

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

WESTMINSTER SCHOOL DISTRICT.

OAH CASE NO. 2011090307

DECISION

Administrative Law Judge (ALJ) Robert Helfand, Office of Administrative Hearings, State of California, heard this matter in Huntington Beach, California, on January 17, 18, and 19, 2012.

Vanessa Jarvis, Attorney at Law represented Student's Parents and Student (Student). Student's mother (Mother) was present on the first and third days of the hearing and for the morning of the second day. Student's father (Father) was present on January 18 and 19, 2012. Minh-Hanh Nguyen, a Vietnamese interpretator, was present on January 17 and 19, 2012; while Minh Q. Nguyen was the interpretator on January 18, 2012.

Jennifer C. Brown, Attorney at Law, represented the Westminster Unified School District (District). Leisa Winston, Administrator of Student Services for the District, and Robyn Moses, Program Director of the West Orange County Consortium for Special Education (WOCCSE), were present throughout the hearing.

Student filed his due process request (complaint) on September 12, 2011. On September 22, 2011, the District filed a notice of insufficiency as to Student's complaint. On September 22, 2011, the Office of Administrative Hearings (OAH) issued an order finding that Issues one, three and five were sufficient and issues two and four were not sufficient. Student was permitted 14 days to file an amended complaint if he chose to. Student failed to file an amended complaint. On October 21, 2011, the parties filed a joint request to continue. On October 24, 2011, OAH granted the request for continuance and scheduled the due process hearing for January 17-19, 2012.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Mai Vi Nguyen; Stephanie Penticuff; Leisa Winston; Father; Marjorie May Schubert; Linda Allen, Robyn Moses; Patricia Larkin; and Ashley Kinsling.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on February 6, 2012, and rebuttal closing briefs on February 16, 2012. The matter was submitted on February 16, 2012.

ISSUES

The following issues, as listed in the Prehearing Conference Order, were to be determined in this matter:

(1) Did the District deny Student a free appropriate public education (FAPE) by refusing to implement the February 4, 2011 Individual Education Program (IEP) by placing Student in the SUCSESS program¹ at Johnson Middle School?

(2) Did the District deny Student a FAPE by failing to implement the goals and transportation services called for in the May 13, 2011 IEP?

(3) Did the District deny Student a FAPE at the May 13, 2011 IEP meeting by failing to (a) make a formal FAPE offer; (b) provide for speech and language services; and (c) list Student's present levels of performance?

District's Motion to Dismiss Issues One and Two

On September 15, 2011, Student filed with OAH a motion for stay put seeking to have Student placed at Warner Middle School, his neighborhood school. On September 21, 2011, the District filed its opposition. OAH, by ALJ Adeniyi Ayoade, issued an order on September 26, 2011, denying Student's motion on grounds that the proper stay put placement was in the SUCSESS class at Johnson Middle School (Johnson) as Student had advanced a grade and the only such program was on the Johnson campus.

On January 12, 2012, the District filed a motion to dismiss issues one and two on the basis that the issues were moot as a result of the September 26, 2011 order. Student filed an opposition to the motion on January 13, 2012. Oral arguments were held at the first day of hearing on January 17, 2012.

¹ SUCSESS, which is pronounced "Success," is an acronym for Systematic Utilization of Comprehensive Strategies for Ensuring Student Success. This program is sometimes referred to in the IEP documents as "SUCCESS."

The ALJ ruled on the record that the District's motion was granted as to issue one and denied as to issue two. As to issue one, Student's parents consented to the IEP of February 4, 2011, which related only to the remainder of school year 2010-2011, which placed Student in the SUCSESS class. As to school year 2011-2012, the IEP team's offer at the May 13, 2011 IEP was not consented to by Parents. The District placed Student at Johnson pursuant to the District's "stay put" obligation as reflected in the OAH September 26, 2011 order. Thus, issue one was moot and District's motion was granted as to issue one. Since issue two dealt with the implementation of the portions of the May 13, 2011 IEP, which were consented to goals and transportation services, it was not moot as the September 26, 2011 OAH order did not apply to that issue. Thus, the hearing proceeded on issues two and three only.

FACTUAL FINDINGS

1. Student is a 12-year-old boy who resides with his family within the District. Student has been in special education since the age of three under the eligibility category of autistic-like behaviors. Student has unique needs in the areas of vocational math skills, adaptive living skills, receptive language, expressive language, reading comprehension, writing, and social/emotional skills. Student is also an English learner as his native language is Vietnamese. He has been in a SUCSESS class since preschool.

2. SUCSESS is a program developed by the Orange County Department of Education (OCDOE) in 2002. It involves a special day class (SDC) for children in the moderate to severe range incorporating a variety of methodologies that have proven to be effective for children with autism.² SUCSESS utilizes a functional alternative curriculum. The class has a two-to-one ratio of pupils to staff. The teacher possesses a moderate-severe special education credential. Teachers attend an extensive training at the SUCSESS Academy run by OCDOE as well as periodic training by OCDOE as to researched best practices.

3. During school year 2010-2011, Student attended the SUCSESS class at Sequoia Elementary School (Sequoia). Student's parents (Parents) believed that Student was not progressing as he should in SUCSESS as the classroom environment was too noisy and other pupils engaged in negative behaviors which distracted Student.

² *Parent v. Anaheim City School District* (2008) Offc. Admin. Hrgs. Case Number 2008010260, p. 28

February 4, 2011 IEP Meeting

4. On February 4, 2011, the IEP team convened its annual meeting. The team was also meeting to plan Student's transition to middle school for the next school year. Attending on behalf of the District were Stephanie Penticuff, a school psychologist and behavior case manager for preschool through sixth grade who acted as the administrative designee;³ Julie Park, Student's special education teacher; an unidentified general education teacher; Joanne Kudo, an occupational therapist; Linda Allen, speech and language pathologist (SLP); and Michelle Garcia, a District autism specialist. A Vietnamese interpreter also attended.

5. The team reviewed a written progress report dated February 4, 2011, prepared by Park. The report indicated that Student had met his annual goals in reading, writing, social/emotional, adaptive/daily living, and fine motor. Student failed to meet annual goals, although he did demonstrate progress, in receptive language, expressive language, math, and vocational (coin counting). In the areas where he failed to meet the annual goals, his performance was inconsistent or he required prompting. Father discussed Student's progress with the SLP and Park in particular.

6. The team also discussed Student's present levels of performance. In the area of reading, Student was able to read short paragraphs that included short vowels and familiar sight words. He was able to identify 50 sight words of which he was able to write 20 or more. In math, Student could solve touch point addition/subtraction problems up to three digits with carrying/borrowing, and was becoming more efficient using a calculator to solve word problems when assisted. Student could copy/write personal information on modified paper in a single format. He was able to focus on non-preferred tasks for two minutes without losing attention and making vocal sounds. Student also could count a combination of two to three coin values up to the amount of one dollar. Additionally, the team discussed eight goals in the areas of receptive language, expressive language, writing, reading comprehension, mathematics, adaptive/daily living, social/emotional, and vocational. For each of these goals, the team listed goal baselines which are the equivalent of Student's level of performance as of February 4, 2011.

7. The team also adopted eight goals and objectives. The IEP team offered to continue Student in the SUCSESS class at Sequoia for the remainder of school year 2010-2011, with individual speech and language twice per week for 15 minutes per session and group speech and language once per week for 30 minutes. For the extended school year (ESY) 2011 (June 29, 2011 through July 25, 2011), the IEP team offered Student to continue in SUCSESS five days per week for a total of 1095 minutes with group speech and language once per week for 30 minutes.

³ Penticuff was part of a team that conducted Student's assessment in February 2009.

8. For the school year commencing on September 7, 2011, the team recommended that Student be placed “in a SUCSESS-type (sic) structured classroom program in the middle school setting” which included “intensive instruction and support in social, emotional, functional, and academic learning to enhance academic and overall growth.” The IEP document omits any reference to speech and language services following the 2011 ESY. Allen had orally recommended at the meeting that speech and language services should continue at the same rate through February 2012. Allen also had drawn up proposed goals and objectives, which were accepted by the team, to run through February 2012. Allen assumed that the speech and language sections reflected her recommendation for speech and language services was listed as being from February 4, 2011 through February 4, 2012. Father testified that he was not aware of the omission but that he anticipated that speech and language services would continue based on Allen’s oral recommendation at the meeting.

