BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: Student, Petitioner, v. SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, Respondent and SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, Petitioner, v. Student, Respondent	OAH Nos. N 2005070073 N 2005070815

DECISION

On August 25, 26, 30 and 31, 2005, Administrative Law Judge M. Amanda Behe, State of California Office of Administrative Hearings, heard these consolidated matters in Oakland, California.

Petitioner and respondent (the student) was represented by her mother.

Petitioner and respondent San Ramon Valley Unified School District (the district) was represented by Matthew Juhl-Darlington, Miller, Brown & Dannis, Attorneys at Law.

A Pre-hearing Conference was conducted telephonically on August 1, 2005, and various orders were made including that the student file a more specific statement of the allegations of

the May 16, 2005, complaint[1] so that the district could prepare a defense. The student was not given leave to add new issues. On August 5, 2005, the student filed a 14-page document listing 32 "key issues." On August 18, 2005, the district filed a Motion To Dismiss regarding the student's addition of 22 new issues plus issues which had been resolved in a prior settlement agreement. On August 19, 2005, the Motion To Dismiss was granted with regard to the 22 new issues and those resolved in the settlement agreement.

At hearing evidence was taken on the student's issues identified in the May 16, 2005, complaint plus the specifics filed on August 5, and the district's issues. At hearing the student withdrew the complaint regarding all of her remaining issues, and the district withdrew one of its two issues in its June 30, 2005, request for due process hearing.

The record remained open for the filing of closing briefs. The Closing Brief on behalf of the student was received as Exhibit 26, and the Closing Brief on behalf of the district was received as Exhibit 27.

On August 31, 2005, the student filed a Motion for Stay Put Regarding Behavioral Services and a Motion for Stay Put In Last Placement. Those motions were marked as Exhibits 28 and 29. On September 8, 2005, the district's Opposition to Parents' Motion for Stay Put was filed as Exhibit 30. No response was received on behalf of the student and the record was closed on September 16, 2005.

ISSUES

1. Has the district offered the student a free appropriate public education (FAPE) in the least restrictive environment for the 2005-06 school year?

2. Was the district's alleged failure to provide "stay put" placement during the pendency of the hearing a denial of FAPE?

FACTUAL FINDINGS

1. The parties stipulated that the student's action was brought in May 2005 pursuant to the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq.

2. The parties stipulated that the student has been diagnosed with autism and is eligible for special education and related services pursuant to IDEA and California Education Code §56000 et seq.

[1] The May 16, 2005, complaint alleged the district failed to provide the student with an appropriate program in that it failed to provide an independent speech assessment requested in June 2004, a state-approved research-based reading program, and an appropriate educational consultant to replace the person who left March 10, 2003. The complaint further alleged that the district failed to offer a free appropriate public education in the 2003-04 and 2004-05 school years.

3. The student is 16 years old and in the 11th grade. In the 2003-04 and 2004-05 school years she attended a special day class at San Ramon Valley High School. From February 2004 to the present Carey Shaw[2] has taught that special day class; her students have a range of disabilities including autism, mental retardation, cerebral palsy, and orthopedic impairments. Most are mainstreamed for three periods per day in subjects such as computer skills, art, culinary arts, and physical education. Ms. Shaw teaches language arts, math, reading, and life skills including banking, family life, etc., in the special day class.

When Ms. Shaw first began working with her, the student's reading comprehension was below primer (1st grade) level, and she was unable to answer questions about material she had just read. The student was strong in subtraction and addition, and could multiply a two-digit by a one-digit number with the help of a chart.

Ms. Shaw met the parents when she hosted a "Meet the Teacher" night in February 2004. The parents expressed concern that the student did not have homework. Ms. Shaw believes the student considers homework important because it is assigned to regular education students, and it allows her to earn credits for the classroom store. Ms. Shaw provided homework including simple multiplication pages and cut-and-paste worksheets. Because the student returned homework that was always incorrect Ms. Shaw further simplified the materials. She expected the parents to help with homework, but based on the student's results apparently no assistance was provided. Homework in reading was noted on log kept in the classroom, but the student only minimally participated.

4. The April 9, 2004, Three-Year Psycho-educational Re-Evaluation Report was completed by school psychologist Ryan Pickett[3] and Ms. Shaw. In addition to reviewing previous Individualized Education Program (IEP) documents and school records, Mr. Pickett observed the student in the classroom, and administered the Vineland Adaptive Behavior Scales, a validated test of personal and social competence, communication, and life skills. The student's mother reported significantly delayed adaptive skills, a view confirmed by Ms. Shaw, the speech therapist, the para-educator and others. Mr. Pickett opined that the student needs a curriculum that will benefit adaptive behavior to permit to her to function well outside school, and supports to learn those skills.

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[2] Ms. Shaw holds a bachelor of science in special education and a master's degree in education. In California she has severely handicapped, learning handicapped, multiple subject, and community college disabled student credentials. In 1977 she started the only program for autistic students in the Imperial Valley, and later was a resource teacher for mainstreamed learning disabled students. She taught in a disabled students program at the community college level, and in 1991 took a 12 year absence during which she was active in her children's schools. Ms. Shaw has 7½ years experience assessing, creating programs for, and working with autistic children. She opined that each autistic child is unique but most have deficits in written and oral language and often behavioral needs and issues.

[3] Mr. Pickett earned his bachelor of science and master's in counseling at the University of California at Davis, and holds a pupil personnel services credential with an emphasis in school psychology. He taught workplace and outside skills as a counselor in a group home of adults and adolescents. In 2000 he was hired by the district as a school psychologist, and has completed approximately 350 psycho-educational assessments.

Ms. Shaw reviewed the student's cumulative file and completed the academic assessment using the Brigance test instrument, which had also been used by the previous teacher. Ms. Shaw had previous experience with the test, which is commonly used in special day classes to measure abilities, strengths and weaknesses and provide on-going data keeping. The student's results showed strengths in decoding and spelling, and delayed academic achievement and deficits in reading comprehension and functional math.

5. The Three-Year Psycho-educational Re-Evaluation Report was reviewed with the student's IEP team at several meetings held between April 23 and June 7, 2004. The IEP for the 2004-05 school year, to which the parents consented, provided language arts and math[4] in a special day class, 1:1 para-educator support in classes and activities, speech and language services (direct and consultation), occupational therapy (direct or consultation), 155 educational consultant hours, and 40 behavioral services hours on an as-needed basis. Due to her need for support and supervision on campus the student was in a non-integrated setting for 33% of the day.

6. On October 25, 2004, speech therapist Paula Alm[5] evaluated the student. In 2000 Ms. Alm was hired by the district as a speech therapist, also termed a speech-language specialist, and her responsibilities included providing services to about 55 students, and conducting and reviewing assessments. Ms. Alm has designed speech and language programs for approximately 120 special education students, and adjusted the goals and objectives of pre-existing programs for about 400 incoming students.

In her testimony Ms. Alm distinguished "speech," the physical production of sounds, from "language," the development of phrases and sentences with intent. The student can articulate the required sounds of English, and therefore does not have speech needs. She has language needs because she is not always able to express her intent as fully as a student of her age should.

Ms. Alm's assessment described the student's broad-based deficits in expressive and receptive language, and that she has no articulation deficits. Ms. Alm discussed her report and recommended a change in the student's services at a November 11, 2004, IEP meeting. The parents did not consent to her recommendation, so the student continued to receive the speech services identified in the June 7, 2004, IEP for the remainder of the school year.

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[4] Although at the June 7, 2004 IEP the parents agreed to a math class, they later refused to allow the student to take math.

[5] Ms. Alm earned a bachelor of arts degree in speech at the University of the Pacific, and a master of arts in dramatic arts at the University of California at Davis. She has a secondary credential in English and dramatic arts, and a multiple subject teaching credential. She obtained a clinical rehabilitative credential in Communication Sciences and Rehabilitation (speech pathology and communication disorders) at California State University at Hayward in 1999. Her internships in the latter program included the K-12 program at Livermore School District. She worked for several years at a small private speech pathology practice which provided collegial sharing of research and case studies, and has 28 years experience in education and nine years experience as a speech pathologist.

7. Karen Heilbronner[6] is the district's Assistant Director of Special Programs, and familiar with the student's educational program. She opined that all of the 2004-05 IEP program and services were fully delivered except for occupational therapy.

8. Amy Sommers[7], the district's occupational therapist, was on maternity leave for the fall 2004 semester. A substitute for those four months could not be found. The district offered compensatory education for the student's missed occupational therapy hours.

When Ms. Sommers returned from maternity leave in January 2005 the student had already met the goals and objectives set by Debbie Wiedreicht, her prior occupational therapist. Ms. Wiedreicht recommended to Ms. Sommers that she move from a direct services role to consultation and eventually to discharge pursuant to the IDEA aim of the least restrictive environment for students.

From January to June 2005 Ms. Sommers worked with the student directly in active visual motor and visual perceptive areas. The student is a good artist, and her activities demonstrated achievement of her occupational therapy goals. Although tying her shoes was not an IEP goal Ms. Sommers worked on that skill at the mother's request. Ms. Sommers had the student's 1:1 aide practice daily with the student, and later Ms. Shaw reported that the student was regularly wearing tie shoes.

9. During the 2004-05 school year the student's parents contended that the student did not receive all of the 155 hours of educational consultant time to which she was entitled by the IEP[8]. That dispute arose because on approximately February 10, 2005, Marcie Radius, the student's educational consultant, gave the district 30 days notice that she was leaving her position. She had already advised the student's mother of her planned departure. The mother wanted the district to hire Dr. Jacqueline Cheong, a private

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[6]Ms. Heilbronner began teaching in 1976, and holds multiple subject, learning handicapped, special education, and administrative credentials. She earned a masters degree in special education at St. Mary's College. Prior to her current position she was a special day class teacher, a resource specialist, and an assistant principal. Ms. Heilbronner spends at least one-to-two hours per week dealing with issues concerning the student, and receives as many as five e-mails per day from the student's mother.

[7] Ms. Sommers has a bachelor of science in occupational therapy, and is licensed in that profession by the State of California. Her eight years experience includes working with children and adolescents in two psychiatric hospitals, a responsibility which emphasized the significance of a student's emotional state and its relationship to the treatment plan. Ms. Sommers has been a district occupational therapist for 6½ years, and is responsible for assessment, treatment plans and intervention, caregiver and other education, in-service training, and providing direct and consultative services. She works with 1:1 aides, whom she characterized as a valuable resource in carrying out plans, especially sensory integration programs. Ms. Sommers has assessed approximately 150 students for occupational therapy needs, designed and implemented such programs, and attended approximately 300 IEP meetings.

[8] The January 2004 Settlement Agreement between the parties provided for up to 12 hours per month of educational consultant services from Marcie Radius, then the educational consultant assigned to the student.

psychologist, because she was already working with the mother's other daughter[9]. The district's Special Programs staff considered various individuals to replace Ms. Radius.

On March 1, 2005, the student's mother e-mailed a request for an IEP to discuss the replacement, and the parties exchanged several e-mails on that and other subjects. Ms. Radius' last day of work was March 17, 2005. On March 23, 2005, the superintendent responded to one of the mother's e-mails with the information that a potential replacement and other issues would be discussed at an IEP meeting. The mother e-mailed back that an IEP was not necessary to "discuss a person," and "useless" because the involved staff would not have authority to hire a therapist.

On April 1, 2005, Marie Sousa[10] was hired by the district as the student's educational consultant. District staff advised the parents of that hire and arranged an informal meeting at a coffee shop on April 18, 2005, so they could get acquainted. During that meeting Ms. Sousa provided her resume and spoke with the mother for about an hour. She met the student on April 21, 2005, during a 1.5 hour classroom visit.

The student's mother contended that the district could not hire Ms. Sousa because she is a friend of the Director of Special Programs, and initially refused to accept Ms. Sousa's services.

Ms. Heilbronner estimated that a two week gap occurred between Ms. Radius leaving the district and Ms. Costa being available to provide services. That gap was not critical to the student's program in that Ms. Radius had previously worked with her teachers, and the student received all the services necessary for her educational program. The bank of 155 hours was to be used as needed, and those services were not needed during the short gap between consultants. At hearing the student did not present evidence of any unmet need for educational consultant services during the weeks between Ms. Radius' departure and Ms. Costa's hire.

10. During the 2004-05 school year the student's parents contended that the student was owed replacement services for behavioral services to which she was entitled by the IEP. Frank Marone provided 33.5 hours of the bank of 40 hours in the IEP prior to his resignation in the spring of 2005. He typically worked an hour per week with the student's para-educator, and addressed any additional on-going problems as they arose. At the time Mr. Marone left the student was not exhibiting behavior problems.

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[9] The nature of the services Dr. Cheong provides to the other daughter was not identified.

[10] Ms. Sousa obtained a master's degree in special education from San Francisco State University, and a master's degree in education administration from the California State University at Hayward. She holds K-8 life, special education life, and administrative credentials. She began teaching in a general education classroom in 1964, and worked with students in home and hospital settings from 1966-69. At Albany Unified School District from 1974-80 Ms. Sousa was a special education teacher of severely handicapped students. She later was a program specialist for eight years, and then the Director of Special Education from 1988-2002. In the latter position she supervised certificated and classified staff and participated in, and supervised the implementation of, IEPs.

Jill Gershune[11] had been hired by the district as a behavior analyst in February 2005. Her responsibilities include assessing behaviors, creating supports and behavior plans to maximize academic success, training teachers and staff, and supervising para-professionals and 1:1 aides. To create behavior support plans she draws on her experience with autistic students during and since her internships. She employs only proven programs including applied behavior analysis and discrete learning.

On June 6, 2005, Ms. Heilbronner wrote the student's parents that the district was no longer able to contract with Mr. Marone, and to continue to implement the IEP Jill Gershune would be the assigned behavior analyst. The letter noted Ms. Gershune's master's degree in Social Work from the University of Michigan, and experience as a behavior analyst in school districts in Michigan and California. The student's parents have not accepted her services. When the mother questioned Ms. Gershune's qualifications the district provided additional information.

The gap between Mr. Marone's last day of work and Ms. Gershune's assignment was no more than four weeks, and during that time the student's behaviors were on track and she was doing well in her academic program. The parents had the opportunity to use the remaining available hours when Ms. Gershune was assigned in early June, but chose to not consent to her services. The student is not owed replacement services.

11. On June 14, 2005, an IEP team meeting was held to discuss the district's program and services offer for the 2005-06 school year. The proposed program included language arts, life skills, and math in the special day class, occupational therapy (30 minutes of direct service per week plus 10 hours of consultation services for the school year), speech services (two 45-minute small group sessions per week plus ten hours of consultation for the school year), behavioral services (40 hours direct and consultation services for the school year), 1:1 para-educator support (six hours per school day), and educational consultant services (155 hours for the school year). The entire offer of placement and services was reviewed and discussed with the IEP team, including the student's parents. The parents left the meeting without explanation after approximately two hours; the rest of the IEP team completed the meeting.

The parents did not sign off on the IEP or consent to the program and services offered and discussed at the meeting. Ms. Heilbronner recalled that the parents disagreed with the

[11] Ms. Gershune earned a bachelor's degree in psychology from Michigan State University and a master's degree in social work from the University of Michigan. Her graduate school internships were completed at a day treatment center for emotionally disturbed children from preschool-grade 12, a middle school, and a community mental health center for dual-diagnosis adults. She worked with autistic students for seven years in Michigan as a school social worker, a responsibility akin to the role of a behaviorist in California. In that position she provided training for parents, social skills in the classroom, coordinated the IEP process, and developed behavioral approaches. She next worked as a learning support consultant for the San Francisco Unified School District providing mental health services for at-risk students and families, coordinating the Student Success Team Process, training teachers on mental health needs, and creating behavioral plans.

proposed reading program and would not accept Ms. Gershune as the provider of behavioral services.

12. In the 2004-05 school year the student had been in Ms. Shaw's special day class for life skills and language arts only. During the June 14, 2005, IEP meeting Ms. Shaw described the student's current levels of performance. When re-tested in 2004-05 her reading comprehension had progressed from below primer to upper second grade level, and she had gained the important skill of reviewing what she read if she did not know the answer. In early 2004 the student was strong in subtraction and addition, could multiply a two-digit number by a one-digit number with the help of a chart, but after a year without math class she had lost her multiplication skills.

During the IEP team meeting Ms. Shaw reviewed the proposed goals and objectives and program being offered for life skills, math, and reading for the 2005-06 school year.

The proposed life skills program will consist of different units, such as sex education, family life, interviewing for a job, banking, community activities such as going to a movie using public transportation, etc. The program elements are skills the student will require in adulthood and employment, and are appropriate for her age and needs.

The student's greatest functional math difficulty is word problems; she can use a calculator but does not know if a word problem requires addition or subtraction. Ms. Shaw testified that "life is one big word problem" and the student needs work on division, multiplication, and fractions for purchasing items, cooking from recipes, etc. She created functional math goals related to those needs, and broke down the objectives into measurable components, such as multiplying a two-digit by a one-digit number. She proposes daily math activities, such as the "word problem of the day" and math games on Friday.

Ms. Shaw noted that if the student is not enrolled in a math class she would be unable to teach these needed math skills. Moreover, she cannot take time from a life skills class on bank accounts, for example, to teach math to one student. The parents previously suggested that Ms. Shaw fuse math with life skills. She persuasively testified that at the high school level it is not possible to fuse an entire math program with a separate life skills program, and the student is resistant to being pulled out of class to work on math deficits. The parents did not consent to the student enrolling in the proposed math class.

At the IEP team meeting Ms. Shaw passed out and reviewed the proposed language arts program which focuses on written language comprehension, the student's greatest deficit. For independence in adulthood and employment the student should be able to read a want ad, bus schedule, recipe, etc. To provide different ways of working on the comprehension goals Ms. Shaw identified activities such as summarizing, answering "who, what, when" questions, etc.

Ms. Shaw will utilize appropriate selections from language programs used in the district including Houghton Mifflin texts. Daily language practice, which she instituted in

the 2004-05 school year, will be continued using overheads and questions based on that series. Ms. Shaw determined to use appropriate parts of various programs because no single published program meets the student's reading needs. For example, the EdMark II program has a large work recognition component which is not a significant need for the student, but has other sections which address her deficits. The SRA Reading program provides story pamphlets with reading comprehension and vocabulary questions, and the Steck-Vaughn Core Skills consists of page-long stories with multiple choice questions which are an excellent match for the student's skill development. All of the selected reading programs are research-based, and appear on approved lists of the State Department of Education and the district.

To make the reading program enjoyable and age-appropriate Ms. Shaw selected high-interest books at the student's level, such as "Mulan," modified versions of children's classics like "Tom Sawyer," and Children's National Geographic, which the student favors among the magazines available in the classroom. Ms. Shaw opined that a variety of materials will keep language arts interesting to the student.

Ms. Shaw did not state a separate writing goal on the IEP because, as reflected on her "Language Arts Weekly Schedule," writing exercises are done every week. The student can construct sentences up to the fourth grade level. Writing is a skill which the student needs work on, as do all her classmates, but it is not as great a deficit as her reading comprehension. Ms. Shaw is amenable to adding a writing goal in the IEP if that is of concern to the parents.

Ms. Shaw drafted behavior goals for the academic program with the assistance of Ms. Gershune. The student has made progress in tolerance of being approached and accepting staff assistance, but she requires considerable additional improvement to secure employment. The behavioral goals were divided into small steps and elements which are consistently included in the special day class. If Ms. Gershune is approved as the student's behaviorist she could work with student on behavioral matters that would permit her to move on in school and the job market.

13. The June 14, 2005, IEP proposed that the student will continue to have a 1:1 para-educator. Ms. Brunt was the assigned para-educator for the preceding school year and was supervised by Ms. Shaw. Ms. Shaw opined that Ms. Brunt is an exceptionally qualified para-educator. Ms. Brunt is motivated, responsible, and has wonderful rapport with the student and teachers at the high school. Ms. Shaw is confident that the proposed para-educator will meet the student's unique needs.

14. Due to scheduled occupational therapy appointments Ms. Sommers arrived 30 minutes late for the June 14, 2005, IEP meeting. Nonetheless she had time to summarize the student's current achievement of goals and objectives, and those proposed for the coming school year. She planned to use the offered 30 minutes of direct services per week working with the student to achieve goals, consulting with the aide, and imbedding the program in the student's classroom so it would be supported by her classmates and teacher. The IEP also

offered up to 10 hours per year consultation, which Ms. Sommers anticipated would be more heavily used at the beginning of the school year.

Before the IEP meeting the mother had expressed concern that the student's resistance to school could be related to sensory integration problems. In investigating that topic, Ms. Sommers found that the classroom teacher had not observed any evidence of sensory integration issues in the student's learning. Ms. Sommers proposed "How Does Your Engine Run," a program was created by two occupational therapists to teach self-regulation, which would provide beneficial information whether or not the student has sensory integration needs. Ms. Sommers based her proposed goals and objectives on the program, whose elements can be specifically tailored for adolescents and have measurable goals.

Ms. Sommers presented the program to the IEP team, and explained that it provides specific strategies for self-regulation and relating appropriately to the environment. Children with autism have a deficit in executive functioning, self-reference, and prioritizing strategies. When they are sleepy or excited, new learning at school, or completion of a task at work, are difficult. The program's strategies to recognize and alter her internal "engine speed" would benefit the student in all areas of her life. Dr. Cheong was present at the June 14, 2005, IEP team meeting and expressed agreement with the program Ms. Sommers proposed. Dr. Cheong opined that it would be beneficial to the student by teaching skills such as recognizing facial expressions as specific emotional states.

Ms. Sommers opined that the student has a lot of wonderful skills, and is very friendly and a delight to work with. Ms. Sommers understands the parents have questions about her qualifications to provide services to their daughter. Ms. Sommers is qualified to provide occupational therapy services by her education and training, experience in conducting evaluations and activity assessments, familiarity with how goals are achieved, and work with autistic students with similar needs.

15. During the June 14, 2005, IEP meeting Ms. Alm discussed the student's current speech and language abilities, and the services proposed for the coming school year, including goals and objectives. She had observed the student and her classmates in class, at lunch, on field trips, etc., and was aware of her progress during the 2004-05 school year. The student had progressed to volunteering to answer questions and participating with enthusiasm, and decreased her tangential responses to questions. She remained weak in expressive language and conversational skills, but was starting to joke around and display trust and fun in such interchanges.

Because of the student's success in participating during "sharing time" in the special day class Ms. Alm eliminated an objective that the student relate three events in the prior week. Ms. Alm proposed small group lessons because the student progressed well in such settings in the past year, does not like to be pulled out of class, and learns in indirect instruction, i.e., instruction addressed to other students. The 10 hours of consultation with the teacher or aide would provide preparation for lessons Ms. Alm conducts relating to real life events that matter to the student. Such lessons allow autistic students, who do not

generalize well, to work on that skill. The proposed services will teach the student to more fully send and receive non-verbal signals, cue her to use the appropriate rate and loudness of speech, and address her major communication weaknesses. The objectives are measurable and appropriately designed to meet the student's unique needs.

During the IEP meeting Ms. Alm asked the mother if she had any concerns, and she replied that there was a lot of information in each area. Ms. Alm asked if the mother wanted the information broken down a little more. The mother nodded, left the IEP meeting, and did not return. She did not explain her departure, or otherwise communicate with the other members of the IEP team.

16. Ms. Gershune met the parents at the June 14, 2005, IEP meeting. The IEP provides a bank of 40 hours of direct or consultative behavioral services for the 2005-06 school year. Ms. Gershune is not permitted to provide those services until the IEP has been signed, and to date the parents have not accepted her services. Once permitted to work with the student Ms. Gershune would do observations, review files, keep data, conduct discrete trials, consult with those who have worked with the student, etc., to create specific behavioral goals for the student.

Ms. Gershune exceeds the district job requirements of a related master's degree, a year's experience, and working knowledge of special education students. Ms. Gershune's work with autistic teenagers throughout her career, education, training in taking and analyzing data, and creation of behavioral programs establish that she is fully-qualified to work as the student's behaviorist.

17. A district para-educator, also termed a 1:1 aide, must have a high school diploma and pass a qualifying interview. Ms. Brunt, who worked as the student's para-educator in the 2004-05 school year, will continue in that position. Ms. Brunt was trained by the student's previous behavioral specialist, Mr. Marone, and is supervised by Ms. Gershune and Ms. Shaw. Ms. Heilbronner noted that Ms. Brunt received excellent evaluations from the on-site staff, and all teachers indicated that she works very well with the student.

18. Ms. Sousa participated in the June 14, 2005, IEP meeting at which the educational consultant services for the 2005-06 school year were discussed. Ms. Souza considers that at the student's age the focus of her program should be the transition plan, and the team members discussed the plan at the meeting.

Douglas Dildine, Youth Coordinator of Independent Living Resources, assists families and school districts in transitioning planning. He described that the Department of Rehabilitation and various professional associations recognize that employment planning is an important component of a transition plan. Mr. Dildine has attended the student's IEP meetings for the past several years, and was present on June 14, 2005. He offered suggestions regarding vocational training activities the student could do on campus, and the IEP team discussed his ideas. He remembered that the student had signed a transition plan, but could not recall if it included a vocational element.

Ms. Sousa's role as the student's educational consultant for the 2005/06 school year will be to help implement the IEP, facilitate communications between the parents and the school, and work with the teachers and staff. She has continued in that role in the current school year, including speaking with the mother regarding the student's schooling. She attended the mediation in the subject case as part of her effort to bring the parents and district together and resolve any disagreements. Ms. Sousa has exceptional expertise for the role of an educational consultant including extensive program development experience and eight years of classroom teaching of the student's academic population.

19. During the June 14, 2005, IEP meeting Mr. Pickett introduced an assessment plan to establish the student's intellectual development, and personal care and living skills needs. He designed the plan after discussion with the district staff members who work with the student, and in recognition that previously the district was given permission to evaluate only academics and adaptive behavior.

Because of the student's educational progress Mr. Pickett disagrees with the parents' view that the student needs a neuro-psychological examination. He opined that such an examination is appropriate only when the school cannot assess a student, and in the subject case the district has not been given the opportunity to assess her.

20. Jacqueline Cheong, Ph.D.[12], reviewed reports of several evaluations of the student at UCSF dating back to 1995, evaluations completed at the district by Ms. Pickett and by LaShaun Schank-Byer, and a state Diagnostic Center report issued when she was about 10 years old. Dr. Cheong described that the student has a somewhat variable cognitive profile with a range of strengths that were documented about four years ago, and in subsequent reports questions were raised about "plateau-ing" or regressing.

On a date not established on the record[13] the parents expressed concern to Dr. Cheong regarding the functional aspect of the June 14, 2005, IEP goals and objectives. Specifically, they questioned the degree to which the offered program would deal with using written language in everyday life, the effectiveness and classroom implementation of the goals and objectives, and the curriculum materials and strategies to be used.

Dr. Cheong opined that to achieve independence the student needs to recognize which activities are multi-step, and needs communication skills organized around her ability to function everyday at school and in the community. Her language arts program must have very clear goals and daily targets to achieve functional literacy, and must be very behavioral, systematically organized, and provide for a transfer of activities between school, home and

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[12]Dr. Cheong earned her bachelor's degree at the University of California at Davis, and her master's and Ph.D. from the University of California at Berkeley. She completed a fellowship in pediatric neuro-psychology. Dr. Cheong is a credentialed school psychologist, and a psychologist licensed by the State of California.

[13] Dr. Cheong and the parents were present at the June 14, 2005, IEP team meeting but the concerns were apparently not voiced there.

the community. Incorporating visual materials and props with oral communication, such as a schedule with oral instructions, would be beneficial.

Dr. Cheong testified that she could not tell from Ms. Shaw's "Language Arts Weekly Schedule" what sections of the identified materials would be used. The listed texts, such as EdMark Reading and SRA Reading, are multi-level multi-material programs applicable to both general education and the range of individual differences found in special education. Dr. Cheong acknowledged that the materials on Ms. Shaw's schedule would assist the student with her reading comprehension needs. Ms. Shaw's "Language Arts Weekly Schedule" was not intended to be a list of all reading materials which would be offered to the student, but rather a description by days of the week of her language arts activities.

Dr. Cheong's testimony was thoughtful and displayed considerable expertise in the design of programs for autistic students. She did not testify that the district's program offer at the June 14, 2005, IEP meeting was not FAPE.

21. Based upon her experience and training in special education programs, Ms. Heilbronner persuasively opined that the district's program offer for the 2005-06 school year made at the June 14, 2005, IEP meeting is FAPE in the least restricted educational setting. Ms. Heilbronner could not predict the student's results, noting that provision of FAPE does not guarantee success.

LEGAL CONCLUSIONS

1. Has the district offered the student a free appropriate public education in the least restrictive environment for the 2005-06 school year?

a. Under both State law and IDEA, students with disabilities have the right to a free appropriate public education. 20 U.S.C. §1400 (2005); Education Code § 56000. The term "free appropriate public education" (FAPE) means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program. 20 U.S.C. § 1401(9). "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. 20 U.S.C. § 1401(29).

A complaint that there has been a denial of FAPE can present both substantive and procedural issues. The obligation to provide a FAPE does not require a state to "maximize each child's potential." *Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 198; see also 20 U.S.C. § 1401(8)(D). The Court in *Rowley* determined that the IEP must be designed to provide educational benefit to the students and be reasonably calculated to provide the student with some educational benefit. Pursuant to IDEA and *Rowley*, to be substantively appropriate the district's proposed program for the 2005-2006 school year must be designed to meet the student's unique needs, and reasonably calculated to provide some educational benefit.

The IEP is the blueprint for successfully formulating and achieving the goal of IDEA. *Murray v. Montrose County School District* (10th Cir. 1995) 51 F.3d 921, 925; see also 20 U.S.C. § 1401(11). IEPs should provide a "basic floor of opportunity" consisting of services that are "individually designed to provide educational benefit" to a child with a disability. *Rowley*, 458 U.S. at 201. In California, Education Code section 56341.1 requires, among other matters, that the IEP team consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 (stating that the IDEA does not provide for an "education . . . designed according to the parent's desires," citing *Rowley*, 458 U.S. 176, 207).

Here the IEP proposed for the student provides math, life skills and language arts education to provide the skills she will need for independence, as well as three periods in the general education setting in which she can take computers, PE, and art, her special interest. The proposal includes support of the educational consultant, occupational therapist, speech and language therapist, behaviorist, and para-educator. The IEP is unique, individualized to the student's needs and abilities, and appropriately designed to maximize her opportunities for independence and employment after high school. The IEP included objective criteria to measure progress. The district staff assigned to the student's program are well-educated, have the necessary experience to handle their responsibilities, and are motivated to provide the student a meaningful education. The mother's contentions that most, if not all, of the district staff involved in the student's education are not competent were not supported by the evidence.

The district's expert witnesses established that the proposed program will meet the student's unique needs and is reasonably calculated to provide the student with some educational benefit. While some sections of the IEP addressed at the June 14, 2005, team meeting were in the form of abbreviated outlines, the district's offer was sufficiently specific to apprise the parents of the program being offered. The parents made no request for augmentation or clarification before leaving the team meeting.

b. IDEA's procedural mandates require that the parent be allowed to meaningfully participate in the development of the IEP. *Rowley*, 458 U.S. at 207-208. Procedural flaws do not automatically require a finding of a denial of FAPE. However, flaws that seriously infringe on the parent's opportunity to participate in the IEP process or that result in the loss of educational opportunity to the student result in the denial of FAPE. *W.G. v. Board of Trustees of Target Range School District No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.[14] Technical deviations from procedural requirements in developing an

[14] IDEA has been recently amended; most of the changes went into effect on July 1, 2005 and are therefore inapplicable to the present dispute related to the appropriateness of a June 2005 IEP. See 20 U.S.C. 1400 *et seq.* The new amendments require a determination of FAPE on *substantive* grounds. Procedural violations may result in a denial of FAPE only if the procedural violation impeded the child's right to FAPE, significantly impeded the parents' op-

IEP do not automatically lead to the conclusion that the IEP is invalid. *Urban v. Jefferson County School District R-1* (10th Cir. 1996) 89 F.3d 720, 726.

The student failed to establish that any technical deviations by the district resulted in a loss of educational opportunity or infringed upon the parents' opportunity to participate in the IEP process. The district provided the parents with a comprehensive written offer of placement at the June 2005 IEP meeting. The parents walked out of the subject IEP team meeting without explanation, and thus chose to not participate in the IEP formulation process.

c. The June 2005 IEP offers the student FAPE in that it is designed to meet her unique needs, and is reasonably calculated to provide her with some educational benefit in the least restrictive environment. The district may implement the June 14, 2005, IEP over the parents' objections, pursuant to the authority of 34 C.F.R. §300, Appendix A, which provides:

> 9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?
>
> The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the (1) child's needs and appropriate goals; (2) extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs (§§ 300.343(c)(iii) and 300.346(a)(1) and (b)).
>
> The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

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portunity to participate in the decision making process, or caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E).

> Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B.

If the student is to continue to receive educational services from the district, she must accept the FAPE that was offered at the June 14, 2005, IEP meeting. The parents may appeal this Decision. The district may implement the IEP over the parents' objection.

2. Was the district's alleged failure to provide "stay put" placement during the pendency of the hearing a denial of FAPE?

A special education student is entitled to remain in his or her then-current educational placement pending resolution of the due process hearing procedures, absent an agreement by the parties otherwise. 20 U.S.C. § 1415(j); Cal. Educ. Code § 56505(d). Application of stay put is automatic upon filing of a request for due process hearing. No motion or other action by or on behalf of the student is required, and the right to stay put is unequivocal. *Honig v. Doe* (1988) 484 U.S. 305. The purpose of stay put is to ensure some stability in a disabled student's school placement pending resolution of due process proceedings. *Stacy G. v. Pasadena Independent School Dist.*, (5th Cir. 1983) 695 F.2d 949; *Zvi D. v. Gordon Ambach*, (2nd Cir. 1982) 694 F.2d 904.

Subsequent to the evidentiary hearing the parents filed a "Motion for Stay Put Regarding Behavioral Services" and a separate "Motion For Stay Put in Last Placement."

In the "Motion for Stay Put Regarding Behavioral Services" the parents contend that because they did not sign the June 14, 2005, IEP in the area of behavioral services and the "district took no action as required by law to contest the parents (sic) refusal for change (sic)" the "last placement for this service is the mediation agreement signed January 15, 2004." (The latter reference is to the January 2004 Settlement Agreement of an earlier case, not a mediation of the subject case.) The parents assert that the applicable stay put provision is the Settlement Agreement term "3-4 hours per week of behavioral support services in April 2004; a bank of 10 hours for training, if required for new staff, provided by an NPA behavioral provider." The parents conclude with the statement that "An NPA is a non public agent (sic) and not a district employee."

The district correctly notes that the express terms of the January 2004 Settlement Agreement provide that it was to be in effect through the remainder of the 2003-04 school year. It was supplanted by the IEP for the 2004-05 school year which the parents signed in consent to the entire program, despite their later refusal to honor its term regarding math class. The parents' contention that the correct stay put placement is the Settlement Agreement or the 2003-04 IEP is not persuasive or supported by the evidence. The

behavioral services in the 2004-05 IEP, which was implemented and constitutes the student's last or present placement, provides for 40 hours of behavioral services per school years on an "as needed" basis. Those services are the required services during stay put. 20 U.S.C. §1415(j), 34 C.F.R. §300.514(a); see also *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.

In their separate "Motion For Stay Put in Last Placement" the parents note that, as described in Finding 5, above, the IEP for the 2004-05 school year which they signed provided for language arts, life skills and math in a special day class. The parents assert that "However parents and district had a mutual agreement and placed [the student] in Language Arts and Life Skills for the 2004/2005 school year. This agreement is solidified by her report card indicating this (sic)."

There is no evidence in the record that the parties had a "mutual agreement" that the student would not take math. Rather, the parents refused to permit the student's enrollment in math class despite the specific terms of the IEP which they signed. The referenced report card was not provided. The parents contend that the applicable stay put placement is the result of their refusal to honor the IEP they signed, i.e., the provision of only life skills and language arts in the student's special day class. The parents assert that the district currently has tried to place the student in life skills, language arts, and math.

Again, the district correctly notes the parents signed in consent to the IEP for the 2004-05 school year. That IEP included a math class, despite their later refusal to permit the student to participate. The record does not establish how long the student was in the math class before the parents refused to permit her to participate, or if in fact that portion of the IEP was implemented. As the parents have the burden of proof on their motion, including the underlying issue of whether that section of the IEP was ever implemented, their motion fails.

The student did not establish that the district denied her the appropriate stay put placement. Therefore, she was not denied FAPE.

ORDER

1. The district offered the student a free appropriate public education for the 2005-2006 school year. The District may implement its June 14, 2005, offer of a free appropriate public education in the least restrictive environment for the 2005-06 school year over the objection of the student's parents and without their consent if the student remains enrolled in the district.

2. The Motion for Stay Put Regarding Behavioral Services and the Motion for Stay Put In Last Placement are denied.

PREVAILING PARTY

Pursuant to California Education Code § 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

The District prevailed on the single remaining issue at hearing, whether the district offered the student a free appropriate public education in the least restrictive environment for the 2005-06 school year, and on both post-hearing motions.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. California Education Code § 56505, subdivision (k).

Dated: _____

_____
M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings