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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

J.E., a minor, by and through her  
parents B.E., and C.E.,

Plaintiffs,

v.

ORANGE UNIFIED SCHOOL  
DISTRICT,

Defendant.

CASE NO. SA CV 07-1253 DOC (Ex)  
JUDGMENT

This action came on for hearing before the Court, on September 29, 2008, Honorable David O. Carter, District Judge Presiding, on Defendant's Motion for Summary Judgment. The evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant's motion be granted, that the plaintiffs take nothing, that the action be dismissed on the merits and that defendant Orange Unified School District recover its costs, to be determined by the Clerk.

DATED: September 30, 2008

*David O. Carter*  
United States District Judge

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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**J.E., a minor, by and through her  
parents B.E., and C.E.,**

**Plaintiff(s),**

**v.**

**ORANGE UNIFIED SCHOOL  
DISTRICT,**

**Defendant(s)**

**CASE NO. SA CV07-1253 DOC (Ex)**

**ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT;  
DENYING PLAINTIFFS’ MOTION  
FOR SUMMARY JUDGMENT**

Before the Court are Plaintiffs’ and Defendant’s Cross Motions for Summary Judgment seeking review of a decision by Administrative Law Judge Jacqueline Jones. After considering the Moving, Opposing, and Replying papers, as well as oral argument, and for the following reasons, the Court hereby GRANTS Defendant’s Motion for Summary Judgment and DENIES Plaintiffs’ Motion for Summary Judgment.

**I. BACKGROUND**

Plaintiff, J.E. (“Student”) is a nine-year-old girl. Plaintiffs B.E. and C.E. (“Parents”) are Student’s parents. Student presently attends The Prentice School (“Prentice”), a private school. Plaintiffs seek reimbursement from Defendant Orange Unified School District (“OUSD” or the “District”) for Student’s tuition. They contend that the District failed to provide student

1 appropriate educational services, necessitating her transfer to Prentice.

2 While in first grade in 2004 to 2005, Student attended the Corona-Norco Unified School  
3 District ("Corona-Norco"). In September 2004, Drs. Eugene Wong ("Dr. Wong") and Dudley  
4 Weist ("Dr. Weist") conducted an "independent psychoeducational assessment" of Student and  
5 prepared a report of their results. As reflected in Drs. Wong and Weist's report, Student scored  
6 in the low-average range of most parts of the Cognitive Assessment System ("CAS") test. On  
7 the Weschler Individual Achievement Test-II ("WIAT-II") Student performed from "extremely  
8 low" to "average." Her scores were similar on the Comprehensive Test of Phonological  
9 Processing ("CTOPP") the Wide Range Assessment of Memory and Learning ("WRAML") and  
10 Wide Range Assessment of Visual Motor Abilities ("WRAVMA"). During the testing, Parents  
11 stated concerns with attention and concentration as well as temper tantrums, anxiety and worry.  
12 Drs. Wong and Weist diagnosed Student with Attention Deficit / Hyperactivity Disorder  
13 ("ADHD"), inattentive type, and a reading disorder. Drs. Wong and Weist identified student as  
14 eligible for consideration for special education and recommended medical consultation.

15 On January 13, 2005 Corona-Norco conducted another assessment based on parent  
16 concerns and to determine eligibility for special education services. Bill Smithson, the school  
17 psychologist evaluated Student and concluded that she was cognitively functioning in the  
18 average range. He relied on the Receptive One-Word Picture Vocabulary Test, the Expressive  
19 One-Word Picture Vocabulary Test, and the Test of Auditory-Perceptual Skills-Revised.  
20 However, he found weakness in the area of visual-perceptual skills using the Test of Visual-  
21 Perceptual Skills. He also identified problems with visual motor integration, reading and  
22 mathematics using the Developmental Test of Visual Motor Integration, the Kaufman test of  
23 Educational Advancement - Second Edition (KTEA-II) and the Brigance Educational Inventory.  
24 He then concluded that Student had a specific learning disability and was eligible for special  
25 educational services.

26 On January 26, 2005, Jill Cleveland, a speech and language pathologist at Corona-Norco,  
27 prepared a speech and language assessment report for Student. She concluded that Student had  
28 difficulty with vocabulary, antonyms, stating differences, providing multiple word-meanings and

1 giving attributes. She noted that student was strong in associations, categorization, similarities,  
2 paragraph comprehension, and pragmatic judgment. Ultimately, she concluded that Student was  
3 entitled to special education in language/speech and that a significant delay/disorder existed in  
4 semantics and morphology/syntax.

5 Corona-Norco created an Individualized Education Program (“IEP”) for Student on  
6 January 26, 2005. This IEP provided for resource specialist program (“RSP”) services of 40  
7 minutes, four days a week, speech and language services 25 minutes, once per week in a small  
8 group, and 10 minutes of reading and writing consultation per week. Parents consented to this  
9 IEP.

10 Parents and Student moved from Corona-Norco to OUSD on or around June 15, 2005.  
11 OUSD is on a year-round “S” track calendar, and was currently on a break when Parents and  
12 Student moved.

13 The District commenced an Interim IEP for Student on June 15, 2005, which provided for  
14 RSP services for 30 minutes daily, speech and language services once a week in small group,  
15 and 100 minutes of physical education per week. Additionally, although not noted on the IEP,  
16 Ms. Parke, Student’s primary teacher, and Ms. Scheiber, Student’s special education teacher,  
17 testified that they engaged in at least 10 minutes of reading and writing consultation per week.  
18 Ms. Parke and Ms. Scheiber also testified that Student’s RSP services were reduced by 10  
19 minutes per week because Student was required to participate in the ExCel reading program, a  
20 requirement of all students in the District, and because her RSP services conflicted with her  
21 scheduled lunch time. This IEP expressly incorporated the goals of the Corona-Norco IEP.  
22 Parents consented to this IEP.

23 Student began school at Imperial School (“Imperial”) on July 25, 2005.

24 On August 17, 2005, the District commenced an IEP for student. This IEP consisted of  
25 30 minutes of RSP services daily, 30 minutes of speech and language services twice a week in  
26 small group, and 100 minutes of physical education per week. This IEP retained two goals of  
27 the Corona-Norco IEP and added three new goals: using blends, digraphs and letter patterns to  
28 create words, and using capital letters and endmark punctuation. The IEP team also discussed

1 “modifications and adaptations” to be used to address Student’s ADHD. At this time, Ms.  
2 Scheiber believed that Student was doing grade-level math, and Ms. Parke testified that she was  
3 using classroom interventions in math with Student. The IEP failed to identify present levels of  
4 performance (“PLOP”). Parents consented to this IEP.

5 Parents became dissatisfied with this IEP because student was having difficulty  
6 completing her homework in a reasonable time, was having behavioral problems at home, and  
7 was throwing tantrums on her way to school. These problems were not reported at the IEP  
8 meetings, except that Student did not like to do homework with her grandfather. Parents  
9 reported her difficulty completing homework to Ms. Parke. Ms. Parke modified Student’s  
10 workload and agreed to accept late assignments without penalty. All of Student’s teachers  
11 reported that she behaved well in class and got along well with others. None reported significant  
12 problems with attention.

13 On November 16, 2005, after 62 days of instruction at Imperial, Parents, through counsel,  
14 notified the District that they had enrolled Student in Prentice, and demanded reimbursement.

15 On November 29, 2005, in response to Student’s placement at Prentice, the District  
16 convened an additional IEP. At this point, Plaintiff’s teachers had identified difficulties in math,  
17 and provided two math goals. Additionally, the special educational services were increased, as  
18 follows: 90 minutes of RSP services daily, 30 minutes of speech and language services twice per  
19 week in a small group, and 100 minutes of physical education weekly. Parents did not accept  
20 this IEP.

21 Parents had a “due process” hearing before Administrative Law Judge (“ALJ”) Jacqueline  
22 Jones over nine days in March, April and May 2007. On July 26, 2007, the ALJ issued the 21-  
23 page decision currently on review, finding for the District on all issues. Plaintiffs then sought  
24 review in this Court.

## 25 **II. STANDARD OF REVIEW**

26 The Individuals with Disabilities Education Act (“IDEA”) expressly provides for District  
27 Court review of an ALJ’s decision. 20 U.S.C. § 1415(i)(2)(A). Such review is unique in that the  
28 District Court is required to review the administrative record and additional, non-record

1 evidence at the request of any party, and then decide the issues by a preponderance of the  
2 evidence. 20 U.S.C. § 1415(i)(2)(C)(i-ii); *see Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467,  
3 1471 (9th Cir. 1993) (“judicial review in IDEA cases differs substantially from judicial review  
4 of other agency actions, in which courts generally are confined to the administrative record and  
5 are held to a highly deferential standard of review.”)

6 Although the Court is required to make an independent decision based on the  
7 preponderance standard, this “is by no means an invitation to the Courts to substitute their own  
8 notions of sound educational policy for those of school authorities which they review.” *Board of*  
9 *Educ. Of Hendrick Hudson Central School Dist., Winchester County v. Rowley*, 458 U.S. 176,  
10 206, 102 S. Ct. 3034 (1982). Instead, the Court must give “due weight” to the proceedings  
11 below. *Id.*; *see also Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)  
12 (“The court, in recognition of the expertise of the administrative agency, must consider the  
13 findings carefully and endeavor to respond to the hearing officer's resolution of each material  
14 issue.”) Ultimately, the degree of deference given to the school authorities and the ALJ is in the  
15 Court's discretion. *Id.* In exercising this discretion, the Court should consider the thoroughness  
16 of the ALJ's findings: where the administrative decision is thorough and careful, it is entitled to  
17 more deference. *Capistrano Unified School Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir.  
18 1995).

19 In seeking review, the parties typically file cross motions for summary judgment, as they  
20 did in this case. However, “the procedure is in substance an appeal from an administrative  
21 determination, not a summary judgment.” *Id.* at 892. The question is not whether a genuine  
22 issue of material fact exists, but whether the ALJ's decision is supported by a preponderance of  
23 the evidence. *Id.* The party challenging the administrative ruling bears the burden of proof.  
24 *Seattle School Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996).

### 25 **III. DISCUSSION**

26 The IDEA, 20 U.S.C. § 1400, *et seq.*, was enacted to assure that students with disabilities  
27 receive a “Free Appropriate Public Education” (“FAPE”). *See also* Cal. Educ. Code § 56000, *et*  
28 *seq.* This means that students with disabilities are entitled to services at no charge that comply

1 with state law and the student's IEP. 20 U.S.C. § 1401(9). The IDEA and its predecessor  
2 statute, the Education for All Handicapped Children Act, were not designed to compel school  
3 districts to maximize the educational benefits given handicapped children. *Rowley*, 458 U.S. at  
4 191-92. Instead, the District is required to provide a meaningful benefit. *Adams v. State of*  
5 *Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *see also Rowley*, 458 U.S. at 200 ("the education  
6 to which access is provided [must] be sufficient to confer some educational benefit upon the  
7 handicapped child.")

8 The Court must conduct a two-party inquiry when confronted with an administrative  
9 appeal in an IDEA case. *Rowley*, 458 U.S. at 206.

10 First, the Court must determine whether the District complied with the detailed procedural  
11 requirements of the IDEA. *Id.* In doing so, mere failure to comply with IDEA procedures, while  
12 a violation of the statute, does not deny a student a FAPE. *R.B. v. Napa Valley Unified School*  
13 *Dist.*, 496 F.3d 932, 938 (9th Cir. 2000). A procedural violation will only deny a FAPE where it  
14 (1) "impedes the child's right to a [FAPE]"; (2) "significantly impede[s]" parental participation  
15 in the decision-making process; or (3) "cause[s] a deprivation of educational benefits." 20  
16 U.S.C. § 1415 (f)(3)(E)(ii); *R.B. v. Napa Valley, supra*.

17 Second, the Court must determine whether the District has satisfied the substantive  
18 requirement of providing a FAPE. *Id.* at 207. A FAPE means special education and related  
19 services provided by the District, that meet state educational requirements, include an  
20 appropriate education, and comply with the Student's IEP. 20 U.S.C. § 1401(a)(9). An  
21 "appropriate" education is one "reasonably calculated to provide . . . educational benefits."  
22 *Gregory K.*, 811 F.2d at 1314. The program must be "tailored to the unique needs of the  
23 handicapped child." *Rowley*, 458 U.S. at 176. However, the IDEA also contains a strong policy  
24 that the student will be "mainstreamed" – i.e. educated in the regular education classroom to the  
25 extent possible. 20 U.S.C. § 1412 (a)(5)(A) ("to the maximum extent appropriate, children with  
26 disabilities. . . , are educated with children who are not disabled."); *Sacramento County School*  
27 *Dist., Bd. of Educ.*, 14 F.3d 1398, 1403 ("This provision sets forth Congress's preference for  
28 educating children with disabilities in regular classrooms with their peers." (collecting cases));

1 see *also* Cal. Educ. Code § 56364(a) (“special classes may enroll pupils only when the nature or  
2 severity of the disability of the individual with exceptional needs is such that education in the  
3 regular classes with the use of supplementary aids and services, including curriculum  
4 modification and behavioral support, cannot be achieved satisfactorily.”)

5 Plaintiffs raise one procedural error, namely that the District failed to adopt a new IEP  
6 within 30 days as required by Cal. Educ. Code § 56325. Further, they raise several substantive  
7 issues. They claim that the interim IEP was not comparable to the Corona-Norco IEP. They  
8 further claim that the August 17, 2005 IEP was insufficient because, (1) it did not include  
9 meaningful goals in each area of Student’s unique need, (2) it did not include PLOP, and (3) it  
10 was generally not reasonably calculated to provide a meaningful educational benefit. The Court  
11 addresses each of these purported defects in turn.

12 **A. Failure to Create a New IEP within 30 Days**

13 Student enrolled in OUSD on June 15, 2005. Because of a scheduled break, Student  
14 began classes on July 25, 2005. The District implemented a new IEP on August 17, 2005, 63  
15 days after Plaintiff enrolled, and 23 days after Plaintiff began classes.

16 When an individual with exceptional needs transfers from one district to another, the  
17 transferee district must provide comparable services under an interim IEP until a new IEP can be  
18 developed. *See* Cal. Educ. Code § 56325(a)(1). The transferee district may rely on the interim  
19 IEP “for a period not to exceed 30 days, by which time the local educational agency shall adopt  
20 the previously approved [IEP] or shall develop, adopt, and implement a new [IEP]. . . .” *Id.*  
21 Plaintiffs claim that this 30-day period began to run when Student enrolled. The District argues  
22 that it began to run when Student started classes. However, the Court need not decide this issue.

23 Even if the District failed to timely implement a new IEP, the record discloses no  
24 evidence that this failure was prejudicial to Plaintiffs. As discussed below, the Interim IEP was  
25 substantially comparable to the Corona-Norco IEP as well as the August 17, 2005 IEP. Further,  
26 Parents participated in the development of both the Interim IEP and the August 17, 2005 IEP.  
27 Thus, there was no prejudice to Parents’ right to participate in the process, or students right to a  
28 FAPE based on the purported 33-day delay in implementing Student’s new IEP.

1           **B.     Failure to Provide Comparable Services in Interim IEP**

2           The Corona-Norco IEP provided for RSP services for 40 minutes, four days a week,  
3 speech and language services 25 minutes, once per week in a small group, and 10 minutes of  
4 reading and writing consultation per week. The District’s Interim IEP provided for RSP services  
5 for 30 minutes daily, speech and language services once a week in small group, and 100 minutes  
6 of physical education per week. The District’s IEP expressly incorporated the goals of the  
7 Corona-Norco IEP, which were attached to the final IEP document.

8           According to Plaintiff, the reduction of RSP services by 10 minutes per week and the lack  
9 of reading and writing consultation denied Student a comparable IEP as required by Cal. Educ.  
10 Code § 56325(a)(1). However, the services provided under the Norco-Corona IEP and the  
11 Interim IEP were substantially similar, thus satisfying Section 56325.

12           It would be unreasonable to expect the transferee district to provide exactly the same  
13 services as the prior district. *See Johnson v. Special Educ. Hearing Office, State of California*,  
14 287 F.3d 1176, 1181 (9th Cir. 2002) (quoting district court with approval as indicating that  
15 “[t]he new agency need not, and probably could not, provide the exact same educational  
16 program.”). Instead, according to the version of section 56325(a) in effect at the time of the  
17 Interim IEP, the school was only required to match the old IEP “to the extent possible within  
18 existing resources.” *See also Ms. S. v. Vashon Island School Dist.*, 337 F.3d 1115, 1133-34  
19 (school must provide IEP that approximates old IEP as closely as possible).

20           Although Student’s RSP services were reduced by 10 minutes per week, this is not a  
21 substantial reduction that would run afoul of the “stay put” provision. *See Johnson*, 287 F.3d at  
22 1181 (“The purpose of the ‘stay put’ provision is to strip schools of the ‘unilateral authority they  
23 had traditionally employed to exclude disabled students . . . from school’ and to protect children  
24 from any retaliatory action by the agency.” (citing *Honig v. Doe*, 484 U.S. 305, 323, 108 S. Ct.  
25 592 (1988))). Further, the reason for the reduction was that Student was required to participate  
26 in the ExCel program along with her classmates – a program that focused on reading, one of  
27 Student’s areas of difficulty. Further, providing additional RSP services would have conflicted  
28 with Student’s scheduled lunch break.

1 With respect to the reading and writing consultation, both Ms. Parke and Ms. Schieber  
2 testified that, although it was not included in the IEP documents, they consulted for at least 10  
3 minutes per week about Plaintiff's reading and writing. In response Plaintiffs submit Scheiber's  
4 testimony that it was not the District's practice to provide services not on the IEP. However,  
5 they submit no evidence contradicting Scheiber and Parke's testimony, which the ALJ deemed  
6 credible. As they bear the burden of persuasion at this hearing, they must present more than  
7 testimony that may or may not contradict the testimony of two witnesses previously deemed  
8 credible by the ALJ.

9 Finally, and somewhat notably, Parents participated in, and consented to, the Interim IEP.  
10

11 In sum, the Interim IEP was qualitatively and quantitatively comparable to the Corona-  
12 Norco IEP. Accordingly, the District did not violate the IDEA in implementing the interim IEP.

### 13 **C. The August 17, 2005 IEP**

14 On August 17, 2005, the District, with participation for Student's teachers and Parents,  
15 commenced the August 17, 2005 IEP. The IEP consisted of 30 minutes of RSP services daily,  
16 30 minutes of speech and language services twice a week in small group, and 100 minutes of  
17 physical education per week.

18 The August 17, 2005 IEP set the following goals for Student: 1) "Student will read a list  
19 of 100 sight words with automaticity as measured by teacher made test using a criteria of 95  
20 percent"; 2) "Student will write in complete sentences when giving a verbal or visual cue as  
21 measured by work samples using criteria of four out of five sentences"; 3) "Student will  
22 correctly use simple capital letters (beginning of sentence, names, I) and endmark punctuation  
23 when given sentences to write as measured by work samples using a criteria of four out of five  
24 sentences"; 4) Student will create recognizable words when given letter combinations with  
25 consonant blends, digraphs and letter patterns containing long and short vowel patterns as  
26 measured by work samples using criteria of eight out of 10 words"; 5) "Student will make gains  
27 in expressive semantic skills as measured by progress towards benchmark goals using criteria of  
28 70 percent." For the fifth goal, the IEP listed two benchmark goals.

1 The August 17, 2005 IEP failed to include PLOP for any goal except “communication  
2 skills” goals. It further failed to include goals in math, attention or behavior.

3 Under the Ninth Circuit’s “snapshot rule,” the Court must consider the goals and methods  
4 of the IEP “at the time the plan was implemented and ask whether these methods were  
5 reasonably calculated to confer [Student] with a meaningful benefit.” *Adams*, 195 F.3d at 1149.  
6 The Court cannot consider the IEP exclusively with the benefit of hindsight, in light of Student’s  
7 progress or the November 29, 2005 IEP. *Id.* In making this assessment, the Ninth Circuit has  
8 stated that, while the IDEA’s required items in an IEP are certainly important, “rigid ‘adherence  
9 to the laundry list of items . . .’” is not an absolute necessity. *W.G. v. Target Range*, 960 F. 2d  
10 1484 (quoting *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990)). This is particularly  
11 compelling where the omitted information is known by other means. *Id.*

#### 12 **1. Failure to include Measurable Goals in All Areas of Disability**

13 The IDEA requires an IEP to contain “a statement of measurable annual goals, including  
14 academic and functional goals designed to [a] meet the child’s needs that result from the child’s  
15 disability; [and b] meet each of the child’s other educational needs that result from the child’s  
16 disability.” 20 U.S.C. § 1414 (d)(1)(A)(i)(II); *see also* Cal. Educ. Code § 56345(a)(2)(A-B).  
17 This permits educators, students, and parents to measure progress though special education  
18 services against identifiable standards.

19 Plaintiffs contend that the August 17, 2005 IEP failed to provide measurable goals in each  
20 area of Student’s unique need because the goals provided were not objectively measurable, and  
21 because certain areas of need were not given goals. The Court disagrees.

22 The goals provided were objective, measurable goals in the area of Student’s difficulty –  
23 i.e. reading and writing. The goals contained objective standards, such as reading words at 95  
24 percent; successfully completing four of five sentences; using capitals and punctuation in four of  
25 five sentences; creating eight out of 10 words, and making gains towards 70% in semantic  
26 benchmarks. The tasks to be completed were also objective: using punctuation, reading words,  
27 completing sentences, etc. Some ambiguity in the goals does not make them “entirely  
28 subjective” as Plaintiffs contend. For instance, whether a written word is “recognizable” is

1 subject to objective determination. Likewise, Plaintiffs identify no authority for the proposition  
2 that the goals cannot rely on educators' expertise in determining progress. For example, whether  
3 a student reads with "automaticity" might well be easier for an educator to determine than a  
4 layperson. This does not render the goals "subjective." Even the most complex goal, Goal 5,  
5 contained an objective, measurable standard: "progress toward benchmark goals using criteria of  
6 70 percent." Accordingly, the five goals provided were satisfactorily "measurable" to comply  
7 with the IDEA.

8 Further, the District did not deny Student a FAPE by failing to provide goals in the areas  
9 of attention, mathematics, and reading comprehension.

10 With respect to attention, Student was diagnosed with ADHD by Drs. Wong and Wiest,  
11 and the District was aware of this diagnosis. However, Student's teachers testified, and the ALJ  
12 concluded, that attention and behavioral problems were never manifested in the classroom  
13 setting. Ms Schieber stated that Student was easily redirected when she got off task, and was  
14 only off task for six to ten seconds during the 30-minute RSP period. Ms. Parke stated that  
15 Student got along well with other students and never exhibited any behavior problems. Indeed,  
16 student was being treated for ADHD with medication. Parents indicated that student had  
17 problems on the way to school and problems with her homework, but provide no evidence of in-  
18 class problems. Nor do they state that they brought up the "attention" difficulty in the IEP  
19 meetings, although they participated. Finally, Ms. Scheiber used "modifications and adaptations"  
20 to contend with Student's ADHD. Accordingly, a specific "attention"-related goal was not  
21 necessary "to enable [Student] to be involved in making progress in the general education  
22 curriculum" or to "meet each of the child's other educational needs." Simply put, no general  
23 "attention" goal was necessary in light of the substantive goals provided by the District.

24 Although the only ADHD expert to testify, Dr. Passaro, claimed that a goal was necessary  
25 to make progress on Student's attention difficulties and that modifications are merely "crutches,"  
26 this does not render the ALJ's findings erroneous. The decision to rely on the opinion of  
27 experienced educators, who had day-to-day contact with Student, rather than an expert who was  
28 not one of Student's teachers, is well within the proper role of the ALJ. The Court will not

1 attempt on a cold record to reconsider such a determination made by the ALJ, who had far  
2 superior access to these witnesses and was in a better position to assess their credibility.

3 With respect to math, the District points out that Drs. Wong and Weist never diagnosed  
4 Student with any disability in math, although her math scores were in the 10th percentile. Dr.  
5 Wong merely stated that her numerical math scores were “within the average” but that her  
6 knowledge of math concepts was “in the low average range.” Dr. Wong did not mention any  
7 concerns in math, and Drs. Wong and Weist found that Student’s needs were in the area of  
8 reading. Ms. Scheiber stated that Student did grade-level math. Ms. Parke used classroom  
9 interventions in math with Plaintiff. Finally, math was only raised as a concern for Student in  
10 the November 29, 2005 IEP, although Parents participated in the August 17, 2005 IEP.

11 With respect to reading comprehension, the parties do not dispute that reading  
12 comprehension was an area of difficulty. Indeed in Drs. Wong and Weist’s report, Student’s  
13 lowest score on the WIAT-II test was in the area of reading comprehension. Their disagreement  
14 concerns whether the reading component of the August 17, 2005 IEP was sufficient to satisfy  
15 Student’s reading comprehension difficulty. The IEP did address Student’s reading difficulty.  
16 However, Plaintiffs’ expert, Dr. Passaro, as well as Ms. Scheiber testified that reading “fluency”  
17 and reading “comprehension” are distinct skills. Plaintiffs and Dr. Passaro contend that the  
18 August 17, 2005 IEP only addressed fluency but not comprehension.

19 Witnesses on both sides testified that fluency and comprehension are related, especially  
20 early in education. Indeed, in discussing Student’s reading comprehension difficulty, Drs. Wong  
21 and Weist state that Student had difficulty reading aloud, that she could not pronounce many  
22 words and that she could not identify the letters that composed certain words. This suggests that  
23 Drs. Wong and Weist also believed that Student’s reading comprehension difficulty was a  
24 consequence of an antecedent difficulty in reading fluency. Indeed, they note that Student  
25 performed very poorly on a written “word fluency” task and suggest that “weak rapid naming  
26 skills which impact reading fluency also contribute to comprehension difficulties when reading.”

27 Here the dispute between the parties is, in essence, the degree of specificity used to  
28 define Student’s special needs with respect to skills that clearly overlap. The fact that Plaintiffs

1 can define a specific difficulty narrowly enough so that it falls outside the IEP does not mean  
2 that the IEP was inappropriate. If deference to educators is to mean anything, the Court cannot  
3 resolve this issue for them, particularly in light of the disagreement between experienced  
4 witnesses.

5 In sum, the goals included in the August 17, 2005 IEP were imperfect. However, they  
6 were not defective to such a material degree that they denied Student a FAPE or precluded her  
7 from obtaining a meaningful benefit from her schooling. Accordingly, the Court does not find  
8 that Student was denied a FAPE on this basis.

## 9 2. Failure to Assess and Provide Present Levels of Performance

10 The IDEA requires an IEP to contain a statement of the student's PLOP. 20 U.S.C. §  
11 1414(d)(1)(A)(i)(I) (requiring "a statement of the child's present levels of academic achievement  
12 and functional performance . . ."). Because the District believed that PLOP was only required  
13 in annual IEPs, it failed to include Student's PLOP in the August 17, 2005 IEP except in the area  
14 of communication skills. The question, however, is not whether the District merely failed to  
15 provide written PLOP, but whether this failure denied Student a FAPE. The Court concludes  
16 that it did not.

17 First, the January 26, 2005 Corona-Norco IEP contained a statement of Student's PLOP.  
18 This IEP stated that Student's "written language skills are at ending K [kindergarten] level," and  
19 that Student could read 38 of 108 "sight words." In addition, the undisputed testimony of the  
20 District's witnesses, accepted by ALJ Jones, shows that Student's PLOP was discussed with  
21 Parents at the August 17, 2005 IEP meeting in reference to the goals established for Student.  
22 Indeed, goals on the Corona-Norco IEP were revised in the August 17, 2005 IEP. This suggests  
23 that there must have been some discussion of PLOP in order to determine that the Corona-Norco  
24 IEP goals had been met and that new goals were required. Additionally, the goals of the August  
25 17, 2005 IEP were discussed in reference to Student's then-present level of performance.  
26 Accordingly, although the District did not include the PLOP in the ultimate written IEP, Parents  
27 and the District were aware of Student's PLOP based on this discussion. *See Doe v. Defendant*  
28 *I, supra.* (missing information does not deny FAPE if parents know information from other

1 sources). Finally, as observed by the ALJ, PLOP can be determined by other indicators such as  
2 progress reports.

### 3 **3. IEP Reasonably Calculated to Provide Meaningful Benefit**

4 Plaintiffs contend that, in addition to the omissions identified above, that the August 17,  
5 2005 IEP was not reasonably calculated to provide Student with a meaningful educational  
6 benefit. Much of parties' evidence relates to whether student actually improved as a  
7 consequence of the IEP. However, the most pertinent question is not whether, in hindsight, the  
8 program conferred an educational benefit on Student. Rather, the question is whether, at the  
9 time the IEP was implemented, it was so designed. *Adams, supra*. After considering the  
10 evidence submitted and the ALJ's findings, the Court concludes that it was.

11 The goals set in the August 17, 2005 IEP, and the methods relied on to reach those goals,  
12 were substantially similar to those identified in Plaintiffs' Corona-Norco IEP. Indeed, the  
13 District gave Plaintiff more hours of speech and language education than did Corona-Norco – 30  
14 minutes twice a week versus 25 minutes once a week. Although a numerical comparison of  
15 minutes spent in special classes is not determinative, the fact that both Corona-Norco and OUSD  
16 set virtually the same goals and relied on virtually the same methodology suggests that OUSD  
17 was at least on the right track in the August 17, 2005 IEP.

18 Further, the IEP was designed to address the issues assessed by Drs. Wong and Weist,  
19 namely reading and language difficulties. The focus of the August 17, 2005 IEP was helping  
20 Student resolve such difficulties. Ms. Scheiber also testified that she included the Language!  
21 and Project Read programs in Student's RSP services. She stated that the Project Read program  
22 was peer reviewed and, although she could not identify the source of this information, Plaintiffs  
23 adduced no testimony to contradict this claim. Further, the Project Read program includes a  
24 multi-sensory aspect similar to that used at Prentice, Plaintiffs' current school.

25 Plaintiffs also contend that the general curriculum at Imperial was insufficient. However,  
26 Student's difficulties in the areas of reading and language were certainly addressed, at least in  
27 part, in the ExCel program. The ExCel program includes 60 minutes of intensive reading as part  
28 of the standard curriculum at Imperial. This program also includes a multi-sensory component

1 and is tied to California state standards. Ms. Parke also used a multi-sensory approach  
2 throughout the general curriculum.

3 Plaintiffs further note that Student began tantrum behavior and did not want to go to  
4 school and that Student had difficulty finishing her homework in a reasonable amount of time.  
5 Parents failed to raise the former in any IEP before the November 29, 2005 IEP. Accordingly,  
6 the District could not be expected to remedy this problem. Parents raised the second issue with  
7 Ms. Parke, who agreed to adjust Student's homework load and to accept late assignments  
8 without a penalty.

9 To the extent that actual progress is relevant, the District submitted uncontroverted  
10 testimony that Plaintiff did achieve meaningful progress before leaving Imperial. For one, Ms.  
11 Parke noted that, before she went on maternity leave in November 2005, Student exhibited some  
12 progress and was "at grade level" in writing content. Further, by the time of the November 29,  
13 2005 IEP, Student had achieved two of the goals on the August 17, 2005 IEP. Finally, and  
14 perhaps most tellingly, Student was administered a WIAT-II test in September 2004, and a  
15 WIAT-I test immediately after leaving Imperial. Her reading comprehension score increased  
16 from 68 to 86; her math reasoning score increased from 81 to 86; and her spelling score  
17 increased from 91-94. Dr. Passaro, Plaintiffs' expert, stated that these figures indicated progress,  
18 although they were based on different versions of the WIAT test.

19 Finally, there is no dispute that student was placed in the Least Restrictive Environment  
20 possible as required by the IDEA. Under the August 17, 2005 IEP, student remained in her  
21 regular classroom all but 13% of the time, when she received special services.

22 Parents have simply failed to identify what, aside from simply placing Student in  
23 Prentice, the District could have done to provide a more meaningful educational benefit to  
24 Plaintiff. Indeed, after participating in the IEP process, failing to raise many of these concerns,  
25 Parents unilaterally decided to place Student in Prentice. Parents then rejected an IEP which  
26 provided for three-times the RSP services of the August 17, 2005 IEP. The District certainly  
27 met its obligation to provide a meaningful educational benefit.

28 Accordingly, the August 17, 2005 IEP satisfactorily provided a FAPE based on the

1 information available to the IEP team at that time. To the extent that the August 17, 2005 IEP  
2 was deficient in failing to provide sufficient services, it seems beyond question that the  
3 November 29, 2005 IEP, which tripled Student's RSP services, was more than sufficient to  
4 provide a FAPE.

5 **D. Conclusion**

6 First, the procedural issue raised with the August 17, 2005 IEP, namely that it was not  
7 issued within 30 days of Student enrolling in OUSD, did not cause prejudice to Student or  
8 Parents. Parents were involved in the IEP process as required by the IDEA, and there is no  
9 suggestion that they were deprived the right to take part in Student's placement.

10 Second, the District did provide comparable services in the Interim IEP to those provided  
11 in the Corona-Norco IEP. The Interim IEP contained the same goals as the Corona-Norco IEP  
12 and was qualitatively and quantitatively similar to the Corona-Norco IEP.

13 Finally, the August 17, 2005 IEP, did provide a FAPE. Although it did not expressly  
14 include PLOP, it set appropriate goals in the areas of known difficulty – i.e. reading, writing and  
15 language. It relied on appropriate methodologies to achieve these goals including regular  
16 classroom programs and special services. To the extent that Plaintiffs challenge the particular  
17 methodologies, resolution of this dispute is best left to educators, with greater experience in this  
18 area. *See Rowley*, 458 U.S. at 207-08 (“it seems highly unlikely that Congress intended courts to  
19 overturn a State's choice of appropriate educational theories. . .”) After a little over a year  
20 under this and the similar Corona-Norco IEP, Student made significant progress as reflected on  
21 WIAT assessments. Finally, the August 17, 2005 IEP was designed to “mainstream” student to  
22 the extent possible. Insofar as the August 17, 2005 IEP was deficient, the District made an offer  
23 of services in the November 29, 2005 that was clearly sufficient to cure any defect in the August  
24 17, 2005 IEP.

25 Accordingly, Plaintiffs' Motion for Summary Judgment is hereby DENIED, and  
26 Defendant's Motion for Summary Judgment is hereby GRANTED.

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**IV. DISPOSITION**

Plaintiffs' Motion for Summary Judgement is hereby DENIED. Defendant's Motion for Summary Judge is hereby GRANTED.

IT IS SO ORDERED.

DATED: September 30, 2008



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DAVID O. CARTER  
United States District Judge