9. Father indicated that he did not want Student to continue in the SUCSESS program as he felt his son’s needs would not be met by staying in the program. Father cited to the negative behaviors of class members he had observed in the classroom. Father preferred an SDC with a quieter environment. The team discussed the other available programs, but that they were of the opinion that the Johnson Middle School SUCSESS class, the District’s only SUCSESS class at the middle school level, was the most appropriate program to meet Student’s unique needs. Father requested an opportunity to visit programs at the three District middle schools. The meeting was then adjourned with no decision made as to placement for the next school year to give Parents an opportunity to visit and observe other District programs at its three middle school campuses. The IEP states that “Parent has requested that visits to three middle schools take place before determination of placement for next year.” The IEP notes also state that the “[s]chool psychologist will contact Diane Hall to set up visits to the middle schools.”⁴

10. Father signed the IEP. Thus, Father consented to the IEP offer for the remainder of the 2010-2011 school year plus ESY.

School Observations by Parents

11. Following the February 4, 2011 IEP meeting, Parents observed the special education programs at the District’s three middle schools. Father felt that the SUCSESS class at Johnson was identical to the one at Sequoia, and Student would be distracted by the negative behaviors by the pupils and the high noise level in the classroom. Father also believed that the academic level of the SUCSESS class was below his son’s ability. Additionally, the Johnson class had 10 pupils with a teacher and four aides, whom he believed were one-to-one aides for four of the pupils. Father felt that the SDC at the Stacey Middle School (Stacey) would be an appropriate

⁴ Hall is the parent liaison in the District’s Student Services division.

placement for Student, because he did not observe problem behaviors by the pupils and the noise level appeared to be quieter. Father also felt that the academic level of the Stacey class was a good fit for his son. The Stacey class comprised eight to nine pupils with a teacher and two aides. Father felt that the SDC at Warner Middle School (Warner) was not appropriate for his son. The Warner and Stacey SDC's use a general education curriculum as opposed to the Johnson SUCSESS class which uses a functional alternative curriculum.

May 13, 2011 IEP Meeting

12. The IEP team reconvened on May 13, 2011, in a continuation of the February 4, 2011 IEP meeting, to resolve placement for school year 2011-2012. Attendees were Father; a Vietnamese interpreter; Penticuff, as school psychologist; Allen; Park; and Loretta Szebert, as administrative designee.⁵ The team discussed Student's progress since the prior IEP meeting. The District team members explained that they felt that the Johnson SUCSESS class was the most appropriate placement to meet Student's needs and that Student had been making steady progress in the program. Father informed the team that the Parents preferred that Student be placed at the Stacey SDC as they felt that the academic level was more appropriate for Student and there would be fewer distractions because the noise level was much lower than SUCSESS and the pupils were better behaved. Following Father's presentation, the team discussed Father's concerns and examined why the SUCSESS class would best meet Student's unique needs as the classes at Warner and Stacey were not similar. The team then recommended that Student be placed at the Johnson SUCSESS class. The recommendation was unanimous except for Father.

13. The IEP document restated the present levels of performance and the goals and objectives which were in the IEP document for the February 4, 2011 meeting. Under classroom and curricular accommodations and modifications, the IEP reads: "[Student] will participate in curriculum that is based on a subset of the California Content Standards for students with significant disabilities. He is in a SUCSESS (sic) program which includes highly structured instruction and support in social skills, functional, academic, and planning skills to support his overall learning and growth." It also states that Student will receive the modified curriculum in English-language arts, mathematics, science, and history/social science.

14. In the Instructional Settings/Services section, the IEP repeats the same program for the remainder of the 2010-2011 school year and ESY as was contained in the February 4, 2011 IEP. For the next school year (2011-2012), it states that Student will receive from September 7, 2011 through February 4, 2012, group instruction in a "separate classroom in a public integrated facility" five days per week for 280 minutes per session for a total of 1400 minutes. There is no mention of speech and

⁵ Szebert is also the school psychologist at Johnson. Szebert was initially invited by Penticuff as she was most familiar with the Johnson class.

language services for the 2011-2012 school year. Father testified that he expected that speech and language services would continue at the same rate as in the 2010-2011 school year based upon discussions at the two IEP meetings.

15. The IEP handwritten notes state:

- Parents prefer placement at Stacey Middle School for [Student's] 6th grade placement.
- The IEP team has recommended continued placement into a SUCSESS program as provided at Johnson Middle School. [Student] has been in a mod/severe (moderate/severe) program and Stacey and his home school of Warner both do not have similar programs.
- The Special Education Administrator will respond to the parents' request in a reasonable time.

16. Father did not consent to the IEP and refused to sign the IEP because he did not agree with the IEP team recommendation that Student be placed at Johnson.

17. The evidence demonstrates that the IEP team made a definitive offer of placement at the May 13, 2011 IEP meeting even though Father testified that he felt no decision had been made as to placement at the May 13, 2011 IEP since he was informed that a final decision as to Parents' request for placement at Stacey must be made by the "boss," the special education department head. This assertion was contradicted by Penticuff and Allen who testified that a definitive offer of placement at Johnson was made at the May 13, 2011 IEP meeting. This is also corroborated by the IEP document itself. Penticuff testified that since Father asked for a different placement than the team offered, the District offer can be considered a denial of a parental request. The District practice was to refer the matter to Leisa Winston, the District's administrator of student services,⁶ to formally respond in writing. The reference in the notes to the Special Education Administrator responding refers to this procedure.

Summer 2011

18. On June 10, 2011, Winston forwarded a letter to Parents regarding the denial by the IEP team of father's request for his son to be placed at Stacey in lieu of Johnson.⁷ The letter states that it is being made under the provisions of the Individuals with Disabilities Education Act of 2004 (IDEA) section 1414(b) and (c) as a prior written notice. Winston lays out the information considered by the District, which included parental input, professional observations by staff, input from

⁶ As part of her duties, Winston supervises special education.

⁷ The letter was accompanied by a copy in Vietnamese.

credentialed teachers, past IEP meetings, and progress reports. She also lists the basis of the options considered-the severity of Student's disability and the staff ratios at both the SUCSESS and Stacey programs; the reasons why the District offered continued placement in the SUCSESS program; and the curriculum and modifications required to meet Student's needs. Additionally, Winston explained that the District is required to implement the last agreed upon IEP at the middle school level which meant that Student would be in the SUCSESS program at Johnson. Enclosed with the letter was a copy of parental procedural safeguards.

19. On June 28, 2011, Father responded to Winston's June 10, 2011 letter in writing. Father stated that parents disagreed with Student attending Johnson and requested placement at Stacey as Student would succeed in being more independent and improve his social skills. He requested another IEP to discuss placing Student at Stacey.

20. The District responded to the June 28, 2011 by its letter dated July 8, 2011. The District agreed to schedule a new IEP meeting no later than October 7, 2011, as the District was in summer recess until September 7, 2011. For the 2011-2012 school year, Winston wrote:

The District understands that you disagree regarding [Student's] middle school placement. The District responded to your request in a letter dated June 9, 2011 and included a copy of your parent's rights. [Student] will be enrolled at Johnson Middle School beginning September, 2011, as the District is required to implement the last agreed upon and implemented program during the pendency of the dispute.

21. On August 16, 2011, Parents retained the Special Education Law Firm (SELF) to represent them with respect to special education matters concerning Student. On August 17, 2011, Jennifer Guze Campbell of the SELF sent a letter to Tammy Steel, principal of Sequoia, to notify the District that SELF was now representing Parents. Campbell also forwarded a second letter to Steel on August 17, 2011. In that letter, Campbell informed the District that Father consented to all annual goals and short term objectives, transportation, and to individual and group speech and language services contained in the May 13, 2011 IEP. Campbell also stated that Father did not consent to portions of the May 13, 2011 IEP relating to speech and language services, specialized academic instruction, the provisions for ESY, and Student being placed "at a location other than [Student's] school of residence." The letter contained no mention of the present levels of performance in either the February or May IEP's. Campbell's letter also stated that the District should observe "stay put" as follows:

(a) Provide speech and language individual sessions twice per week for a total of 30 minutes;

- (b) Provide group speech and language services once per week for 30 minutes;
- (c) Provide special academic instruction, group, for five days per week for 1400 minutes;⁸
- (d) Intensive individual instruction supervision once per month for 90 minutes;
- (e) Goals associated with Discrete Trial Training/ Applied Behavior Analysis; and
- (f) Placement at Student's school of residence, Warner.

22. On September 1, 2011, Winston responded to Campbell's August 17, 2011 letters on behalf of the District. Winston denied Student's request for stay put placement at Warner. Winston cited that the proper placement for stay put is based on the last IEP which was consented to by Parents and implemented by the District, which was the February 4, 2011 IEP, which places Student in the SUCSESS class which is only available at Johnson.

23. On September 2, 2011, Campbell forwarded a letter to Winston claiming that the February 4, 2011 IEP failed to determine Student's placement for sixth grade which was "to be determined" and that Student would be in a "SUCCESS-type program." Campbell then states that Father "expects the Westminster School District to permit enrollment of [Student] at Warner Middle School in a timely manner." On September 6, 2011, Winston responded by letter to Campbell disagreeing with "your interpretation of the 'stay put' provision in regards to [Student]." She ended her letter by stating that the Johnson staff looks forward to beginning the school year on September 7, 2011, with Student. Winston sent an email to the Johnson principal alerting him that Father may attempt to enroll Student at Warner and to not enroll him.

Commencement of the 2011-2012 School Year

24. On September 7, 2011, Father attempted to enroll Student at Warner. Mai Vi Nguyen, Warner's registrar, refused to enroll Student at Warner and referred Father to the District's main office as Student had an IEP, which was standard procedure for special education students attending a SDC. Nguyen also was aware of Winston's email. Father responded to Nguyen's denial by telling her that her action was "illegal." He then called a person he referred to as his attorney and had Nguyen speak to him. Nguyen spoke to James Campbell, an educational advocate with the SELF, who stated that the state education law required Student to be enrolled at his home school. Nguyen refused to enroll Student and again referred him to the main office.

⁸ Campbell had earlier stated in her letter that Student did not consent to this portion of the IEP.

25. On September 12, 2011, Student filed his Request for Due Process Hearing (complaint).

26. Parents decided to not have Student enroll or attend any District school. Student finally enrolled at Johnson on or about September 27, 2011, following the OAH September 25, 2011 order ruling that the Johnson SUCSESS program was the proper stay put placement.

27. On September 19, 2011, Robyn Moses, Program Administrator at the West Orange County Consortium for Special Education (WOCCSE) responded by letter to Student's complaint on behalf of the District. On September 20, 2011, Moses forwarded a second letter to Campbell noting that "the District erroneously recorded incorrect dates on the May 13, 2011 IEP document in regards to the period when the IEP team determined that [Student] should receive speech and language services," which were to continue until February 4, 2012. She included a proposed amendment to the IEP for signature by Parents correcting this error. Moses did not receive a response to her letter.

October 12, 2011 IEP Meeting

28. On October 12, 2011, the IEP team met as a result of Father's June 28, 2011 request.⁹ Attending on behalf of the District were Winston, administrative designee; Allen; Ellen Fitzsimmons, program specialist; Shane Vinagupta, the Johnson principal; and Marjorie May Schubert, SUCSESS teacher. Father attended along with Jim Campbell and Wiley Campbell, advocates from the SELF. Student's advocates presented their concerns about Student's placement at Johnson and the IEP team discussed services then being implemented. There was a discussion over Student's speech services, and the advocate requested that the District increase speech services. The District representatives commented that they thought the services were appropriate and that the SUCSESS class includes language concepts and pragmatics in its curriculum. The District representatives also noted that Student was then being assessed in a number of areas, including speech and language, so that the issue could be revisited in the future. The IEP document was prepared as an amendment which reiterated the placement offered at the May 13, 2011 IEP and added that speech and language services from February 4, 2011 to February 4, 2012 would be two 15 minute individual speech and language sessions weekly and one 30 minute group speech and language session per week. Father refused to consent to the IEP but signed as being present.

⁹ The District had previously attempted to schedule the IEP meeting in September, but this was not convenient to Parents. The parties agreed to the October 12, 2011 date.

