child's unique needs that result from his or her disability so that the child may progress in the general curriculum and must be measurable.

70. For the May 2007 IEP, District IEP members proposed ten annual goals for Student in the areas of reading, math, speech, handwriting (alternative of keyboarding as a means to produce written work), written language, and study skills. The goals were to be achieved in increments with three benchmarks between May 18, 2007 and the next annual review in May 2008. Many of the goals were first drafted in connection with the February 2007 IEP, and Parent participated in the process of their development over several months. Although Student had unique needs in the area of internalizing problems, no goal was developed to address those needs.

71. Parent contends that the OT keyboarding goal is inappropriate. Parent does not argue that any of the other goals is inappropriate. Nevertheless the burden is on the District, as the petitioner, to establish that its goals have offered Student educational benefit.

72. District's first annual reading goal is to increase the words per minute Student can read aloud with 100 percent accuracy from a baseline of 106 words per minute to 136 words per minute. This goal addresses improving Student's reading proficiency and fluency, and was also designed to learn to read multiple pages. The goal is appropriate.

73. The second reading goal is for Student to correctly respond to questions regarding sequence and the chronology of an achievement level text as measured by specific skills series increasing to 90 percent accuracy. Student's baseline was his ability to analyze text that is sequential and chronological with 70 percent accuracy. According to Ms. Murrett, this goal addresses sixth grade state standards for reading. In addition, it addresses Student's reading comprehension and visual memory needs. The goal is appropriate.

74. District's first annual math goal is for Student to be able to correctly compute fractions with multiplication and division strategies applying this information to solving problems as measured by a Houghton Mifflin text (a math book) increasing to 85 percent accuracy. This goal addresses Student's math needs, including division. The second math goal is for Student to be able to reduce fractions to their simplest form as measured by the Houghton Mifflin text with 80 percent accuracy. This goal addresses reducing the number of steps to do fractions to help Student pass tests. The math goals are appropriate.

75. District's first annual speech and language goal is for Student to define vocabulary words based on his current reading levels with 85 percent accuracy as he uses sentences and the context of words to find the meaning of unknown words. Student's vocabulary baseline was 55 percent in the recent SL assessment. Ms. Dial first drafted the goal for grade level vocabulary but Parent objected that it would be too hard for Student and it was changed to be based on Student's current reading level. This goal addresses Student's vocabulary deficiencies as well as spelling. The goal is appropriate.

76. The second speech and language goal addresses Student's auditory comprehension deficit. Student would listen to short paragraphs and answer comprehension questions with 95 percent accuracy as he demonstrates comprehension by identifying answers in text. Student's baseline auditory comprehension was 66 percent in the recent assessment. In addition to addressing Student's auditory comprehension needs, the goal also addresses Student's visual memory processing. The goal is appropriate.

77. District's keyboarding goal (as an alternative to handwriting as a means to produce written work) is for Student to be successful at completing 50 out of 50 keyboarding exercises from May 18, 2007 to March 2008, and then to utilize the Write Plus program to complete two out of five written assignments weekly. Student's baseline was that he required the paraprofessional to assist Student in the classroom with writing and copying from the board or overhead projector but no frequency data was provided. No baseline was provided for Student's computer skills. Nevertheless, the keyboarding exercises were to be provided by a specific measurable program.

78. The keyboarding goal addresses Student's fine motor deficits. It also deals with written expression. Ms. Davis has worked with Student for over five years to remediate Student's delayed fine motor skills and his handwriting in particular. Ms. Davis established that Student's motivation to continue with direct OT remediation exercises to perfect his handwriting had dwindled. The general education teacher and the RSP teacher stated that Student's handwriting was no longer an issue in the classroom as it is "very legible with good alignment, letter formation and spacing." It takes Student longer than his peers to complete things using handwriting, his need for more time was accommodated and he was not timed on tests. Ms. Davis recommended this keyboarding goal as the direction Student's future OT services should take, to teach Student to create written work on the keyboard as an alternative to handwriting. By pursuing it, Student would gain independence and a sense of accomplishment with the printed product. This goal was appropriate. Parent's contention that Student should have an OT goal for handwriting is rejected because it is not based on the

results of the OT assessment or on an established need. Student no longer needs an OT handwriting goal to perform appropriately using handwriting in the general education classroom, and his remaining delayed fine motor skill deficits are appropriately addressed by the keyboarding goal.

79. District's two proposed written language goals address Student's deficiencies in written language. The first goal provided that Student would be able to write a factual paragraph retaining information and proper chronology from an achievement level text reducing the need to review the text during writing to one time. The baseline was Student's ability to summarize text in paragraph form including details and proper chronology with five returns to text. This goal addresses Student's needs in the area of written expression, and also deals with his visual memory processing. The second goal provides that Student would be able to write multiple paragraphs, following teacher-led prompts, incorporating grammar, punctuation and content as measured by the District's writing rubric. This goal addresses Student's needs in the area of writing mechanics. Both goals are appropriate.

80. District's final annual goal is in the area of study skills. Student would be able to initiate an assignment when given a verbal prompt from the teacher within three minutes 80 percent of the time. Student's baseline was being able to do so only five percent of the time. This goal addresses Student's auditory comprehension needs, and also addresses improving his skills for independence and initiation. This goal is appropriate.

#### *Placement and Services*

81. A school district is required to provide instruction and related services that are reasonably calculated to provide the student some educational benefit. The IEP must contain a statement regarding the student's present levels of academic achievement and functional performance, and a statement of the special education and related or supplementary aids and services to be provided.

82. 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, four factors must be evaluated and balanced, including the academic benefits of placement in a mainstream setting, with any supplementary paraprofessionals and services that might be appropriate, the non-academic benefits of mainstream placement, the negative effects the student's presence may have on the teacher and other students; and the cost.

#### *Resource Specialist Program Services*

83. District's offer for RSP intervention services is for 45 minutes daily, five times a week. This is a reduction of 15 minutes per day from the RSP services in the May 2004

IEP. Parent contends that because Student is significantly behind his peers in the sixth grade general education classroom, he needs all 60 minutes of RSP support every day.

84. Ms. Murrett has been Student's RSP teacher since 2003 when Student was in second grade. RSP is viewed as an intervention, not a class. Student is pulled out of the general education classroom in order to receive individualized support and assistance from the RSP teacher in the areas of reading, writing, and math in a small group setting. This occurs in the afternoon from 1:30 p.m. to 2:30 p.m. At Parent's request at some point during the 2006-2007 school year, Ms. Murrett began excusing Student from the RSP time early because Student wanted to participate in classroom activities. Parent also requested that Student not be pulled out for RSP when music, traffic service, or special classroom projects occurred because he would get upset. Ms. Murrett recommended the reduction in RSP time in order to provide Student more time in the general education environment and thinks that his needs for individualized support can be appropriately met in 45 minutes. She also would support Student staying longer than 45 minutes if he wanted to. Moreover, Ms. Murrett knew that Student's ability to focus and concentrate did not last much longer than 45 minutes. By about 2:15 p.m. Student generally becomes tired and wants to relax and have fun, and the last 15 minutes or so of his RSP time are usually not productive.

85. Parent's concern that reducing RSP support, even by 15 minutes a day, might harm Student's academic achievement, test scores and grades is a valid one. However, Ms. Murrett believes that Student's scores and grades can be supported in the 45 minute daily time proposed, and can also be supported in the general education classroom. All District members of the IEP team concurred with her recommendation. Ms. Murrett's opinions and testimony are persuasive in light of her experience in special education and her knowledge of Student's growth and unique needs. District's proposal for RSP services is appropriate to provide Student a FAPE in the least restrictive environment.

#### *Occupational Therapy Services*

86. Related services must be provided by the District if a student's unique needs related to his disability require such services for the student to obtain educational benefit. Parent contends that District's offer for OT services does not provide a FAPE because, since Student still has fine motor deficits, he should continue to receive direct OT services to address those deficits.

87. As set forth in Factual Findings 77 and 78 above regarding the OT keyboarding goal, the goal was designed to address Student's remaining delayed fine motor skills. The OT assessment established that Student no longer needs direct OT services to address his fine motor deficits because he is succeeding in the classroom with legible and appropriate handwriting, and his slower speed is accommodated. In addition, Student has poor motivation to continue being pulled out for such OT services, and handwriting is his least favorite activity. Instead, OT can serve Student productively at this stage of his life by providing him with an alternative, technologically advanced method to produce written work in computer format, using keyboarding.

88. District's keyboarding OT services will support the OT goal on a consultation basis as follows: For the first month, consultation would be for 20 minutes every week to implement and monitor progress in the Writer Plus program. The OT consultation will include teaching Student, his paraprofessional, and the teachers how the program works, and starting Student on his exercises. Thereafter, the consultation will be a minimum of 30 minutes once per month to continue monitoring progress.

89. Ms. Davis is confident that Student's OT keyboarding needs may be dealt with in the general education classroom with her consultation. Student would be able to stay in the classroom in the least restrictive environment instead of being pulled out for OT services. The District members of the IEP team considered not only the OT assessment data but Ms. Davis's opinion based on over five years of working with Student, along with Student's age and need to be prepared to enter middle school for seventh grade next year. Ms. Davis's testimony was consistent with her report in emphasizing that Student is becoming a young adolescent who is conscious of activities that might appear to be childish, and is motivated by peer views. She strongly supported providing Student with an alternative means to produce written work and remain in the least restrictive environment of the mainstream classroom.

90. District's offer for OT consultation services to support the OT keyboarding goal was reasonably designed to offer Student a FAPE to address his OT needs in the least restrictive environment.

#### *Speech and Language Services*

91. District's offer for SL services is for one 30-minute session per week, pulled out from the general education classroom. This is a reduction from three 20-minute sessions per week in the May 2004 IEP. Parent contends that since Student still has speech and language areas of need due to his disability, he should continue to receive the same level of services to help prepare him for seventh grade.

92. As of the January 10, 2006 IEP, Student had good articulation. His voice cut in and out at times. He was working on language, and doing well with synonyms, antonyms and irregular verbs. He worked on auditory memory by reading short three-sentence stories, breaking them down, and answering comprehension questions.

93. As set forth in Factual Findings 66 and 67, Student has made significant progress. He met all of his prior goals. He still has deficits in the areas of vocabulary and auditory comprehension. The SL therapist, Ms. Dial, proposed two new annual goals to address these needs and believes that one weekly session for 30 minutes is enough to meet the goals. While Student's voice still occasionally is raspy or cuts in and out, Ms. Dial thinks that there may be a medical issue but does not view it as a speech and language problem for remediation.

94. Student continues to have problems with grade-level vocabulary, and his vocabulary tests in the general education classroom are modified. Student still needs individualized work on auditory comprehension as is reflected in the proposed goals. Parent does not accept the District proposal in part because she filed a complaint against Ms. Dial and has had past disputes with her about Student's services. However, Ms. Dial's professional experience, credible testimony, and knowledge of Student's unique needs since first grade lend weight to her opinion. Ms. Dial did not think it was beneficial for Student to be pulled out three times a week for SL services. Student did not like to be singled out for special education services by being pulled out of class so often. He will be going into middle school next year, and she believes this is a good time to transition to keep him in the classroom longer. Based on the SL assessment and Ms. Dial's opinion, Student no longer needs direct SL services three times a week, and to insist on retaining that level of services would not be consistent with a placement that would meet his unique needs in the least restrictive environment in the mainstream classroom.

95. Ms. Dial is responsible for monitoring Student's progress on the goals. If Student has difficulty achieving them, it would be her responsibility to recommend an IEP team be convened to modify the services. Ms. Dial has successfully helped Student to achieve progress over the years.<sup>24</sup> District's proposal for SL services to support the SL goals is reasonably designed to address his speech and language needs in the least restrictive environment.

#### *One-to-One Paraprofessional Services and the Fade Plan*

96. District proposes in the May 2007 IEP to continue Student's one-to-one paraprofessional support services on a daily basis, for four hours a day instead of five hours a day as has been the case under the May 2004 IEP. In addition, District proposes a Fade Plan to eliminate the aide's services based on certain criteria. Parent contends that Student needs a paraprofessional to support his access to the classroom and the educational environment for five hours a day and that reduction and elimination of those services will be detrimental and deny Student a FAPE. Parent also contends the Fade Plan is inappropriate because its criteria do not address the aide's academic support role.

97. District team members consistently and credibly testified that they are concerned about Student's overdependence on his aide, to the extent that the aide's services are impairing his educational progress.<sup>25</sup> Program Manager Michelle Wells explained that

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<sup>24</sup> Apparently, Ms. Dial believed that Parent had consented to SL goals she proposed in February 2007 and had been implementing them. That issue is not part of this proceeding.

<sup>25</sup> The depth of the disagreement between the parties about this issue is reflected in the IEP history. In the May 2004 IEP, District staff first proposed to discontinue Student's OT services, and to reduce the aide's support. That proposal was to eliminate the aide's support during the afternoon. Parent objected and wanted the aide all day (five hours). When Parent finally consented to the IEP in August 2004, she did not consent to the OT and aide service proposals. Parent has not consented to an IEP since.

District proposed to fade Student's aide in 2004 to promote his independence because the staff believed Student had become too dependent on her and relied on her to help him complete things they thought he should learn to do for himself. At the January 2006 IEP, District staff thought that because of Student's academic progress and lack of behavioral issues, it was appropriate to move toward the least restrictive environment and fade out the aide's services. Accordingly, the District team members drafted a Special Circumstances Fade Plan to completely fade out the aide services by a specified date. Whether a complete fade would occur would depend on Student meeting certain criteria.

98. According to RSP teacher Melinda Murrett, the District staff want Student to be a successful, independent person, which involves taking risks, and think that because Student is a kind and compliant person more independence should be encouraged. The SELPA Director Ginger Johnson credibly articulated the concerns about Student's aide, based on research in the field about the balance between "helping" and "hovering." Overdependence on a personal aide creates negative effects, including decreased self-confidence, needing the aide's approval, decreased reliance on natural cues in the environment from one's peers, teacher, the board, and interference in the teaching relationship between the student and the teacher or therapist. Ms. Johnson thought that most if not all of these disadvantages appear in Student's relationship with his paraprofessional, Ms. Alvarado.

99. Parent has insisted that Ms. Alvarado remain in close proximity to Student in general education and while special education resource and SL services are being provided, as well as at recess. Both Student's fifth and sixth grade teachers, Tiffany Watson and Susan Salyer, respectively, reported that when Student's aide is not present, he performs well and is able to participate, but that when the aide is present, he looks to her for directions, which inhibits his self-confidence. The problem has been compounded, as set forth in Factual Findings 50 and 51, because Ms. Alvarado in the past had done too many things for Student, such as spelling words for him. Because of that, as of May 2007, District may not have fully understood Student's present levels of academic functioning. In September 2007, Ms. Alvarado received redirection from District staff about how to provide academic support.<sup>26</sup>

100. District's proposal to reduce the paraprofessional's educational support for Student by one hour is appropriate at this time, and is reasonably designed to retain aide support for a significant portion of the day, while giving Student an extra hour a day in the least restrictive environment without an aide to encourage his self-reliance, confidence and independence.

101. On the other hand, because Student is a special education student with a SLD in core academic areas, is in an inclusion program in a regular general education classroom

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<sup>26</sup> Parent's contentions that such redirection of the paraprofessional's training constituted implementation of a fade plan or modification of Student's stay put placement under the May 2004 IEP without her consent are not issues in this proceeding.

with supports, accommodations, and modifications, and is several grades below grade level in reading and writing, with both visual memory and auditory processing deficits, a paraprofessional or classroom aide may remain an appropriate support to ensure that he can access the curriculum. Depending on a variety of factors such as the size of the class, the needs of other students, and how much individualized attention Student needs, the general education teacher may not have sufficient time to provide Student the extra explanations, prompts or cues he needs.

102. The primary work of a paraprofessional is to ensure that Student understands the teacher's directions or class assignments, to help organize his work, and to provide prompts and cues to encourage focus and attention, but not to do his work for him. District has the discretion to determine the levels of strategies and methodologies, which should involve a consulting relationship between the special education staff and the general education classroom teacher, as well as the aide.

103. Although Student's teachers have observed him perform successfully during times when the aide was absent, District has no present data to support a complete elimination of the aide's services. District's proposal to collect data to support whether Student's paraprofessional can be appropriately faded out is a good idea. However, District's Fade Plan is inappropriate and should be re-designed. First, as admitted at hearing, the staff merely copied the January 2006 Fade Plan, which now does not have the correct end date on it. The Fade Plan at page 21 of the May 2007 IEP states that the aide would be "completely faded by March 17, 2006." This is the same date as in the 2006 Fade Plan. District never amended the plan and did not do so at hearing.

104. Second, the 2007 IEP team did not tailor the older Fade Plan to changed circumstances. There are only two criteria listed for the reduction of Student's one-to-one assistance: (a) Student would remain engaged in a task until it is completed 80 percent of the time; and (b) Student would be able to produce a full line of motor movement without lifting his pencil, and to follow the lines with good accuracy 80 percent of the time. District staff indicated at hearing that the criteria would be measured by the collection of data over time. Accomplishing the first item would show that Student could attend and focus on an assignment, but the plan does not say whether that would be accomplished with or without direction or prompts from a teacher or an aide. The second item, taken verbatim from the 2006 plan, makes no sense in light of the new keyboarding goal for OT, which redirects Student from pencil to keyboard. District's inclusion of modeling handwriting in the aide's fade plan goals may remain a matter of interest, but the aide's modeling of keyboarding is not mentioned and would be more relevant and consistent with the rest of the IEP offer.

105. Third, there is no criterion in the Fade Plan for Student's level of academic success. Completely fading out the aide appears to be the targeted goal without regard to any negative effect on Student's levels of academic performance. Student could "complete" a project 80 percent of the time and flunk the test if he did not understand the test or the directions. Parent points out anecdotally that Student's test scores have fallen since the aide's retraining. District has not developed criteria to address this concern.

106. Finally, the Fade Plan is inappropriate because it is not a “fade” plan. It does not contain any plan to gradually fade out the aide’s services either qualitatively or quantitatively over time, accompanied by benchmarks until a date certain in 2008 when the services would theoretically be at zero percent (depending on Student’s progress). It fails to distinguish fading levels of aide support such as a reduction in close proximity. Accordingly, District’s Fade Plan does not provide Student with a FAPE regarding his paraprofessional support.

#### *Accommodations and Modifications*

107. The May 2007 IEP offer provides for both accommodations and modifications for state testing. In addition, on page 32 of the May IEP, a form page of pre-printed Accommodations and Modifications with boxes checked, District offered the following accommodations: simplified or clarified test administration directions, peer tutor or staff assistance in core academic areas, speech, and OT tests or assessments, note taking assistance, extended time on in-class tests or assignments, extra time on a test within a testing day, supervised breaks within a section of the test, and test questions read aloud to Student or presented in audio form (CD) in math, science, history, social science and writing. District offered the following modifications to curriculum: a dictionary, a calculator on mathematics or science tests, reduced or shortened tests or assignments, and extended time on in-class tests or assignments. District’s accommodations and modifications are appropriate.

#### *Mental Health Referral*

108. A local educational agency (LEA), IEP team, or parent may initiate a referral for assessment of the social and emotional status of a pupil, as part of special education assessment procedures. Based on the results of assessments, an IEP team may refer a special education pupil who is suspected of needing mental health services to a community mental health service if the pupil meets specified criteria. The LEA must have provided appropriate counseling and guidance services, psychological services, parent counseling and training to the pupil, or behavioral intervention, as specified in the IEP. The IEP team must have determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the IEP team must have documented which of these services were considered and why they were determined to be inadequate or inappropriate.

109. As set forth in Factual Findings 58, 59, and 60, School Psychologist Erwin concluded from the BASC-2, one assessment tool that surveyed two teachers and the paraprofessional, that Student had problems regarding anxiety and somatization, meaning that he physically internalizes and manifests anxiety. The IEP team’s response to this information was to propose an immediate referral to county mental health, and a specific program called the Academic Success Program.

110. No evidence was presented that the BASC-2 assessment tool constituted a complete social and emotional assessment of Student. The IEP team did not propose any school-based counseling for Student with the school counselor, or any counseling or training for Parent. The IEP team did not propose any behavior intervention plan to help Student communicate or deal with problems that arose during the school day. Assuming the accuracy of the limited assessment information at hand, the IEP team did not give any school-based methods or strategies a chance to help Student.

111. District failed to comply with the required criteria prior to deciding to refer Student to a community mental health service. The IEP team did not make a determination that such District-provided counseling, guidance, training or intervention did not meet Student's needs or were inadequate. Moreover, District provided no legal authority that its proposal to refer Student to a county mental health program was exempt from the legal mental health referral requirements.

#### *Miscellaneous*

112. Parent contends that the sixth grade classroom teacher, Susan Salyer, is not qualified to teach Student and does not treat him well. District did not propose any specific teacher in the May 2007 IEP, and District has discretion to make personnel decisions. Thus, the qualification or training of Ms. Salyer is not an issue in this proceeding. Moreover, no issues regarding the implementation of Student's special education and related services for the 2007-2008 school year are involved in this proceeding.

113. Parent objects that the May 2007 IEP did not contain a "transition plan" from sixth grade to middle school next year. The law does not require such a plan. However, in proposing the various services in the May 2007 IEP that have been found to be appropriate, the District members of the IEP team had preparation of Student for seventh grade in mind.

### 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 to consent to all services in an IEP, the LEA must 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 local educational agency (LEA) such as a school district 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) & (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. The LEA shall convene an IEP team meeting at least annually to review the student's progress, the IEP, including whether the annual goals are being achieved, the appropriateness of the placement, and to make any necessary revisions. (Ed. Code § 56343, subd. (d).) The LEA shall have an IEP in effect for each child with exceptional needs at the beginning of each school year. (Ed. Code, § 56344, subd. (b); Code of Fed. Regs., tit. 34, § 33.342.) The LEA shall reassess the student at least once every three years. (Ed. Code, § 56381, subd. (a)(2).)

8. 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.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1) [parents are members of IEP team], 300.345 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Id.*)

9. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 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].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. etc. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County School Board, supra*, 806 F.Supp. at p. 1262.)

10. The LEA must provide the parent with adequate advance notice to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate, and must be sent out early enough to ensure attendance. (Ed. Code, § 56341.5, subds. (a) & (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. (Ed. Code, § 56341.5, subd. (c).) The IEP meeting should be scheduled at a mutually-agreed upon time and place. An IEP meeting may be conducted without a parent in attendance if the LEA is unable to convince the parent to attend. In that event the LEA is required to maintain a record of attempts to arrange a mutually agreed-upon time and place, including detailed records of telephone calls, copies of correspondence, and records of visits to the parent's home or place of employment.

Telephonic conferencing is authorized as an alternative method of holding an IEP meeting. (Ed. Code, § 56341.5, subd. (h); 34 C.F.R. §§ 300.322, 300.328.)

*Did District commit a procedural violation that resulted in the denial of FAPE by scheduling IEP meetings in a manner that significantly impeded Parent's opportunity to attend and participate in them and FAPE by failing to provide Parent a complete and accurate copy of the May IEP offer?*

11. As set forth in Factual Findings 7 through 25, District's scheduling of the IEP meetings from February through May 18, 2007 did not impede Parent's opportunity to attend and participate in them and did not deny Student a FAPE.

12. As set forth in Factual Findings 26 through 34, District failed to meet its obligation to deliver the proposed goals to Parent prior to the May 30, 2007 meeting, wasted over an hour of meeting time, and then refused to accommodate either Parent's medical appointment or her need to review the goals just delivered to her at the end of the scheduled meeting time. District should have continued the May 30, 2007 IEP meeting. District's failure to continue the meeting significantly impeded Parent's participation in the IEP process and denied Student a FAPE.

13. As set forth in Factual Findings 35 through 38, District delivered a complete and accurate copy of the May 2007 IEP to Parent and did not commit a procedural violation.

*Clear Written Offer*

14. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, a statement of the anticipated frequency, location and duration. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child. (Ed. Code, § 56345.)

*Did District commit a procedural violation that resulted in the denial of FAPE by failing to make a clear written offer in the IEP of May 2007 for occupational therapy services and for one-to-one paraprofessional support services?*

15. As set forth in Factual Findings 39 through 48, District's failure to make a clear written offer for OT services constituted a procedural violation. The procedural violation significantly impeded Parent's participation in the IEP process. Ms. Davis did not discuss the details of the proposed consultation/training services, which were not set forth in her assessment report, by the time Parent had to cease her participation in the May 30, 2007 IEP meeting, and District failed to reschedule another time. When Parent received the final IEP, one component of the offer had been changed from 30 minutes once a month to 30

minutes once a week. As of the hearing, Parent still did not understand what District's specific OT offer was. This procedural violation denied Student a FAPE. As set forth in Factual Findings 49 through 52, District's offer for paraprofessional support services was clear.

16. The procedural denial of FAPE as to Student's OT services in isolation would not invalidate the entire IEP. Here, however, District's more fundamental procedural violations in failing to timely deliver IEP documents to Parent and failing to continue the May 30, 2007 IEP meeting renders the IEP a denial of FAPE.

#### *Substantive FAPE*

17. For a school district's IEP to offer a student a substantive FAPE, 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 provide 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." (*Id.* at pp. 198-200.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

18. 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.)

19. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams etc. 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.Ore. 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, 1314.)

### *Least Restrictive Environment*

20. 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 paraprofessionals 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.)

*Did District offer Student a FAPE for the 2007-2008 school year in the May 2007 IEP, so that District may implement the IEP over Parent's objections?*

21. As set forth in Factual Findings 69 through 80, and 83 through 106, with two exceptions, District's annual goals and offers for placement and services in the May 2007 IEP were reasonably designed to provide Student some educational benefit, addressed his unique needs and provided him a FAPE. The first exception is that, as set forth in Factual Findings 69 through 80, District failed to offer an annual goal to address Student's unique needs related to internalizing problems, and denied Student a FAPE. The second exception, as set forth in Factual Findings 96 through 105, is that the Fade Plan to eliminate Student's one-to-one paraprofessional, based on an incorrect date, deficient criteria, and lack of a gradual fading plan with benchmarks, was inappropriate and denied Student a FAPE.

22. As set forth in Factual Findings 83 through 100, District's offers for a reduction of 15 minutes a day in RSP intervention, reduction in SL services from three times a week to once a week, replacement of direct OT services once a week with weekly/then monthly consultation OT services for keyboarding and daily keyboarding exercises, and reduction of one hour per day of the one-to-one paraprofessional's services, all supported Student's unique needs while increasing his ability to remain in the least restrictive environment in general education, and, with the exceptions determined in Legal Conclusion 21 above, comprised an offer of FAPE.<sup>27</sup>

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<sup>27</sup> To the extent District makes a new IEP offer consistent with this decision, the parties may be collaterally estopped from relitigating the same issues in a new due process proceeding.

### *Mental Health Referral*

23. An LEA, IEP team, or parent may initiate a referral for assessment of the social and emotional status of a pupil, as part of special education assessment procedures. (Gov. Code, Ch. 26.5, § 7576.) Based on the results of assessments completed pursuant to those procedures, an IEP team may refer a pupil who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services to a community mental health service if the pupil meets specified criteria. Among those criteria are the requirements that the LEA has provided appropriate counseling and guidance services, psychological services, parent counseling and training to the pupil, or behavioral intervention, as specified in the IEP, and the IEP team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the IEP team has documented which of these services were considered and why they were determined to be inadequate or inappropriate. (*Id.*)

24. Pursuant to Factual Findings 108 through 110, the District failed to establish an exemption from, or to comply with the requisite legal criteria prior to deciding to refer Student to a community mental health service. District did not provide Student with any appropriate counseling or guidance services, parent counseling or training to Student, or devise a behavioral intervention plan in the IEP. The IEP team did not make a determination that such District-provided counseling, guidance, training or intervention did not meet Student's needs or was inadequate.

### ORDER

1. District's request to implement the May 2007 IEP is denied.
2. Within thirty days of this Decision, District shall convene an IEP meeting to make an appropriate offer for placement and services consistent with this Decision, as follows:
  - (a) District shall communicate by telephone and in writing with Parent in good faith to establish an IEP meeting date, taking into account the schedules of all members of the IEP team, including Parent. The IEP meeting shall be scheduled to last not less than three hours.
  - (b) Due to Parent's disability and request for an IEP meeting by telephone conference, District shall deliver all proposed IEP documents, including proposed annual goals, not less than five days in advance of the IEP meeting.
  - (c) Based on Student's unique needs as found herein, District's offer of placement and services shall include an appropriate annual goal to address internalizing problems, together with school-based counseling or other appropriate intervention.

(d) In the event District proposes a Fade Plan, it shall address the deficiencies in the May 2007 Fade Plan found herein.

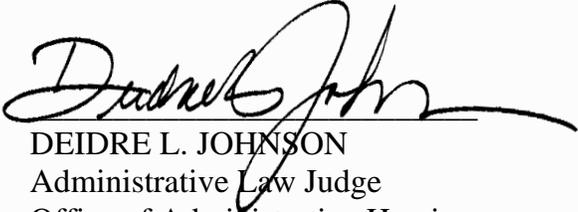
#### PREVAILING PARTY

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 Issue 1(a), and prevailed in part on Issue 1(c) and Issue 2 for hearing in this case. District prevailed on Issue 1(b) and prevailed in part on Issue 1(c) and Issue 2.

#### 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: December 17, 2007



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