

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

In the Matter of:

STUDENT,

Petitioner,

v.

COLTON JOINT UNIFIED SCHOOL  
DISTRICT, SAN BERNARDINO COUNTY  
SUPERINTENDENT OF SCHOOLS,

Respondents.

OAH CASE NO. N2006070438

**NOTICE: This decision  
has been UPHELD by the  
United States District  
Court. Click [here](#) to view  
the USDC's decision.**

**DECISION**

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on December 13, 14, 15, and 18, 2006, in Bloomington, California.

Petitioner/Student (Student) was represented by Nora Asahara, Attorney at Law, Waterson & Huth. Student's mother (Mother) was present throughout the hearing on Student's behalf.

Respondents Colton Joint Unified School District (District), and the San Bernardino County Superintendent of Schools (Superintendent) were represented by Gail Lindberg, Program Manager, Office of Superintendent of Schools, East Valley Special Education Local Plan Area. Diane D'Agostino, Ed.D., Director, Pupil Personnel Services for the District, was also present throughout the hearing on behalf of the District. Peggy McFee, Principal, East Valley Operations, Student Services Division for the Superintendent, was present during the majority of the hearing on behalf of the Superintendent.

Sworn testimony and documentary evidence were received at the hearing. Pursuant to agreement of the parties, the record was held open to allow Student to submit photographs of two of Student's assistive technology devices. The parties further agreed that, unless the Respondents objected to the photographs within 48 hours of receipt of the photographs, the photographs would be received in evidence and designated as Student's exhibits. On

December 26, 2006, Student submitted two photographs of these assistive technology devices. The Respondents have filed no objections to the photographs. Therefore, the photograph of Student's Intellikeys device was admitted into evidence and marked as Student's exhibit U and the photograph of Student's touch talker was admitted into evidence and marked as Student's exhibit V. At the conclusion of the hearing, the matter was continued until January 17, 2007, to allow the parties to file closing briefs. The parties timely filed closing briefs. Student's closing brief was marked as Student's exhibit W. Respondents' closing brief was marked as Respondents' exhibit 6. On January 17, 2006, the matter was submitted for decision.

## ISSUES

1. Did Respondents deny Student a free, appropriate, public education (FAPE) during the 2004-2005 and 2005-2006 school years by failing to conduct an appropriate reassessment of Student upon her enrollment at Rialto High School (Rialto High)?
2. Did Respondents deny Student a FAPE during the 2004-2005 school year by:
  - A. Failing to conduct a functional analysis assessment (FAA) and to create a behavioral intervention plan (BIP)?
  - B. Failing to provide an appropriate statement of Student's present levels of educational performance in the Student's Individualized Education Program (IEP) of December 16, 2004?
  - C. Failing to develop appropriate annual goals and short-term objectives for Student in the IEP of December 16, 2004, and failing to include an appropriate method of measuring Student's progress in the IEP?
  - D. Failing to provide assistive technology devices and services to Student?
  - E. Failing to develop an appropriate Individualized Transition Plan (transition plan), including failing to invite the Inland Regional Center (Regional Center) to participate in the development of the transition plan?
  - F. Failing to measure and/or record Student's progress and failing to regularly report Student's progress to Mother?

- G. Failing to provide Student with a teacher who was qualified to teach students whose primary eligibility is orthopedic impairment?
3. Did Respondents deny Student a FAPE during the 2005-2006 school year by:
- A. Failing to conduct a FAA and create a BIP?
  - B. Failing to provide an appropriate statement of Student's present levels of educational performance in the Student's IEP of December 6, 2005?
  - C. Failing to develop appropriate annual goals and short-term objectives for Student and failing to include an appropriate method of measuring Student's progress?
  - D. Failing to provide assistive technology devices and services to Student?
  - E. Failing to develop an appropriate transition plan, including failing to invite the Regional Center to participate in the development of the transition plan?
  - F. Failing to measure and/or record Student's progress, and by failing to regularly report Student's progress to Mother?
  - G. Failing to provide Student with a teacher who was qualified to teach students whose primary eligibility is orthopedic impairment?
  - H. Failing to provide a copy of the IEP of December 6, 2005, to Mother in a timely manner?
  - I. Changing Student's placement without Mother's prior written consent?
4. Is Student entitled to compensatory education?

#### CONTENTIONS OF THE PARTIES

Student contends that the Respondents denied her a FAPE during the 2004-2005 and 2005-2006 school years. Student asserts that when she transferred from Perris High School to Rialto High, Respondents denied her a FAPE by failing to re-assess her and to perform an FAA. Student also contends that her IEPs of December 16, 2004, and December 6, 2005, are defective for several reasons. First, the IEPs do not adequately state her present levels of

educational performance. Second, the goals and objectives of those IEPs, which are based upon those present levels of performance, are inappropriate, and failed to include appropriate measures of Student's progress. Third, the IEPs did not provide for Student's use of her assistive technology devices, which consisted of a touch-talker and Intellikeys. In fact, according to Student, Respondents did not use these devices in Student's educational program. Fourth, Student contends that the IEPs did not contain appropriate transition services, and Respondents failed to invite the Regional Center to the IEP meetings to participate in formulating Student's transition plans.

Student also contends that Respondents failed to measure and/or record Student's progress, and failed to regularly report Student's progress to Mother. Student contends that her teacher during the 2004-2005 and 2005-2006 school years was not qualified to teach Student because the teacher did not hold a credential to teach students who had a primary eligibility of orthopedic impairment.

Student asserts that, although Mother requested a copy of the IEP of December 6, 2005, she did not receive a copy of the IEP until June 6, 2005. This IEP, among other things, provided that Student would receive a certificate of completion and be exited from special education in June 2006. Student contends that Mother withdrew her consent to the IEP of December 6, 2005 on June 6, 2005. Therefore, by awarding Student her certificate of completion on June 8, 2006, Respondents changed Student's placement without Mother's written consent.

As a consequence of the Respondents' denials of a FAPE, Student contends that she is entitled to compensatory education. Respondents deny that Student is entitled to any such relief.

Respondents contend that they had no obligation to perform an assessment of Student upon her enrollment at Rialto High in November 2004 because Student's prior school district had performed a triennial assessment of Student in March 2004. They also contend that an FAA and BIP were unnecessary, as Student did not display any behavioral difficulties in the classroom. Respondents further contend that Student is severely developmentally disabled, and that the functional curriculum that they provided was appropriate. Therefore, the present levels of performance in the IEPs were sufficient, the goals and objectives which were based upon those levels were appropriate, Student's progress was measured and recorded, and the services that the IEP required were provided and constituted a FAPE. In this regard, they contend that the touch talker was not appropriate for Student because, despite years of working with this device, Student did not use it effectively. Therefore, she used alternative means of communication in the classroom. Respondents also contend that Student's teacher was qualified, since she was credentialed to teach children who were mentally retarded and had multiple handicaps, and because the teacher's qualifications met the requirements of the No Child Left Behind Act.

Respondents also contend that Student's receipt of her certificate of completion after Mother withdrew her consent to IEP of December 6, 2005, was not a procedural violation of the IDEA, because Mother was not a holder of Student's educational rights at the time. Consequently, Mother's consent or withdrawal of consent to the IEP and to the change of placement was of no legal significance.

## FACTUAL FINDINGS

### *General Background and Jurisdictional Matters*

1. Student was born on August 13, 1984. She is 22 years old and has resided in the District since the 2004-2005 school year, when she was 20 years old. Upon moving into the District, the District placed her as an orthopedically impaired student in a Special Day Class (SDC) at Rialto High. Rialto High is a public school which is not located in the District, but which is under the jurisdiction of the Superintendent. The District placed Student at Rialto High, because Respondents, who are both members of the East Valley SELPA, determined that Rialto High was the most appropriate placement for her. Student attended the SDC at Rialto High from November 2004 through June 7, 2006. On June 8, 2006, Student was exited from special education with a certificate of completion of IEP.<sup>1</sup>

2. Student was diagnosed with cerebral palsy shortly after her birth. She has moderate spastic quadriplegia associated with her cerebral palsy. She is developmentally delayed, and requires almost total assistance for her self-care needs. Student is non-verbal. Throughout her life, she has communicated through gestures, informal sign language, facial expressions, body language, pointing, eye gaze, crying, head shakes or nods, and also through various communication devices, some of which are more highly technological than others. Student's expressive language skills are limited; her receptive language skills are stronger. She is primarily dependent upon a wheelchair for mobility, although she can use a walker for a short distance. Two medical reports refer to Student as severely retarded, a label which Mother denies. In September 2006, she was assessed by the Superintendent, and achieved an Intelligence Quotient (IQ) score of less than 25, and a mental age equivalent score of one year, three months. A previous assessment, performed on February 27, 2004, showed her cognitive level to be at an age equivalent of 43 months.

3. Mother was able to care for Student at home until 1993, when Student was approximately nine years old. Student was then placed in a group foster home in Riverside County, under the care of a foster mother (Foster Mother). Student attended schools and received special education services in the Riverside Unified School District (Riverside

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<sup>1</sup>Exiting a student from special education means that the student is no longer eligible to receive special education instruction and services. Exiting may occur under a variety of circumstances, such as when the student reaches a certain age (also known as "aging out"), when a student graduates from high school with a regular high school diploma, or when the student is no longer disabled and no longer requires special education instruction and services.

District). In August 2004, when Student attained the age of 20, she could no longer reside with Foster Mother. Therefore, Mother placed her in Mavis House, a group home for developmentally disabled adults which is located in the District. Shortly thereafter, Mother enrolled Student in Rialto High. Student has resided at Mavis House continuously through the present.

4. After receiving her certificate of completion from Rialto High, and since approximately fall 2006, Student has been attending Redlands Adult Basic Learning Environment (Redlands ABLE). Redlands ABLE is a day program for developmentally disabled adults. In September 2006, Mother was appointed Student's conservator.

#### *Assessment of Student Upon Enrollment at Rialto High*

5. A school district must perform an assessment every three years, but it has no obligation to assess a student more frequently than annually, unless the district and the parent agree otherwise. A failure to assess may be a procedural violation of the IDEA. A procedural violation is a denial of a FAPE if it significantly impeded the ability of the student's parents to participate in decisions regarding the student's education, or deprived the student of an educational opportunity.

6. In November 2004, Student transferred from Perris High School, in the Riverside District, to Rialto High. Respondents convened an IEP meeting on December 16, 2004, which was intended to serve as both a 30-day interim IEP and an annual IEP. No assessments were conducted by Respondents at that time, as the Riverside District had conducted a triennial multidisciplinary assessment on February 27, 2004, while Student was attending Perris High School. The triennial assessment was performed by Astrid Peterson, MA Ed. Psych., the school psychologist.

7. Mother did not submit a written request to Respondents to assess Student. There was no evidence that Mother had verbally requested that Respondents assess Student. There was no evidence that Respondents ever formulated an assessment plan.

8. Mother's contention that the Respondents should have performed another assessment is not persuasive. It is not clear what another assessment would have demonstrated or accomplished in view of Student's then-recent triennial assessment, which Student does not challenge. There was no evidence that Respondents' failure to assess Student deprived Student of an educational opportunity or significantly impaired Mother's ability to participate in decisions regarding Student's education. Respondents were not required to assess Student upon her transfer to Rialto High, and their failure to do so did not constitute a denial of a FAPE for either the 2004-2005 or 2005-2006 school years.

*Student's IEP of December 16, 2004*

*A. Failure to Perform an FAA and to Develop a BIP*

9. An FAA is performed and a BIP is developed when the student exhibits a serious behavior problem that significantly interferes with the IEP's implementation. A failure to perform an FAA may be a procedural violation of the IDEA. A procedural violation is a denial of a FAPE if it significantly impaired the ability of the student's parents to participate in decisions regarding the student's education, or deprived the student of an educational opportunity.

10. The triennial assessment of February 27, 2004, included Foster Mother's observations that Student demonstrated "marginally serious problem behaviors." Ms. Peterson identified as a "problem" Student's aggressive behavior toward herself. According to Ms. Peterson's report, this "moderately serious" behavior involved Student's pulling her own hair, scratching herself, and throwing herself out of her chair when frustrated. These acts reportedly occurred approximately one to six times per week. Additionally, Ms. Peterson reported that Student exhibited uncooperative behavior (refusing to obey, refusing to follow rules, defiance, refusing to perform school tasks). This uncooperative behavior reportedly occurred one to ten times per day. Based upon these observations, Student contends that Respondents should have performed an FAA and then developed a BIP. Instead, the IEP of December 16, 2004, stated that a BIP was not necessary.

11. Student offered no evidence that problem behaviors occurred in the classroom which adversely affected the implementation of Student's IEP. Furthermore, Student's most recent IEP from the Riverside District, which was based upon Ms. Peterson's report of the triennial assessment, stated that a BIP was not necessary. Under these circumstances, Respondents did not have any obligation to perform an FAA and develop a BIP for the 2004-2005 school year.

*B. Present Levels of Educational Performance, Annual Goals and Short Term Objectives, and Measurement of Progress in the IEP of December 16, 2004*

12. Under the version of the IDEA that was in effect at the time of the December 16, 2004 IEP meeting, an IEP must contain a statement of the present levels of educational performance, annual goals and short-term objectives, and a means to measure progress towards the annual goals.<sup>2</sup> Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP, so as to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals and objectives. The failure of the IEP to include the required elements is a procedural violation of the IDEA. A procedural violation is a denial of a FAPE if it significantly

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<sup>2</sup>As is further discussed below, the re-authorized IDEA, which became effective on July 1, 2005, eliminated the requirement that an IEP contain short-term objectives, except for students who take alternative assessments.

impaired the ability of the student's parents to participate in decisions regarding the student's education, or deprived the student of an educational opportunity. An IEP that is not properly formulated may also constitute a denial of a FAPE if the IEP thereby fails to address the student's unique needs, or is not reasonably calculated to provide the student with some educational benefit.

13. The IEP team at the meeting of December 16, 2004, included Ms. Harris, who was Student's special education teacher; the lead teacher who supervised Ms. Harris; and a representative from Mavis House. Mother was not able to attend. Mother was generally unable to participate in Student's education during the school year 2004-2005 because Mother was seriously ill during that time. Student did not attend the IEP meeting. At the time of the meeting Student was 20 years old, her educational rights had been transferred to her, and she had no guardian or conservator.

14. The IEP team noted that Student was eligible for special education services as an orthopedically impaired student.<sup>3</sup> The IEP stated that Student would receive adaptive physical education (APE) and designated instruction and services (DIS) in a small group pull-out setting for 40 minutes, once per week. Extended school year (ESY) services and special transportation services were also to be provided. The team also noted that Student would be placed in an SDC class for students with severe and profound disabilities. Respondents would provide special education for 30 hours per week, with two to three of those hours occurring in the community, and the remainder consisting of special education instruction. The team mentioned that student's general cognitive delays impacted her rate of learning and development such that she needed a separate classroom. The team noted that "The best program to meet [Student's] needs is located at Rialto High School," as a reason why Student was not being served at Colton High School, her home school in the District.

15. Ms. Harris drafted the present levels of educational performance portion of the IEP, based on her observations and informal classroom assessments of Student. The present levels of educational performance, so far as they are relevant to this Decision, stated:

Reading: [Student] likes to listen to stories, she likes to look at and touch the pictures.

Math: [Student] likes to feel geometric objects, such as puzzle pieces.

Written Expression: Written skills are very limited because of clenching of hand. On occasion, student will make marks on paper using writing utensil.

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<sup>3</sup>The IEP mistakenly indicates that Student resides in the home of her parent/guardian. This error is not significant. On the same page as this error, the IEP accurately states that Student resides at Mavis House, and the evidence revealed that, at all relevant times, the Respondents knew that Student resided at Mavis House.

Language/Communication/Speech: Student does not talk, but likes to smile and laugh. When student is not happy or wants something, will cry.

Social Behavior: Student is generally cooperative. Student is accepted by both peers and staff.

Physical Skills (Gross/Fine Motor): Skills are limited, but student can make marks on paper with assistance of staff.

Self-Help Skills (Functional Skills, Independent Skills, Activities of Daily Living): Needs assistance with caring for personal needs.

Prevocational/Vocational/Career/Exploratory Information/Work Experience: Can follow 1-step command to manipulate objects.

16. Four goals and related short-term objectives were formulated by the team. The goals were:

Goal #1: By 12/16/05 [Student] will develop productive work habits by completing 1-step task (i.e. hitting computer switch upon request) with only 2-3 verbal prompts from staff on 4/5 occasions on 4/5 trial days as measured by charting.

Goal # 2: By 12/16/05 [Student] will express information by nonverbal means when presented with a preferred and non-preferred object or activity by expressing her choice through gestures (i.e. reaching for the item or pushing the item away) or changing facial expressions as noted and recorded by staff at least 5x/day for 10 consecutive trials.

Goal #3: By 12/16/05 [Student] will develop an awareness of place by taking campus walks with peers and staff, noting various landmarks of the campus. . .with minimal staff assistance (2-3 verbal prompts) on 4/5 occasions on 4/5 trial days.

Goal # 4: By 12/16/05 [Student] will listen to gain information by focusing her attention (eye contact/gaze, smiles, etc.) on an instructional staff member who is reading a story, announcing current events, doing counting activities, etc., to a

small group for 5-7 minutes on 4/5 occasions on 4/5 trial days as measured by teacher data sheet.

17. Two short-term objectives were set for each of the foregoing goals, to be reached by April 16, 2005, and August 16, 2005, all of which were to be measured by charting or teacher data sheet. For Goal #1, the first objective was completion of the 1-step task with only 4-5 verbal prompts and 2-3 partial physical prompts, on 3-5 occasions on 3-5 trial days. The second objective was completion of the 1-step task with only 3-4 verbal prompts and 1-2 partial physical prompts on 3-5 occasions on 3-5 trial days.

18. For Goal #2, the first objective involved Student's expression of her choice through gestures or changing facial expressions at least 2-3 times per day for 5 consecutive trials. The second objective involved Student's expression of her choice through gestures or facial expressions at least 3-4 times per day for 5 consecutive trials.

19. For Goal #3, the first objective involved Student's noting of various campus landmarks with 5-6 verbal prompts and 2-3 partial physical prompts on 3-5 occasions on 3-5 trial days. The second objective involved Student's participation in campus walks with 4-5 verbal prompts on 4-5 occasions on 4-5 trial days.

20. For Goal #4, the first objective involved Student's focusing her attention on a staff member who is performing an activity to a small group for 3-4 minutes on 3-5 occasions on 3-5 trial days. The second objective involved Student's focusing her attention in that situation for 4-5 minutes on 3-5 occasions on 3-5 trial days.

21. The team left blank that part of the IEP form which stated how frequently progress reports as to the goals would be given to parents. The team noted that the APE teacher was absent and could not provide a new APE goal, but that the APE teacher would develop a new goal. The team noted that the staff would receive MOVE (Mobility Opportunities Via Education) equipment training, so that Student could resume her activities on the MOVE equipment. MOVE equipment is adaptive equipment that is designed to enhance independent mobility for disabled people.

22. The IEP sets forth goals and objectives and appropriate means for measuring them. However, the goals and objectives do not relate to the present levels of educational performance, and neither the present levels of educational performance nor the goals and objectives based upon them accurately reflected the range of Student's abilities. Prior to arriving at Rialto High, Student communicated primarily through a device known as a touch talker. The touch talker contains buttons which are covered by an array of thematically grouped icons. When the icon is pressed, a recording states what the icon is. The icons can be changed, and the device can be programmed to several "levels" which correspond to different thematic arrays of icons. By pressing the appropriate icons, Student was able to communicate wants and needs, as well as answer questions regarding materials which were read to her.

23. Student's level of proficiency while using the touch talker is reflected in the triennial assessment of February 27, 2004, performed by Ms. Peterson, the school psychologist in the Riverside District. The assessment states that Student could repeat two-step instructions on the touch talker, respond to questions, communicate three-part phrases, and use 12 of the icons consistently. Foster Mother testified that Student could use six icons to put a sentence together on the touch talker, and that Student used four of the levels on the device. The evidence also demonstrated that, unless Student used the device consistently, Student would not be able to progress in using the device.

24. Ms. Peterson's triennial assessment also revealed that Student "indicates, recognizes, and matches the numbers 1-15." Ms. Peterson reported that Student can place a circle and square in a form board, match simple geometric forms, sort forms by shape, and identify the longer of two sticks. Foster Mother testified that Student used an Intellikeys device, which is an interactive computer keyboard and program by which Student could learn and practice math and language skills. Foster Mother testified that Student could perform basic addition and subtraction using the Intellikeys device, and was beginning to learn multiplication and division. While residing with Foster Mother, Student was also beginning to learn about currency denominations.

25. The IEP of December 16, 2004, did not mention any of these skills in the present levels of educational performance, in the goals and objectives, or anywhere else in the IEP. Nor did this IEP refer to the findings of Ms. Peterson's triennial assessment.

26. In contrast, the Student's last IEP from the Riverside District, which was formulated at an IEP team meeting held on March 4, 2004, and which was based on the triennial assessment, contained the following under current levels of educational performance:

Communication: Uses a touch talker. Uses 12 pads consistently.

Reading: When attending, [Student] can match 3-5 letter words. Can answer yes/no questions after listening to a short story.

Math: Indicates, recognizes, and matches the numbers 1-15.

Community Participation: Likes going out (shopping, to the park, etc).

Behavior: Likes to joke and tease. Does this by answering questions incorrectly, in an oppositional manner. Flails arms when angry.

Fine/Gross Motor: Able to pick up foam puzzle pieces. Uses fine motor skills to activate talker. Stands in prone stander for

125 minutes in 2 sessions. Can walk in walker for over 1500 feet.

Social/Emotional: Likes to interact with other students and has favorite friends. Good sense of humor.

27. The Riverside IEP team formulated five goals and associated short term objectives to correspond to these levels of performance. The relevant goals included working on the Intellikeys device, using her communications device to express food wants, participating in group activities at school while using her communication device to answer questions and provide information while standing in her stander, and walking in her walker while following directional commands.

28. Student had more skills than were accounted for in the IEP of December 16, 2004. The present levels of performance, and the goals and objectives formulated by the IEP team at Rialto High, did not include any specific communication, language/vocabulary, or math skills, although the triennial assessment reflected that Student had some skills in those areas. The IEP team did not include any socialization activities using Student's communication device, or any goal-oriented activities to promote Student's gross motor skills. APE is mentioned, but there was no evidence that an APE goal was ever set. There was no evidence that any goal was set with respect to MOVE equipment, or that Student used MOVE equipment at school. The evidence does not demonstrate that the IEP team based the IEP on Student's triennial assessment, which was Student's most recent assessment, although the team was required to do so. There was very little in the IEP which addressed Student's unique needs or which was reasonably calculated to provide Student an educational benefit.

29. The IEP of December 16, 2004, which governed Student's educational program at Rialto High during the 2004-2005 school year, did not provide Student with a FAPE. It failed to include appropriate goals and objectives designed to address Student's unique needs, and the IEP was not reasonably calculated to provide Student with an educational benefit.

### *C. Assistive Technology*

30. An IEP team must consider whether the student requires assistive technology and, if so, the nature and amount of such services must be set forth in the IEP. If assistive technology is required to meet the student's unique needs, and to provide the student with an educational benefit, then the district's failure to provide it is a denial of a FAPE.

31. The primary assistive technology devices used by Student in school prior to enrollment at Rialto High were the Intellikeys program and the touch talker. The IEP does not mention Intellikeys or specifically refer to the touch talker. Under "Assistive Technology Needs," the IEP team stated: "Access to big button switches, which can be

attached to appliances, computers, etc. to help student exercise control over environment.” The comments section of the IEP refers to Student’s “communication device,” and ambiguously describes it as “primarily a choice board,” for which no training is needed. This does not accurately describe Student’s touch talker. The transition plan included in the IEP refers to Student’s use of a “Nouns and Sounds” computer program, but the program is not described, and no goals or objectives are specifically set for its use. Under “Program Modifications and Support” the IEP states: “Use of specialized, adaptive equipment to enhance participation.” The IEP does not describe this equipment, and, again, there is no goal that refers to this equipment.

32. Ms. Harris testified that Student used the touch talker in the classroom, and that only one of the icon arrays was used. She further testified that she used another communication device in the classroom, which she referred to as a “1, 2, 3 talker.” As described, this was a far less sophisticated device than the touch talker, as it has only three or four icons on it at a time. By failing to provide for Student’s consistent use of Intellikeys and her touch talker or comparable assistive technology, and specifically by failing to provide for use of the touch talker in the more advanced manner in which Student had previously used it, Respondents denied Student a FAPE. The IEP failed to meet Student’s unique needs, and was not reasonably calculated to provide Student with an educational benefit.

#### *D. Student’s Transition Plan*

33. An IEP for a student who, like Student, is 20 years old at the time of the IEP, must contain a transition plan. Further, the school district must invite to the IEP meeting a representative of any agency which may be providing or paying for transition services. A failure to comply with the procedural requirements of the IDEA is a denial of a FAPE if it impaired the ability of student’s parents to participate in decisions regarding the student’s education, or deprived the student of an educational opportunity. A transition plan that fails to address the student’s unique needs or is not reasonably calculated to provide the student with an educational benefit also denies the student a FAPE.

34. Student’s IEP of December 16, 2004 contained a transition plan. Student contends that Respondents denied her a FAPE because the Regional Center was not invited to the IEP meeting to provide input into the transition plan. However, the evidence did not demonstrate that the Respondents were obligated to invite the Regional Center. Student did not produce evidence that the Respondents were aware, or should have been aware, that the Regional Center was likely to be responsible for providing or paying for transition services. Indeed, the transition services in the transition plan do not require Regional Center participation.

35. The transition plan stated that Student’s Postschool Goals were “to communicate her wants and needs to others and be as independent as she can possibly be given physical limitations.” It contains a section entitled “Present Levels of Performance,” but it is unclear whether these skeletal comments relate to the transition plan or to the IEP in

general. Under the category “Transition Services Needed,” the IEP states: “Student’s curricula will lead to a high school certificate of completion of IEP.”

36. There are five subcategories under the heading “Transition Services to Be Provided.” They are:

**Instruction:** Student will receive a functional skills curriculum emphasizing daily living skills.

**Community:** Student will go on campus outings with staff and peers to explore various components of the high school—e.g. cafeteria, library, main quad, gym, etc.

**Employment:** Student will attempt to exercise greater control over her environment by using a single switch connected to various appliances to make them perform a function (i.e., mixer, radio, fan, etc).

**Daily Living Skills (If Appropriate)** NA

**Functional Vocational Evaluation (If Appropriate)** NA

37. The program described in the transition plan is vague. It does not specify the daily living skills that the curriculum will foster, or how those skills will be developed. The “Nouns and Sounds” computer program to which it refers is not well described, and its purpose is unclear. There is no explanation as to how outings around the high school campus to find various school facilities will assist Student in finding her way in the larger community. Student enjoys a variety of activities, including listening to country music, going to church, shopping, socializing, communicating, and bowling. The transition plan does not address these activities. Nor does the transition plan address Student’s use of her touch talker and Intellikeys device. Consequently, the transition plan does not address Student’s unique needs, and was not reasonably calculated to provide Student with an educational benefit. Indeed, there was no evidence that Student has benefited from the transition plan since her exit from special education. Under these circumstances, Respondents failed to provide a FAPE to Student.

#### *E. Progress Reports*

38. A student’s progress must be measured and reported to the parent. The failure to do so is a procedural violation of the IDEA. Such a procedural violation may constitute a denial of a FAPE, if it deprived the student of an educational benefit, or impaired the ability of the student’s parents to participate in decisions regarding the student’s education. In general, when a student’s attains the age of 18, a student’s educational rights are transferred from the parents to the student, unless a guardian or conservator has been appointed for the student. A student who has reached the age of 18 and for whom no guardian or conservator has been appointed is defined as a “parent” for purposes of California special education law.

39. In the “Comments” section of the IEP, the team stated that the transfer of educational rights to Student was discussed, and that parent would be sent a copy of the new IEP and a copy of the parent’s educational rights. An unidentified person signed the IEP in the “Parent Approval” space, and someone checked a box above the signature line stating: “The transfer of educational rights to the student has been explained at least one year prior to reaching the age of majority (18).”

40. Ms. Harris testified that Student’s progress was measured. The evidence showed that the school customarily issued progress reports twice per year, at the end of each semester, but that no progress reports were issued for Student during the 2004-2005 school year. However, Mother did not establish that she was entitled to obtain progress reports during that school year. Rather, the evidence demonstrated that Student herself possessed her educational rights during the 2004-2005 school year. At that time, Student was 20 years old, and there was no evidence that Student had a conservator or guardian. Mother was not appointed Student’s conservator until September 2006. Therefore Student did not establish that the failure to provide Mother with progress reports violated the IDEA.

41. Moreover, Student has not established that Respondents’ failure to provide reports deprived her of an educational benefit, or impaired Mother’s ability to participate in decisions regarding Student’s education. Therefore, Student has failed to establish that Respondents’ failure to provide reports constituted a denial of a FAPE during the 2004-2005 school year.

*F. Qualifications of Student’s Teacher*

42. Special education students who are orthopedically impaired shall be taught by teachers whose training and credentials are specific to that impairment.

43. Student’s primary eligibility category for special education was “orthopedic impairment.” Ms. Harris’s credentials permitted her to teach Students with a variety of primary disabilities, including moderate/severe mental retardation, and multiple disabilities, but she did not have a credential specifically authorizing her to teach students whose primary disability is orthopedic impairment.

44. Student did not demonstrate how Respondents’ failure to comply with this technical requirement caused Student any harm. Student had multiple handicaps and severe retardation, and Ms. Harris’s credentials corresponded to those infirmities. As was discussed above, Student was harmed because her IEP was inadequate; not because Ms. Harris lacked a particular teaching credential.

*Student's IEP of December 6, 2005*

*A. Failure to Perform an FAA and Develop a BIP*

45. The analysis of this issue is the same as was discussed above with respect to the IEP of December 16, 2004. An FAA is performed and a BIP is developed when the student's maladaptive behaviors are negatively impacting the student's ability to achieve her IEP goals. A failure to perform an FAA may constitute a procedural violation of the IDEA. Such a violation is a denial of a FAPE if it impaired the ability of the student's parents to participate in decisions regarding student's education, or deprived the student of an educational opportunity.

46. The IEP team found that a BIP was unnecessary. Student offered no evidence that Student exhibited any problem behaviors in the classroom that adversely impacted her ability to achieve any of the goals in her IEP. Respondents did not have any obligation to perform an FAA and develop a BIP. There was no denial of a FAPE on this ground.

*B. Present Levels of Educational Performance, Goals and Objectives, and Measurement of Progress in the IEP of December 6, 2005*

47. The reauthorized IDEA, which became effective on July 1, 2005 and was in effect at the time this IEP was formulated, provides that an IEP must contain a statement of the current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP, so as to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals. The failure of the IEP to include the required elements is a procedural violation of the IDEA. A procedural violation is a denial of a FAPE if it significantly impaired the ability of the student's parents to participate in decisions regarding the student's education, or deprived the student of an educational opportunity. An IEP that is not properly formulated may also constitute a denial of a FAPE if the IEP thereby fails to address the student's unique needs, or is not reasonably calculated to provide the student with some educational benefit.

48. The IEP team at the December 6, 2005 meeting consisted of Ms. Harris, Mother, Ms. McFee, (the principal in charge of special education programs for Rialto High and other schools), and a representative of Mavis House. Student did not attend. At the time of the meeting, Student was 21 years old, her educational rights had been transferred to her, and she had no conservator or guardian.

49. The IEP of December 6, 2005, is largely the same as Student's IEP of December 16, 2004. The IEP of December 6, 2005, stated that the purpose of the meeting was "Exit from Special Education." However, the IEP incorrectly stated that the "Exit Reason" was "Graduated/Regular." The team noted that Student's primary eligibility was orthopedic impairment. The IEP stated that Student would receive special education in a "Small Group/SDC" setting for 360 minutes per week, commencing December 7, 2005 and

ending on June 7, 2006. The IEP also provided that Student would receive APE services during that time period in a small group setting for 20 minutes, once per week.<sup>4</sup> The team again mentioned that Student's general cognitive delays impacted her rate of learning and development such that she needed a separate classroom, and justified her out-of-District placement on the grounds that the most appropriate placement in the least restrictive environment was not available at Student's home school.<sup>5</sup>

50. Ms. Harris drafted the present levels of educational performance portion of the IEP. The present levels of educational performance, so far as they are relevant to this Decision, were substantially identical to those contained in the December 16, 2004, IEP, which was quoted above. The Math level added that Student will sometimes pick up the puzzle pieces. The Written Expression level elaborated that Student will make marks on paper with hand-over-hand assistance. The Language/Communication/Speech level was entirely changed to:

[Student] communicates her wants and needs either through a communication device, picture icons, or through facial expressions and gestures. When she is happy she will laugh and cry when she is sad.

51. Nine goals and related short-term objectives were formulated by the team, all of which were different from the goals set in the IEP of December 16, 2004 IEP. The goals emphasized more skills than those in the previous IEP. They included such goals as: Student lifting her head up and answering "yes" and "no" questions using facial expressions or a communications device while listening to "current events, stories, etc."; Student "will attend to easy, familiar tasks without supervision"; Student will stand and sit using assistive equipment; Student will answer question about the weather during campus walks; Student will stack geometric shapes in the correct sequence; and Student will make a choice between flash cards when presented with a field of two cards. Most of the goals called for measuring by charting or by teacher data sheet. However, the geometric shape stacking and flash card goals did not contain methods of measuring. Two measurable, progressive short-term objectives were set for each goal, with target dates of February 7, 2006, and April 7, 2006.

52. The team left blank that part of the IEP form which stated how frequently progress reports as to the goals would be given to parents. The team recorded the Parent Priorities for the Long-Term Education of the Student as "Increase skills in all areas." In the "Comments" section of the IEP, the team noted that Student would be 22 in August 2006, and noted no less than three times that Student would exit Rialto High on June 7, 2006. The team also noted that Mother and the Mavis House representative were aware that Student would be exited on June 7, 2006. The team again recommended MOVE equipment. The

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<sup>4</sup>At hearing the evidence demonstrated that the reference to "20 minutes" was a typographical error. Student received 40 minutes of APE once per week.

<sup>5</sup>The IEP again mistakenly indicated that Student resides in the home of her parent/guardian. This error is not significant, for the same reasons as were discussed above.

team also noted that the speech therapist would observe Student using her “communication device” and would “make recommendations for continued use or another device.” The IEP was signed in the “Parent Approval” space by Mother and by an unidentified person, indicating consent to the IEP and receipt of a copy of their rights.

53. The IEP sets forth measurable goals and, with the exceptions noted above, an appropriate means for measuring them. However, as was discussed above with respect to the IEP of December 16, 2004, the goals do not relate to the present levels of educational performance. Neither the present levels of educational performance nor the goals based upon them accurately reflect the range of Student’s abilities as measured by the triennial assessment. There was no specific evidence that the IEP team took Student’s triennial assessment results into account in formulating the IEP. The IEP does not mention Student’s Intellikeys device, although, prior to arriving at Rialto High, Student had skills using that equipment. The IEP mentions Student’s “communication device,” but it contains no goals that specify how Student’s ability to use the touch talker will improve, or that specify how consistently Student will use the touch talker. In general, as with the December 16, 2004 IEP, there was very little in this IEP which addressed Student’s unique needs or which was reasonably intended to provide Student any educational benefit.

54. As was discussed above, Respondents’ failure to develop an appropriate IEP that meets Student’s unique needs has denied Student an educational benefit. Under these circumstances, the IEP of December 6, 2005, which governed Student’s educational program at Rialto High during the 2005-2006 school year, failed to provide Student with a FAPE.

### *C. Assistive Technology*

55. An IEP team must consider whether the student requires assistive technology and, if so, the nature and amount of such services must be set forth in the IEP. If assistive technology is required to meet the student’s unique needs, and to provide the student with an educational benefit, then the school district’s failure to provide it is a denial of a FAPE.

56. The IEP of December 6, 2005, like the IEP of December 16, 2004, did not mention Intellikeys. Under “Assistive Technology Needs,” the IEP of December 6, 2005 states only: “Access to big button switches, which can be attached to appliances, computers, etc. to help [Student].” This is almost identical to the language used in the IEP of December 16, 2004. No goals were set with the respect to the Intellikeys device. The goals and the “Comments” sections of the IEP refers to a “communication device,” but, as was described above, no goals were set which specify how Student’s ability to use the touch talker will improve, or that specify how consistently Student will use the device. As with the previous year’s IEP, the transition planning section of this IEP refers to Student using a “Nouns and Sounds” computer program, but the program is not described, and no goals are set. Under “Program Modifications and Support” the IEP only states, as did the prior year’s IEP: “Use of specialized, adaptive equipment to enhance participation.” The equipment referred to is not described.

57. Mother visited the classroom on at least two occasions during the 2005-2006 school year, and did not see the touch talker used.<sup>6</sup> She was told that Intellikeys could not be used because there was no appropriate computer equipment available in the SDC classroom. By failing to specifically provide for Student's use of Intellikeys, and to set appropriate goals which specified in what manner and how consistently Student would use the touch talker or another comparable communications device, the IEP of December 6, 2005, failed to meet Student's unique needs, and failed to reasonably provide her with an educational benefit. Respondents, therefore, denied Student a FAPE during the school year 2005-2006.

*D. Student's Transition Plan*

58. The analysis of this issue is the same as the analysis performed above with respect to the IEP of December 16, 2004. An IEP for a student who, like Student, has reached the age of 20, must contain a transition plan. Further, the school district must invite to the IEP meeting a representative of any agency which may be providing or paying for transition services. A failure to comply with the procedural requirements of the IDEA is a denial of a FAPE if it significantly impaired the ability of the student's to participate in decisions regarding the student's education, or deprived the student of an educational opportunity. A transition plan that fails to address the student's unique needs or is not reasonably calculated to provide the student with an educational benefit also denies the student a FAPE.

59. Student's IEP dated December 6, 2005, contains a transition plan. It is nearly identical to the transition plan contained in the IEP of December 16, 2004. Both IEPs contain the identical "Postschool Goals," and both contain a section entitled "Present Levels of Performance," but it is unclear whether the skeletal comments under this section relate to the transition plan or to the IEP in general. The "Present Levels of Performance" contained in the two IEPs are also substantially identical. Under the category "Transition Services Needed," both IEPs state: "Student's curricula will lead to a high school certificate of completion of IEP." The "Transition Services to Be Provided" are also the same in both IEPs.

60. Respondents again failed to invite a representative from the Regional Center to the IEP to participate in the formulation of the transition plan. However, the evidence did not demonstrate that Respondents were obligated to invite the Regional Center. Student did not demonstrate that the Respondents were aware, or should have been aware, that the

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<sup>6</sup>The use of the touch talker in the classroom was documented in a report dated February 2006 by Linda Robinson, entitled "Observation of [Student's] Communication Device." The report states, "Earlier communication with [Student's] teacher indicates that she can usually locate the icon she prefers from 12 Or [sic] 16 choices. This would suggest that it is appropriate in terms of choices." The document is not signed, it is not on any letterhead, and it does not identify the status, education, or position of "Linda Robinson." Nor does it specifically identify the "communication device" as a touch talker. Testimony at hearing substantiated that Ms. Robinson is a speech and language pathologist and that she is indeed referring to the touch talker in her report. The report indicates that Student can effectively use the touch talker. The report does not document how consistently Student used the touch talker in the classroom.

Regional Center was likely to be responsible for providing or paying for transition services. The transition services set forth in the plan do not require the Regional Center's participation.

61. As was also discussed above with respect to the IEP of December 16, 2004, the transition plan does not address numerous areas, such as Student's functional skills, her communication skills, her use of Intellikeys, and her interests in socializing, listening to music, and generally being out in the community. It does not specify the daily living skills that the curriculum will foster, or how those skills will be developed. The "Nouns and Sounds" computer program is not well described, and its purpose is unclear. Consequently, the transition plan does not address Student's unique needs. It was not reasonably calculated to provide Student with an educational benefit, and, indeed, there was no evidence that Student benefited from the transition plan. Under these circumstances, Respondents failed to provide a FAPE to Student.

#### *E. Progress Reports*

62. Student's progress must be measured and reported to her parent. The failure to do so may be a procedural violation of the IDEA. Such a procedural violation may constitute a denial of a FAPE, if it deprived the student of an educational benefit, or impaired the ability of the student's parents to participate in decisions regarding the student's education. In general, when a student attains the age of 18, a student's educational rights are transferred from the parents to the student, unless a guardian or conservator has been appointed for the student. A student who has reached the age of 18 and for whom no guardian or conservator has been appointed is defined as a "parent" for purposes of California special education law.

63. Student's progress was measured, although two of the goals did not specify the means of measurement. Additionally, Mother received a progress report on June 6, 2005, at the end of the school year, although she did not receive reports during the school year. However, Mother did not establish that she was entitled to receive any progress reports. Rather, the evidence demonstrated that Student herself possessed her educational rights during the 2005-2006 school year. At that time, Student was 21 years old, and there was no evidence that Student had a conservator or guardian. Mother was not appointed Student's conservator until September 2006. Therefore Student did not establish that the failure to provide Mother with progress reports violated the IDEA.

64. Moreover, Student has not established that Respondents' failure to provide progress reports deprived her of an educational benefit, or impaired Mother's ability to participate in decisions regarding her education. Therefore, Student has failed to establish that Respondents' failure to provide reports constituted a denial of a FAPE during the 2005-2006 school year.

*F. Qualifications of Student's Teacher*

65. Since Ms. Harris was Student's teacher during the 2005-2006 school year, the analysis of this issue is identical to the analysis set forth above with respect to the 2004-2005 school year. In short, Student did not demonstrate how the failure of Ms. Harris to have a specific credential to teach orthopedically impaired students caused Student harm.

*G. Providing Mother with a Copy of the IEP of December 6, 2005*

66. The analysis of this issue is the same as the analysis above regarding Student's progress reports. A parent is entitled to a copy of the child's IEP. The failure to provide a parent with a copy of the IEP may be a procedural violation of the IDEA, which is actionable if it deprived the student of an educational opportunity, or deprived the student's parents of the opportunity to participate in decisions regarding their child's education. In general, when a student attains the age of 18, a student's educational rights are transferred from the parents to the student, unless a guardian or conservator has been appointed for the student. A student who has reached the age of 18 and for whom no guardian or conservator has been appointed is defined as a "parent" for purposes of California special education law.

67. Student was 21 years old during the 2005-2006 school year, her educational rights had been transferred to her three years before, and there was no evidence that she had a conservator or guardian prior to September 2006, when Mother was appointed her conservator.

68. Mother requested a copy of the IEP of December 6, 2005, at the IEP meeting on that date. She was told that the copy machine was broken, but that a copy of the IEP would be sent to her, and there is a dispute as to whether Respondents sent Mother a copy of the IEP. However, Student presented no evidence that Mother was entitled to a copy of the IEP of December 6, 2005, in that Student held her own educational rights at the time. Consequently, Student failed to establish that Respondents violated the IDEA in this respect.

69. Furthermore, even if Mother were entitled to a copy of the IEP, as a parent, there was no evidence that Mother's failure to have a copy of the IEP prevented her from participating in decisions regarding the Student's education, or deprived Student of an educational opportunity. Mother was at the IEP meeting, and knew the contents of the IEP. She testified that she spoke to Student's teacher and visited Student's classroom several times during the 2005-2006 school year. Mother had opportunities to participate in the Student's education during the 2005-2006 school year, and she did. Under these circumstances, respondents did not deny Student a FAPE on this ground.

*H. Changing Student's Placement Without Mother's Prior Written Consent*

70. A District cannot change a student's placement without giving prior written notice or obtaining parental consent. Any such change in placement may be a procedural violation of the IDEA. Such a procedural violation can constitute a denial of a FAPE if it deprived the student of an educational benefit, or impaired the ability of the student's parents to participate in decisions regarding the student's education. However, when a student attains 18 years of age, the student's educational rights transfer to the student, even though parents maintain the right to attend their adult children's IEP meetings. In California, a student generally becomes ineligible for special education upon attaining 22 years of age.

71. At Mother's request, Respondents convened an addendum IEP meeting on June 5, 2006, two days before the end of Student's school term on June 7, 2006. Mother, her attorney, Ms. Harris, Ms. McFee, a District Administrator, and a representative from the Regional Center attended the meeting. The addendum IEP notes contain various comments and requests made by Mother. They also state that Mother withdrew her consent to the IEP of December 6, 2005, and requested a full reassessment and a redevelopment of the IEP. Respondents denied these requests.

72. Mother also withdrew her consent to the IEP of December 6, 2005 in a letter to Ms. McFee dated June 7, 2006. The Superintendent received the letter on that same day. On June 8, 2006, Student received her certificate of completion, as contemplated by the IEP of December 6, 2005, and the addendum IEP of June 6, 2006. Mother contends that the issuance to Student of this certificate constituted a change in placement of Student without Mother's consent, and thus it was a denial of a FAPE.

73. Student did not establish that respondents denied Student a FAPE by issuing her the certificate of completion without Mother's consent. First, notwithstanding the Respondent's consideration of Mother's requests at the IEP meetings of December 6, 2005 and June 6, 2006, Mother did not hold Student's educational rights at those times. Under these circumstances, Student did not demonstrate that Mother had any authority to consent to the IEP, or to withdraw her consent to the IEP, or to consent to a placement, or to withdraw her consent to a placement, or to receive prior written notice of any action. Additionally, Student did not demonstrate that the issuance of a certificate of completion, when Student had completed the school term, and when her eligibility for special education was about to terminate because of her age, is actually a change in placement that requires prior written notice or consent under the IDEA. Under these circumstances, Respondents did not deny Student a FAPE by issuing her a certificate of completion.

*Compensatory Education*

74. Compensatory education is an equitable remedy that may be ordered if a student has been denied a FAPE, even if the student is no longer eligible for special

education services. An award of compensatory education need not be on a “day-for-day” basis.

75. Respondents denied Student a FAPE during the school years 2004-2005 and 2005-2006, primarily because Student’s educational program, both as written in her IEPs and as implemented in her classroom, failed to provide specific and consistent instruction with respect to Student’s touch talker and her Intellikeys device. Student had demonstrated some ability with these devices prior to enrolling at Rialto High. Use of the touch talker enhanced Student’s ability to communicate, and both devices provided Student opportunities to learn communication and math skills.<sup>7</sup> Expert testimony with respect to the touch talker established that Student currently requires training on the touch talker to ensure that Student understands and can differentiate the icons, and is able to communicate her needs with the touch talker throughout all of her environments. The failure of her IEPs to specifically provide for Student’s consistent use of these devices, and the expansion of her skills on these devices, deprived Student of educational benefits for two consecutive school years. Compensatory education is therefore appropriate, to offset this deprivation.

76. According to the Riverside District IEP dated March 4, 2004, Student was practicing on the Intellikeys system for approximately 45 minutes a day. She was practicing with her touch talker while standing in her stander to answer questions, in addition to using the touch talker for an unidentified amount of time to express food choices. As of the time of the hearing, Student was attending the Redlands ABLE program for five to six hours each day, and also receives various services at her residence in Mavis House, which necessarily limits the time that is available to Student to receive training on these devices. Based upon all of these factors, Student is entitled to receive 60 minutes of one-to-one training per week in using the Intellikeys device, and 60 minutes of one-to-one training per week in using the touch talker. Respondents are to provide these services for 52 weeks over a period of 14 consecutive months, at a location to be selected by and convenient to Student.

## LEGAL CONCLUSIONS

### A. *Applicable Law*

1. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet

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<sup>7</sup>As is noted elsewhere in this Decision, the IEP also fails to provide Student specific instruction and services with respect to APE and other fine and gross motor skills development. However, the evidence demonstrated that Student currently receives services with respect to these areas, and there was no specific evidence that Student had any particular skills or abilities in these areas that Respondents failed to address.

the state educational standards, include an appropriate school education in the state involved, and conform to the child’s IEP. (20 U.S.C. § 1402(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. § 1402(29).)<sup>8</sup>

2. Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

3. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reasons of mental retardation, hearing impairments, speech or language impairments, visual impairments, ED, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C. § 1401 (3)(A)(i) and (ii); Cal. Code Regs., tit. 5, §3030.)

4. Students who are orthopedically impaired shall be taught by teachers whose professional preparation and credential authorization are specific to orthopedic impairment.<sup>9</sup>

5. Generally, a student continues to be eligible to receive special education and related services until the student reaches the age of 22, unless the student has received a “regular high school diploma.” (Ed. Code, § 56026, subd.(c)(4); Ed Code, § 56026.1.) The precise time that the student’s eligibility ceases during the student’s 22nd year depends upon the student’s birth month and the commencement of the fiscal year. A student is not permitted to begin a new fiscal year in a special education program if he or she becomes 22 years of age during the months of July, August, or September in a new fiscal year. However, if the student is in a year-round school program and is completing the program in a term that extends into the new fiscal year, then the student may complete that term. (Ed. Code, § 56026, subd. (c)(4)(A).)

6. When a student who has been receiving special education services reaches the age of 18, all educational rights are transferred to the student, and the district shall notify the student and the parent of the transfer of rights. (Ed. Code, § 56041.5) If no guardian or

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<sup>8</sup> Certain of the Student’s allegations concern the period of time prior to the reauthorization of the IDEA, which became effective July 1, 2005. Thus, this case straddles both versions of the IDEA. To the extent that provisions of the former version of the IDEA differ from the reauthorized version, and such differences bear directly upon the determination of any issue in this Decision, they will be specifically noted. In most, if not all instances, however, the provisions of the former IDEA that bear directly upon the determination of the issues in this Decision were not amended by the reauthorized IDEA.

<sup>9</sup>Challenges to a teacher’s credentials under the IDEA are circumscribed, however. For example, under the IDEA regulations effective October 2006, a student has no right of action under the IDEA for the failure of a teacher to be “highly qualified” under the No Child Left Behind Act. (34 C.F.R. § 300.18(f).)

conservator has been appointed for the student, the student becomes a “parent” for purposes of special education law. (Ed. Code, § 56028, subd. (a)(2).)

7. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance, a statement of measurable annual goals and objectives, that are based upon the child’s present levels of academic achievement and functional performance, a description of how the child’s progress toward meeting the annual goals will be measured, when periodic reports of the child’s progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year.<sup>10</sup> The district must give the parent a copy of the IEP. (34 C.F.R. § 300.345(f).)<sup>11</sup>

8. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

9. If a student who is receiving special education services transfers during the academic year into another school district which is in a different local plan area, the new school district shall, within 30 days, adopt the student’s previously approved IEP, or shall develop, adopt, and implement a new IEP. (Ed. Code, § 56325, subd. (a)(1).)

10. Reassessments of the student shall be conducted if the school district determines that a reassessment is warranted, or if the student’s parents or teacher requests a reassessment. (Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the District agree otherwise, and shall occur at least once every three years, unless the parent and the District agree, in writing, that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a)(2).)

11. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student’s educational program is appropriate. (20

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<sup>10</sup> The version of the IDEA in effect prior to July 1, 2005 also required that the annual goals be divided into short-term objectives, which are measurable, intermediate steps between the present levels of performance and the annual goals. In the current version of the IDEA, only IEPs for students who take alternate assessments aligned to alternate achievement standards are required to have short-term objectives. Since both of the IEPs at issue have short-term objectives, this amendment to the IDEA has no significant impact on this Decision.

<sup>11</sup> In October 2006, amendments to the C.F.R. to correlate to the reauthorized IDEA became effective. Unless otherwise specified, the citations herein are to the version of the C.F.R. that was in effect when the IEPs that are the subject of this Decision were drafted.

U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025 at pp.1031-1033.)

12. California law provides that a functional analysis assessment (FAA) and the behavior intervention plan (BIP) which is derived from the FAA, occur after the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment pursuant to Education Code section 56320 et seq. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) The BIP is a written document, based upon the FAA, which is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f); Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Such interventions are designed to eliminate maladaptive behaviors that inhibit the student's ability to access the student's education, and to encourage positive behavior so that the student may be educated in the least restrictive environment. (Ed. Code, § 56520, subd. (a).)

13. The United States Supreme Court recently ruled that the student in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

14. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479 at 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034], the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

15. In *Rowley, supra*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best

education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

16. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.)

17. Each public agency must ensure that assistive technology devices and assistive technology services are available to a student with a disability, if required as part of a student's special education or related services. (34 C.F.R. § 300.308.) As part of the IEP process, the IEP team must consider whether the child requires assistive technology devices and services. (20 U.S.C. 1414(d)(3)(b)(v); 34 C.F.R. § 300.346(a)(2)(v)). If the IEP team determines that a student needs assistive technology to receive a FAPE, the IEP must include a statement to that effect, and the nature and amount of such services. (34 C.F.R. § 300.346(c); Off. of Special Education Programs, interpretative letter (November 27, 1991), 18 IDELR 1697.)

18. For each student, beginning with the first IEP to be in effect when the student is 16, the IEP must include as statement of the transition service needs of the student.<sup>12</sup> (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) The district shall invite to the IEP a representative of any other agency that is likely to be responsible for providing or paying for transition services, and, if the invited agency does not send a representative to the meeting, the district shall take other steps to obtain participation of the other agency in the planning of any transition

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<sup>12</sup> Prior to July 1, 2005, the IDEA required the IEP to address transition services at age 14, or younger, if the IEP team deemed it appropriate.

services. (34 C.F.R. § 300.345.)<sup>13</sup> The reauthorized IDEA, effective July 1, 2005, defines transition services to require a focus “on improving the academic and functional achievement of the disabled child to facilitate the child’s movement from school to post-school activities,” which is based upon the child’s needs, and considers the child’s strengths, preferences, and interests. (20 U.S.C. §1401(34)). The reauthorized IDEA also requires that the IEP include a statement of measurable goals based on transition assessments and an outline of services needed to assist the child in reaching those goals. (20 U.S.C. §1414(d)(1)(A)(i)(VIII).) The failure of an IEP team to comply with the requirements for transition planning is a procedural violation of the IDEA. (*Virginia S., et al. v. Dept. of Ed., State of Hawaii* (D.Hawaii, January 8 2007, Civ. No. 06-00128) 2007 U.S. Dist. Lexis 1518.)

19. A school district must provide parents with prior written notice when it proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).) Graduating from high school with a certificate of completion, and not a regular diploma, if the student is still of age to receive special education services, does not constitute a change in placement so as to require prior written notice. (34 C.F.R. § 300.122(a)(3)(ii), (a)(3)(iii).)

20. Consent to an IEP is voluntary, and may be revoked at any time. If the parent revokes consent to an IEP, it does not negate an action that has occurred after the consent was given and before the consent was revoked. (Ed. Code, § 56021.1, subd. (c); 34 C.F.R. § 300.500 (b)(1)(iii)(A)(B).)

21. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*) Relief may be provided even though the student is no longer eligible for special education services. (*Capistrano Unified School District v. Wartenburg* (9th Cir. 1995) 59 F.3d 884, 890; *Student W. v. Puyallup School Dist., supra*, 31 F.3d 1496.)

## B. *Determination of Issues*

Based on the factual findings and applicable law, it is determined as follows:

Issue 1: Did Respondents deny Student a FAPE during the school years 2004-2005 and 2005-2006 by failing to conduct an appropriate reassessment of Student upon her enrollment in Rialto High?

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<sup>13</sup>The provision that the district take steps to insure the participation of the public agency at the IEP was eliminated from the most recent IDEA regulations, which were published in August 2006, after the IEP meetings in this matter were held.

22. As is stated in Legal Conclusion 10, Respondents are obligated to reassess students triennially. Absent an agreement to do so, or cause to do so, they are not obligated to reassess students more frequently than annually. Based upon Factual Findings 1, 2, and 6 through 8, Respondents had no cause to re-assess Student upon her enrollment in Rialto High, and there was no agreement that they would do so.

Issues 2A and 3A: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to conduct an FAA and create a BIP?

23. Relying on Legal Conclusions 11 through 13, and based upon Factual Findings 1, 2, 10, 11, and 46, there was no evidence that Student's classroom behavior demonstrated the need for an FAA and a BIP. Respondents did not deny Student a FAPE on this ground.

Issues 2B and 3B: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to provide an appropriate statement of her present levels of educational performance in her IEPs for those school years?

24. Based upon Legal Conclusions 1, 2, 3, 7, 8, and 13 through 16, and Factual Findings 1, 2, 13 through 29, and 48 through 53, Respondents denied Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to provide an accurate and complete statement of Student's present levels of educational performance which reflected Student's performance levels and abilities.

Issues 2C and 3C: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to develop appropriate annual goals and short-term objectives, and by failing to include an appropriate method of measuring Student's progress?

25. Based upon Legal Conclusions 1, 2, 3, 7, 8, and 13 through 16, and Factual Findings 1, 2, 13 through 29, and 48 through 53, Respondents denied Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to develop appropriate annual goals and, for the school years 2004-2005, short-term objectives, which accurately reflected Student's performance levels and abilities. Respondents generally included methods of measuring Student's progress in the IEPs, and therefore they did not deny a FAPE on this ground.

Issues 2D and 3D: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to provide assistive technology devices and services to Student?

26. Based upon Legal Conclusions 1, 2, 3, 7, 8, and 13 through 17, and Factual Findings 1, 2, 31 through 32, and 56 through 57, Respondents denied Student a FAPE by failing to provide necessary assistive technology devices and services to Student.

Issues 2E and 3E: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to develop an appropriate transition plan, and by failing to invite the Regional Center to participate in the development of the transition plan?

27. Based upon Legal Conclusions 1, 2, 3, 5, 13 through 16, and 18, and Factual Findings 1, 2, 34 through 37, and 59 through 61, Respondents denied Student a FAPE by failing to develop an appropriate transition plan which accounted for Student's interests and abilities and was intended to provide her with the living skills she would require after she transitioned from special education. Respondents' failure to invite the Regional Center to the IEP meetings of December 16, 2004 and December 6, 2005 did not deny Student a FAPE.

Issues 2F and 3F: Did Respondents deny Student a FAPE during the school years of 2004-2005 and 2005-2006 by failing to measure and/or record Student's progress, and by failing to regularly report her progress to Mother?

28. Based upon Legal Conclusions 1, 2, 3, 7, and 13 through 16, and Factual Findings 1, 2, 6, 39 through 41, Respondents did not deny Student a FAPE on these grounds. Student's progress was measured and recorded. Student did not establish that Mother was entitled to reports on her progress, given Student's age and the fact that no conservator or guardian had been appointed for her. Under these circumstances, Respondents' conduct did not deprive Student of an educational benefit or deprive Mother of the opportunity to participate in the development of Student's educational program.

Issues 2G and 3G: Did Respondents deny Student a FAPE during the school years 2004-2005 and 2005-2006 by failing to provide Student with a teacher who was qualified to teach students whose primary eligibility is orthopedic impairment?

29. Based upon Legal Conclusions 1 through 4, and 13 through 16, and Factual Findings 43, 44, and 65, Student did not demonstrate how Ms. Harris's technical lack of this specific credential denied Student a FAPE.

Issue 3H: Did Respondents deny Student a FAPE during the school year of 2005-2006 by failing to timely provide Mother a copy of the IEP of December 6, 2005?

30. Based upon Legal Conclusions 1, 2, 3, 6, 7, and 13 through 16, and Factual Findings 1 through 4 and 67 through 69, Respondents did not deny Student a FAPE on this ground. Student did not establish that Mother was entitled to receive a copy of the IEP. Further, Student did not establish that she was deprived of an educational benefit or that Mother was deprived of the ability to participate in the development of Student's educational program by reason of Respondents' failure to timely send Mother a copy of this IEP.

Issue 3I: Did Respondents deny Student a FAPE during the school year of 2005-2006 by changing Student's placement without Mother's prior written consent?

31. Based upon Legal Conclusions 1, 2, 3, 5, 6, 13 through 16, 19, and 20 and Factual Findings 1 through 4, and 71 through 73, Respondents did not deny Student a FAPE on this ground. Student did not establish that her receipt of a certificate of completion constituted a change of placement, or that Mother's withdrawal of consent to the IEP of December 6, 2005, had any practical or legal effect.

Issue 4: Is Student entitled to compensatory education?

32. Based upon Legal Conclusions 1, 2, 3, 7, 8, 13 through 18, and 21, and Factual Findings 1 through 4, 13 through 29, 31, 32, 34 through 37, 48 through 54, 54, 56, 57, 59 through 61, and 75 through 76, Student is entitled to compensatory education, because Respondents have failed to provide a FAPE.

### ORDER

1. Respondents shall provide one-to-one training to Student in the use of Intellikeys for 60 minutes per week, for 52 weeks, to be provided over the course of 14 consecutive months.

2. Respondents shall provide one-to-one training to Student in the use of Student's touch talker device, for 60 minutes per week, for 52 weeks, to be provided over the course of 14 consecutive months.

3. All services are to be provided at a location convenient to the Student, with the Respondents responsible for providing transportation to and from the site where the instructional services are rendered, if transportation is required.

4. All instructional services ordered herein are to be provided through qualified personnel. The personnel providing the services may be on the staff of the District or the Superintendent, or, at the option of the Respondents, they may contract with a qualified NPA to provide the services ordered herein.

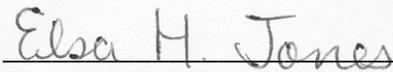
### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on Issues 2B, a portion of 2C, 2D, a portion of 2E, 3B, a portion of 3C, 3D, a portion of 3E, and 4. The District and the Superintendent prevailed on Issues 1, 2A, a portion of 2C, a portion of 2E, 2F, 2G, 3A, a portion of 3C, a portion of 3E, 3F, 3G, 3H, and 3I.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: February 14, 2007

A handwritten signature in cursive script that reads "Elsa H. Jones". The signature is written in black ink on a light-colored background.

ELSA H. JONES

Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division