Speech and Language Services Provided by District

29. Schubert is currently Student's teacher in the SUCSESS class. She has implemented the IEP goals since Student's arrival in her class in late September 2011. Patricia Larkin was the SLP for Johnson from September 7, 2011 through December 5, 2011, when the regularly assigned SLP, Ashley Kinsling, returned from pregnancy leave. Larkin implemented the speech and language goals from the May 13, 2011 IEP. Larkin was informed by Allen and Kinsling that Student was to receive the same level of speech and language services as shown in the IEP for the remainder of the 2010-2011 school year. She also gave Student extra sessions to make up for those sessions he missed while Parents kept him out of school. Upon Kinsling's return, she also gave Student extra sessions in January. Kinsling testified that Student has received the same number of speech and language sessions that he would have received had he been enrolled since the commencement of the school year. Student presented no contrary evidence. Both Larkin and Kinsling noted that Student was making progress on timely meeting his speech and language goals.

Implementation of Goals and Provision of Transportation Services

30. Student contends that the District failed to implement the goals contained in the May 13, 2011 IEP and failed to provide Student transportation services during the two week Parents refused to have Student attend Johnson. The failure of the District to implement his goals was not the fault of the District, which was willing to implement the May 13, 2011 IEP had Student been in attendance. (See Factual Finding 28.)

31. Student in his closing brief bases this claim on the fact that the District refused to transport Student to Warner where he attempted to register. (Student's Closing Brief dated February 6, 2012, at p. 2.) The District provided testimony that its buses going to Johnson passed by Student's home during the time period. This was corroborated by Father. Since Student's proper placement as stay put during this time period was Johnson and Student was not enrolled, the District did not fail to provide transportation services as provided in the IEP.

LEGAL CONCLUSIONS

Jurisdiction

1. Under special education law, the parent of a disabled child has the right to present an administrative complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006); Ed. Code, § 56501, subd. (a)(1)-(4).) Within those parameters, OAH has the authority to hear and decide this matter.

Burden of Proof

2. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has the burden of proof.

Definition of a FAPE

3. A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction that meet the state's educational standards and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction and services (DIS), provided at no cost to parents, that meets the unique needs of a child with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as mental health counseling services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

4. "Language and speech development and remediation" are considered to be a DIS. (Ed. Code, § 56363, subd. (b)(1); Cal. Code of Regs., tit. 5, § 3051.1.)

The IEP

5. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.)

6. An annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency,

location of services and modifications; and, if 16 years or older, measurable post secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345(a).) After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (20 USC § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(4) &(6)(2006); Ed. Code, § 56380.1.)

7. The development of an IEP is a collaborative activity accomplished by an IEP team convened by the school district. A parent is an integral and required member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1)(2006); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education. (20 U.S.C. § 1414(d)(3)(A)(ii); Ed. Code, § 56341.1, subd. (a)(2).) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan [the IEP].” (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882; editorial added.)

Procedural Violations

8. There are two principal considerations in claims brought pursuant to the IDEA; substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*).)

9. Procedural errors during the IEP process are subject to a harmless error analysis. In *M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, fn. 9, the Ninth Circuit decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA. Utilizing the harmless error analysis, the court determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at pp. 652, 658.)

Issue Two: Did the District deny Student a FAPE by failing to implement the goals and transportation services called for in the May 13, 2011 IEP?

10. Student contends that the District failed to implement the goals and transportation services called for in the May 13, 2011 IEP because the District did not permit Student to attend his home school, Warner.

11. The District contends that it was obligated, and did make available, under stay put, the placement called for in the last agreed and implemented IEP, which is the February 4, 2011 IEP. This placement was the SUCSESS program which for sixth grade was at Johnson.

12. California Code of Regulations, title 5, section 3042, defines “educational placement” as “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs,” as specified in the IEP.

13. Student mistakenly cites Title 34, Code of Federal Regulations Section 300.116(c)(2006), as controlling legal authority. That section provides that in determining placement, a school district should place a child with a disability in the school that he or she would attend if nondisabled, unless the child’s IEP requires some other arrangement. (34 C.F.R. § 300.116(c)(2006).) Because the February 4, 2011 IEP found that Student’s unique needs require that he attend a specific special day class, Section 300.116(c) does not apply. (Factual Findings 4 through 10.)

14. Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a)(2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student’s educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) For purposes of stay put, the current educational placement is typically the placement called for in the student's last IEP that has been agreed upon and implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

15. Under stay put, “it is not intended that a child with disabilities remain in a specific grade or class pending appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.” (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) Notably, in *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083 (*Van Scoy*), the Court explained as follows:

Courts have recognized, however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115, 1133-35 (9th Cir. 2003). In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom. Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.

(*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)

16. Thus, progression to the next grade, or as in this instant case matriculation from an elementary school to a middle school, maintains the status quo for purposes of stay put. (See also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

17. Here Student's IEP of February 4, 2011, which Father consented to and the District implemented, clearly indicates that Student was placed in a SUCSESS class.¹⁰ Because Student was promoted to the sixth grade and the SUCSESS class for sixth graders was only offered at Johnson, the proper placement under stay put was the Johnson SUCSESS class. The District was willing to implement the February 4, 2011 IEP as well as the goals and services which Parents consented to in the May 13, 2011 IEP. The reason that Student did not receive transportation nor have the goals implemented was solely Parents' unilateral action to not have Student attend Johnson until the OAH order of September 26, 2011, denying Student's motion for stay put placement at Warner. (Factual Findings 1 through 4, 7 through 10, 17 through 26, 30, and 31.)

Issue Three (a): Did the District deny Student a FAPE at the May 13, 2011 IEP meeting by failing to (a) make a formal FAPE offer?

18. Student contends that the May 13, 2011 IEP fails to contain a "clear, coherent" offer of placement by the District which would permit Parents to reasonably evaluate in deciding whether to accept it. Student's argument is that there

¹⁰ In his closing brief, Student argues that the February 4, 2011 IEP is "unclear" where placement is being offered as it refers to a "SUCCESS-type (sic) structured and classroom program" for placement for school year 2011-2012 in the section entitled "Instructional Setting/Services." Stay put is based on that portion of the IEP which was implemented which is placement in the SUCSESS class.

was no recording in the notes or on tape of the discussions which occurred at the meeting, there is no mention of Johnson except in the notes section, and the notes section uses the word “recommends” when laying out the offer of placement. Student offers no legal authority for this position.

19. The District contends that the IEP document as a whole clearly lays out the District’s FAPE offer, and the offer was reiterated by Winston’s June 10, 2011 correspondence which reviews the discussions at the IEP meetings, information considered by the team, the offer itself and the reasons for the team making the specific offer.

20. There is no requirement that the entirety of the FAPE offer be in a specific portion of the IEP as long as the offer is sufficiently clear so that the parents can understand it and make intelligent decisions regarding the offer. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). In *Parent v. Downey Unified School District* (2011) Cal. Offc. Admin. Hrg. Case Number 2011050579, a valid FAPE offer was contained in several areas of the IEP document (See also, *Parents v. Cabrillo Unified School District* (2009) Offc. Admin. Hrg. Case Number 2009010191). A failure to make a formal written FAPE offer has been held to be harmless error where parents were aware of the District’s offer as they fully participated in the IEP process. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 460-461 (*Fresno*)).

21. A District is required to make a “formal, specific offer” of placement and services in writing, even if the District believes that a child’s parents have no intention of accepting that offer. (*Union, supra*, 15 F.3d at 1519; see also *Glendale Unified School District v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107-1108). In *Union*, the court described the reasons for requiring a formal, specific offer in writing: The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in ‘presenting complaints with respect to any matter relating to the...educational placement of the child.’” (*Union, supra*, at p. 1526.)

22. The May 13, 2011 IEP provided a clear and coherent offer which Parents understood in making their decision whether to accept the offer.¹¹ The District IEP members clearly informed Father at the February 4, 2011 IEP meeting

¹¹ Even assuming that the offer of placement was not clearly laid out in the May 13, 2011 IEP document, Student would not prevail as Father actively participated in discussions at both IEP meetings and was fully aware that the placement offer was for the Johnson SUCSESS class. (See, *Fresno*, 626 F.3d at 460-461.)

that they believed, based on Student's performance levels, progress and his unique needs, the appropriate placement was the SUCSESS class which for sixth grade would be located at Johnson. When Father objected, the team deferred the placement decision to allow Parents to observe the District's special day class programs at its three middle schools. The meeting then was continued to May 13, 2011, to discuss Parents' concerns. After a full discussion, the District IEP team members made the offer of placement in the SUCSESS program which was only offered at Johnson. This was reiterated in clear terms in Winston's June 10, 2011 letter. Father's June 28, 2011 letter clearly demonstrated that Parents understood what the District offer consisted of when Father stated, "[R]ight now both of us are not agreed (sic) with your decision [to] transfer [Student] go to Johnson." (Factual Findings 4 through 19.)

Issue Three (b): Did the District deny Student a FAPE at the May 13, 2011 IEP by failing to provide for speech and language service?

23. Student contends that the District failed to provide speech and language services, which the IEP team determined he needed, because the IEP document omits mention of speech and language services for Student from September 7, 2011 through February 4, 2012. The District counters that the omission was harmless error and that Student received speech and language services as recommended by the IEP team.

24. Procedural flaws do not automatically result in a denial of FAPE, and they are subject to a harmless error analysis. (Legal Conclusions 8 and 9.) "It would exalt form over substance to hold an IEP as inappropriate simply because a recommendation was omitted from an IEP because of clerical error." (*M.H. v. New York City Office of Education* (S.D. N.Y. 2011) 2011 WL 609880, at 10; see also, *Student v. Berkeley Unified School District* (2007) Offc. Admin. Hrg. Case Number 2006110033.) The Sixth Circuit has held as harmless error when an IEP document omitted a pupil's "present educational performance" and "objective criteria" to determine whether annual goals were met where the parents and administrators had all "required information." (*Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190 (*Doe*).

25. The District did not deny Student a FAPE as Student suffered no educational deprivation nor were Parents deprived of meaningful participation in the IEP decision-making process by the clerical omission of the level of speech and language services in the IEP documents. Allen, Student's SLP at Sequoia, orally recommended that Student continue to receive the same level of speech and language services until his next annual IEP meeting scheduled for February 2012. Allen also recommended new receptive and expressive speech goals which were to run until the February 2012 annual IEP meeting. Father testified that he understood that Student was to receive the speech and language services during the 2011-2012 school year at the same level as Student received during 2010-2011. Once Student began attending Johnson, Larkin, the SLP, and then Kinsling provided services at the levels that Allen

had recommended plus added extra sessions to make up for the time that Student did not attend Johnson. (Factual Findings 4 through 9, 12 through 17, 21, 27, and 29.)

Issue Three (c): Did the District deny Student a FAPE at the May 13, 2011 IEP by failing to list Student's present levels of performance?

26. In his complaint, Student alleges that the District failed to provide his present levels of performance at the May 13, 2011 IEP meeting. He argues in his closing brief that the District repeated the present levels of performance from the February 4, 2011 IEP and did not update the levels at the May 13, 2011 meeting which would have been "helpful to the IEP team." Student offers no legal authority to support his argument that the District was required to set present levels of performance at every IEP meeting.

27. Federal and state law specify in detail what is required to be included in an IEP itself. (20 U.S.C. § 1414(d)(1); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345.) These requirements are necessary in making an annual program designed to meet the unique needs of disabled children. For instance, the purpose of developing present levels of performance assists in determining a child's academic and functional levels and how the child's disability affects his/her ability to participate in school activities as well as setting benchmarks to assist in setting annual goals and measuring progress made by the child in reaching the goals. (20 U.S.C. § 1414(d)(1)(A)(I); Ed. Code, § 56345, subd. (a)(1)(A)-(C).) There is no requirement that an IEP team must set new present levels of performance at every IEP meeting.

28. The District did not deny Student a FAPE as he suffered no educational deprivation nor was Parents deprived of participating in the IEP process. The May 13, 2011 IEP meeting was a continuation of the annual meeting of February 4, 2011 which was not completed to permit Parents, at Father's request, to observe placements other than the one recommended. The purpose of the meeting was solely to complete the annual IEP. There was a discussion of Student's progress since the earlier meeting. Penticuff testified that the information discussed did not change the performance levels which were already agreed to at the February 4, 2011 meeting. Allen corroborated that Student's levels had not changed since the prior meeting. Father actively participated in all IEP discussions. Interestingly, Campbell on behalf of Parents, in her August 17, 2011 letter, consented to "all annual goals and short-term objectives" on the May 13, 2011 IEP, which were based on the February 4, 2011 IEP levels of performance. Also, Campbell does list the areas of the IEP that the parents were not consenting to and there is no mention of the present levels of performance. (Factual Findings 4 through 17, and 21.)

ORDER

Student's request for relief is denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: the District prevailed on the issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: February 28, 2012.

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings