

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

In the Matter of :

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, OAH CASE NO. N 2005071031

Petitioner,

vs.

STUDENT,

Respondent.

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

**DECISION**

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter between September 27, 2005 and October 7, 2005, in Oakland, California.

Petitioner San Ramon Valley Unified School District (District or SRVUSD) was represented by its attorney, Elizabeth Rho Ng. Karen Heilbronner, assistant director of special programs, was also present at the hearing on District's behalf.

Respondent Student was represented by his attorney, Eileen Matteucci. Student's parents, Father and Mother, were also present on his behalf at the hearing.<sup>1</sup>

Petitioner called the following witnesses: Kevin Douglas, special education teacher for SRVUSD, Mary Liddle, special education teacher for SRVUSD, Karen Heilbronner, assistant director of special programs for SRVUSD, Angela Conner, Behavior Analyst for SRVUSD, Cheryl Markowitz, co-director of Psychology, Learning and You (PLAY), Linda Wilock, speech pathologist for SRVUSD, Mary Jane McCoy, program manager for SRVUSD, and Julie Stricklin-Burlingame, former behavior analyst for SRVUSD. In rebuttal, District recalled Karen Heilbronner.

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<sup>1</sup> Both parents were present for the majority of the hearing. However, on some days one parent would arrive later than the other, and on other days only one parent would be present.

Respondent called the following witnesses: Mother, Elizabeth Bianchi-Isono, occupational therapist who worked with student, and Lisa Keslin, behavior therapist who worked with student.

Oral and documentary evidence was received and submitted on October 7, 2005. Closing arguments were submitted by both parties on October 24, 2005, and the record was closed.<sup>2</sup>

## ISSUES

I. Did the District offer and/or provide Student a free appropriate public education (FAPE) for the 2004-2005 school year, including an appropriate transition of behavioral services from SI to District behavior analyst or PLAY, and a District 1:1 aide?

II. Has the District offered and/or provided Student a FAPE for the 2005 extended school year (ESY)?

III. Has the District offered Student a FAPE, including an appropriate transition from Stepping Stones to District behavior analyst and District 1:1 aide, for the 2005-2006 school year?

## FINDINGS OF FACT

### *Background*

1. Student is 10 years old and is eligible for special education and related services as a student with severe autism. He also has diagnoses of severe mental retardation and mild cerebral palsy. Student began attending and receiving educational services at SRVUSD when he was 5 years old. Student had been attending a special day class (SDC) at Twin Creeks Elementary School (Twin Creeks) and received in home supportive services delivered by a non-public agency (NPA), until his parents removed Student from the school in February 2005.

2. Student has extreme behavior issues. He takes a great number of medications daily that are constantly being readjusted to find the right mix that will provide the most benefit. Student has unique needs arising from his disabilities in the following areas: development of social skills, independent living skills, augmentative and alternative communication services, functional academics, speech and language, occupational therapy, and behavioral services.

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<sup>2</sup> Counsel for petitioner submitted a reply brief on October 31, 2005. At the conclusion of the hearing, both parties agreed that no reply briefs would be submitted. Therefore, petitioner's reply brief is not considered for purposes of this decision.

3. In August 2003, Student's parents and SRVUSD entered into a settlement agreement that provided the terms of Student's placement and services for the 2003-2004 school year. The settlement agreement placed Student in an SDC at Twin Creeks and provided related services, including in home supportive services. The settlement agreement also required that SRVUSD and Student meet to discuss a transition to an NPA or qualified district staff.<sup>3</sup>

4. When the settlement agreement was signed in August 2003, in home behavioral support services were provided by Synergistic Interventions (SI), a certified NPA. However, use of that particular NPA was not a condition of the settlement agreement. SI had an independent contract with the District that was terminated in June 2004 because of contract irregularities. In a letter dated January 28, 2005, District notified Student's parents that SI would no longer be available to service Student after February 2, 2005, but PLAY and a district aide were available to take over services. In April 2005, the California Department of Education suspended the certification of SI as an NPA, and revoked the certification in June 2005.

5. In spring 2004, SRVUSD asked Julie Burlingame, who at the time worked as a behavior analyst for District, to draft a criteria based transition plan as a place to begin discussion. The plan was developed, but not discussed. SI continued to provide service to Student through the 2003-2004 school year.

6. On September 24, 2004, an IEP was held to discuss the transition from SI to PLAY. The IEP meeting was prescheduled and the parents agreed to attend, but indicated the afternoon before the scheduled start of the meeting that they would not attend. The IEP team met without the parents and discussed the proposed transition plan developed by Ms. Burlingame. A copy of the transition plan was mailed to Student's parents, who received it in the mail, but never responded to the District in any manner.

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<sup>3</sup> The specific language of the settlement agreement that discusses transition is found at paragraphs 12 and 13. Paragraph 12 states:

Parties agree to a "transition plan team meeting" to be held prior to the December 2003 IEP meeting referenced in paragraph 11 [December 13, 2003] of this section above. The purpose of this transition plan team meeting is to develop a criteria-based transition plan to transition from the current provider of the home program (currently, SI) to a qualified District staff or another qualified NPA and, ultimately, to transition out of the home program. Student's teachers, service providers, and home program provider (currently, SI) will attend. The District agrees to contract with the provider of the home program services (currently, SI) to have one of its representatives participate in the transition plan team meeting.

Paragraph 13 states: "Any proposed transition from the current provider of behavior services (currently SI) to qualified District staff or another qualified NPA shall first be approved by the IEP team." This decision does not interpret or settle any dispute related to the language of the settlement agreement. However, it is abundantly clear from the testimony and other evidence received at the hearing that the interpretation of these two clauses was at the heart of the parent's dispute with any transition plans proposed by SRVUSD.

7. Another IEP meeting was held on November 10, 2004. The November 10 IEP was signed by all parties, including the parents, and remains the last agreed upon and implemented IEP. The transition plan was not discussed at the November IEP because the parents indicated that the transition plan had not been developed according to the settlement agreement reached in August 2003, and the parents had an issue with who could attend the transition plan meeting.
8. A transition plan meeting was scheduled for November 29, 2004, but was canceled when the SI representatives calendared the meeting for the wrong day.
9. The next meeting to discuss the transition plan was December 13, 2004. The parents objected to PLAY representatives being at the meeting, so the PLAY representatives left. The meeting still did not go forward because one of Student's service providers could not be reached by phone.
10. On January 24, 2005, another meeting was scheduled to discuss the transition plan. A confrontation occurred in the parking lot involving Student's mother regarding who should attend the meeting. Student's mother left, as did the SI representatives and some of Student's other service providers. The meeting went forward without their participation. The transition plan was discussed and additional goals and objectives were added to the transition plan. The transition plan was mailed to Student's service providers and parents for input in early February 2005.
11. Student's parents removed Student from SRVUSD and Twin Creeks on February 22, 2005. Student has not returned to SRVUSD or Twin Creeks since that date.
12. Attempts by the District to schedule the annual IEP meeting prior to March 25, 2005 to clarify ESY 2005 and the 2005-2006 school year, were not successful because parties were not available, including the parents. The annual IEP meeting was held on April 5, 2005 but did not result in a signed IEP. At that meeting, Student's parents told SRVUSD that they had hired a new NPA called Stepping Stones to provide service to Student and to provide an assessment.
13. The annual IEP meeting was continued to May 24, 2005, to further discuss the offer and placement for Student for ESY 2005 and the 2005-2006 school year. Goals and objectives were discussed, and it was decided that further clarification of the academic and behavioral goals was necessary.
14. The next annual IEP meeting was held on June 14, 2005, without discussion of the transition plan. The June 14, 2005 IEP contained the offer for ESY 2005 and for the 2005-2006 school year. The IEP team had spent a great deal of time developing and discussing the IEP for those time periods. Despite what appeared to be agreement to the IEP, the parents did not sign the IEP. At the June 14 IEP meeting, the parents also requested that Stepping Stones be designated the NPA.

15. On June 16, 2005, the District sent the parents a letter containing prior written notice denying Stepping Stones as the NPA.

16. District sent another letter dated June 24, 2005, in which they described the offer for ESY 2005 and for the 2005-2006 school year that had been made at the June 14, 2005 IEP meeting. The letter did not reference the home program that Student had in previous years, and did not clarify whether an NPA or District personnel would implement that program.

17. On September 27, 2005, the first day of the due process hearing, the parties stipulated that there would be no challenge to the Occupational Therapy (OT) or the Alternative Augmentative Communication (AAC) goals and services for any of the time periods at issue, except to the OT goals and services for the 2004-2005 school year.

18. On October 7, 2005, the parties stipulated that there would be no challenge to the classroom or academic goals and services, or to speech and language goals and services for any time period other than the time period during the 2004-2005 school year that they were not in place.

#### *Classroom and Academic Goals*

19. During the 2004-2005 academic year, Student attended the Special Day Class (SDC) at Twin Creeks where Kevin Douglas was his teacher. The class had 12 students, 11 of whom had major needs, including 3 students with needs similar to Student although none were “quite like Student.” Mr. Douglas taught on a “waiver” while he continued to complete his special education credential. Mr. Douglas was familiar with Student’s IEP and that of his other students. Mr. Douglas was well qualified to teach the SDC class and administer the IEP’s for those students attending the class.

20. Mr. Douglas took over teaching the SDC class from Mary Liddle. He followed the goals and objectives dated March 25, 2004 that Ms. Liddle had established for Student. The goals included independent living skills, functional academics, and social skills. Student was prompt-dependent and the goals were written to assist Student in gaining independence. Student benefited from peers in his class, had formed a bond with one child in particular, and got along well with the other students. The parents never expressed any issues or concerns about the program Student received at the school or about Mr. Douglas’ qualifications to teach the class.

21. During the April and May IEP meetings, Mr. Douglas described the classroom and academic goals he had drafted, and received input on academic goals from the IEP team and Lisa Keslin from Stepping Stones. Mr. Douglas met and refined the academic goals in a meeting with Ms. Keslin, and presented the revised goals at the June 14 IEP meeting.

### *Occupational Therapy*

22. The OT goals for the 2004-2005 academic year were developed through the August 2003 settlement agreement, and the November 10, 2004 IEP, which covered the period until March 25, 2005. The settlement agreement stated that, “Occupational therapy services provided by a qualified NPA or qualified District staff, 2 hours per week of individual services, 2 hours per month of consultation with school staff. (Currently, the provider is Maxability, an NPA.)” The November 10, 2004 IEP states that OT services consist of a 60 minute individual session, 2 times per week at Twin Creeks, and a 60 minute consultation session for home and school, 2 times per month.

23. During the 2004-2005 academic year, OT services were provided by Liz Osono and LeeAnn Williams through Max-Ability, an NPA operated by Ms. Williams who contracted with the district. Ms. Isono and Ms. Williams provided OT services to Student for the past 2.5 years, including the time he has been out of school, except for one month, March to April 2005. Student’s one-to-one aide, provided by SI, was present during his OT sessions. During that time, Student made “incredible gains given his complexity.” Ms. Isono was not a behavioralist and did not write behavior goals.

### *Speech and Language Services*

24. The Speech and Language (S/L) goals and services were developed from the August 2003 settlement agreement, and the November 10, 2004 IEP, which covered the period until March 25, 2005. The settlement agreement stated: “Speech and language services (90 minutes per week total: 45 minutes per week group, 30 minutes per week individual, 15 minutes per week consultation.” These goals remained in place until the November 10, 2004 IEP was signed. That IEP required S/L services, 2 times per week, 1 individualized session for 30 minutes, and 1 group session for 30 minutes, and 15 minutes per week for consultation with staff.<sup>4</sup>

25. S/L services were provided by Elaine Marchetti until February 2005 when the parents withdrew consent for Ms. Marchetti to provide those services.<sup>5</sup>

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<sup>4</sup> The actual language used in the November 10, 2004 IEP is as follows: Speech and Language Services, 11-10-04 – 3-24-05, 2x/wk – 1x individual-30 min, 1x/group-30 min and 15 min consultation with staff per week.

<sup>5</sup> Mother observed Ms. Marchetti interacting with Student at her home and “things did not go well.” Mother believed that Ms. Marchetti appeared uncomfortable and unfamiliar with Student and his IEP, that she used the AAC device inappropriately, and asked Student to say “elephant” even though Student is non-verbal. Mother was “blown away” by what she observed and sent a letter to the district indicating that she would not accept Ms. Marchetti as the S/L provider. Shortly thereafter, Student was removed from school and has not returned. Mother account of the one-time observation does not change the finding that Ms. Marchetti was qualified and capable of providing S/L services to Student.

26. Ms. Marchetti has a Master's Degree in Speech Pathology and Audiology. Her resume includes prior work experience in the area of speech and language assessments, evaluations, diagnoses, and implementing S/L goals, in both a private setting and in a public school setting. She also had experience in a prior district working with severely handicapped children. Her references were checked prior to her employment. Based upon her education and experience, she was well qualified for the position for which she was hired.

27. Linda Wilock, who began to work for SRVUSD in March 2005, assumed Student's caseload after Ms. Marchetti. Ms. Wilock was well qualified to offer S/L services to Student. Ms. Wilock never met Student since he was not in school when she was hired, but she had reviewed his files that contained his goals and objectives, as well as daily notes written by Ms. Marchetti indicating that Student was making progress towards the listed goals. Ms. Wilock was present when Ms. Marchetti updated the goals and objectives for the April 5, 2005 IEP meeting because she had the most recent experience with Student. The April 5, 2005 IEP meeting was Ms. Wilock's first contact with the IEP team, and she indicated that she was prepared to present a progress report and goals to the IEP team, but she had not drafted the report. At the April IEP meeting, the parents requested S/L discussion be postponed until the AAC provider (Deborah McCloskey) was present. The S/L goals were given to the parents at the April 5 IEP meeting.

28. Ms. Wilock presented the S/L progress report and reported on the goals for Student at the May 25 IEP meeting. Ms. McCloskey was present at the May 25 IEP meeting, where it was decided that the S/L goals should be revised based upon the information she provided regarding current levels of performance. Further, the parents and some of the IEP team felt that the accuracy level was too low for some of the S/L goals.

29. Ms. Wilock consulted with Ms. McCloskey, and presented the revised goals at the June IEP meeting. Ms. McCloskey felt the goals were appropriate given Student's current needs. The IEP team had no dispute or issue with the goals. The parents did not express any issue with the S/L goals and did not ask any questions about the revised goals. The goals did not decrease the level of services, and it was believed that the goals could be implemented.

### *Transition Plans*

30. The August 2003 settlement agreement provided the procedures to be used for a transition plan from the current behavioral support provider to a District aide or other NPA for classroom and in home support services. (See *supra*, FN 3.) Each party's interpretation of that provision has impacted virtually every IEP meeting, letter and email exchange that occurred as goals, objectives and services were being considered and developed to meet Student's unique needs. There is a genuine disagreement as to the requirements of the transition planning meeting. The parents refused to participate in any meetings or IEP discussions related to transition unless those meetings were held according to the parent's interpretation of the language of the agreement, which included who could attend the meeting. The District disagreed, and believed that contracted personnel or an NPA that was

working for the District should be included in the meeting. The transition issue became bogged down in a battle of wills over which interpretation would prevail, causing the meetings to be contentious and difficult.

31. SI had a separate dispute with the District related to payments and indicated that they would not participate in any transition meetings unless and until they were paid the money they believed they were owed. While it would have been much better to have the then current providers available to discuss an appropriate transition, numerous district witnesses indicated that it was not uncommon to begin educating a student without the benefit of input from the current provider.

32. Multiple witnesses testified to the animosity and hostility showed by the parents at the meetings that were designed to discuss the transition plan. At some point, the District decided that enough time had gone by, literally months, without a productive transition meeting, and decided to draft a plan for discussion.

33. The District initially offered PLAY as the new NPA to replace SI for in home and classroom behavior support. PLAY was owned by Cheryl Markowitz who has an impressive educational background, extensive work experience, and is well qualified to assume the role of providing behavioral support and services to Student. PLAY met with Mr. Douglas to discuss behavioral goals for Student without any baseline information from SI. Those goals were presented at the June 14 IEP meeting. Ms. Markowitz had worked with students with needs similar to Student's and could implement goals appropriate to providing educational benefit to Student and his unique needs.

34. The parents indicated on multiple occasions that they would not consider PLAY, because it was not an IEP decision made pursuant to the settlement agreement.

35. The transition plan from Stepping Stones had similar difficulties. The parents had independently contracted with Stepping Stones after they withdrew Student from school. Stepping Stones included at least two former employees of SI who had provided services to Student in the past. The parents wanted the District to use Stepping Stones as the NPA. The District did not agree to Stepping Stones. However, in an effort to move the transition plan along, the District had Mr. Douglas meet with Lisa Keslin from Stepping Stones to examine and review the academic goals that Mr. Douglas had developed for Student. Ms. Keslin offered input into the goals in a half hour meeting with Mr. Douglas prior to school one day. A full transition plan from Stepping Stones to a district behaviorist was handed to the parents at the May 24, 2005 IEP with a request for their input, but the parents did not respond.

36. If an agreement could not be reached using PLAY as the behavior service provider, the District had trained staff who were well qualified to offer those services to Student. Angela Connor, a behavioral analyst for SRVUSD, was well qualified to provide educational benefit to Student. The same is true for Patricia Onizuka, the district designated classroom aide that would have been assigned to Student. Mrs. Onizuka did not testify, but there was

ample testimony by credible district witnesses who were familiar with her qualifications and experience, and who had observed her in the classroom.<sup>6</sup>

### *Behavioral Goals*

37. The November 10, 2004 IEP required that the annual IEP meeting begin prior to March 25, 2005. Because members of the IEP team were not available, including the parents, the annual IEP meeting was held on April 5, 2005, but did not result in a signed IEP. The next IEP meeting was held on May 24, 2005, followed by an IEP meeting on June 14, 2005, where discussions occurred concerning appropriate goals and objectives, timelines, and other aspects related to Student's unique needs.

38. The District had worked with the IEP participants to develop appropriate goals and objectives for Student in light of SI's unwillingness to assist in developing those goals due a dispute with the District. At the May 24 IEP, it was decided that additional information was necessary to properly formulate behavioral goals and objectives. The May 24 IEP team discussed the behavioral goals proposed and established by Stepping Stones. Deborah McCloskey reviewed the AAC goals and objectives, and discussed the need to better refine Student's behavioral goals using current information that she had from working with Student. At the conclusion of the May 24 IEP, Mr. Douglas agreed to meet with Ms. McCloskey to further refine and modify Student's behavioral goals. The behavioral goals were modified based upon those discussions.

39. At the June 14, 2005 IEP, the revised behavioral goals were presented and discussed, but they were not available for consideration prior to that meeting. The full IEP team met to review and discuss the program to be offered for ESY 2005 and for the school year 2005-2006. Eileen Matteucci, the parent's attorney, indicated that the behavior goals were not appropriate for Student and should be rewritten. The IEP team also discussed conducting an assessment as part of the transition from Stepping Stones. After the meeting, Angela Connor took the behavioral goals and rewrote them from her notes based upon the discussions, input and decisions from the IEP team about what was appropriate. Those goals were mailed to the parents.

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<sup>6</sup> Testimony was offered regarding a meeting that Mother. had with Ms. Onizuka. The meeting appeared to be a formal interview that left Ms. Onizuka in tears. In spite of the "interview" conducted by Mother., there was no indication that Ms. Onizuka was anything other than qualified to assume the role as Student's one-to-one aide when he returned to school.

## CONCLUSIONS OF LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400, et seq.; Ed. Code §56000, et seq.) The term “free appropriate public education” means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student’s individualized education program (IEP). (20 U.S.C. §1401(9).) “Special education” is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. §1401(29). The term “related services” includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. §1401(26).) California provides that designated instruction and services (DIS), California’s term for related services, shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code §56363, subd. (a).)
2. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (Ed. Code §§56300–56302; 20 U.S.C. §1412.)
3. The United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement 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. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)
4. The U.S. Supreme court recently ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. \_\_\_\_.)
5. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student’s educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) Citing *Rowley*, 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 1484.) Procedural violations may constitute a denial of FAPE if they

result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process. (*Id.*)

6. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

7. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the developed IEP provides the student with a FAPE by meeting the following substantive requirements: (1) have been designed to meet Student's unique needs; (2) have been reasonably calculated to provide Student with some educational benefit; (3) be comported with his IEP; and (4) provide education in the least restrictive environment.<sup>7</sup>

8. As discussed below, a preponderance of the evidence persuasively establishes that the District has met its burden in providing a FAPE and an offer of FAPE during the time periods alleged.

**I. Did the District offer and/or provide Student a free appropriate public education (FAPE) for the 2004-2005 school year, including an appropriate transition of behavioral services from SI to District behavioral analyst or PLAY, and a District 1:1 aide?**

*Compliance with IDEA procedures*

9. As stated in factual findings 3, 17, 22, and 24, the goals and services for the 2004-2005 school year were established by the August 2003 settlement agreement and the signed and implemented IEP dated November 10, 2004. There was no evidence that there were procedural flaws in the November 10, 2004 IEP process.

10. As discussed in factual findings 27 to 37, the District complied with the required IEP procedures. The District's conduct was reasonably calculated to gain the maximum input from the proper parties into developing a correct IEP. Although the parents removed Student from school in February 2005, an IEP was in place and providing educational benefits that addressed Student's unique needs during the 2004-2005 school year.

11. As stated in factual findings 3 to 10 and 30 to 36, to the extent that the settlement agreement required a transition meeting to be held prior to December 15, 2003, the meeting did not take place. The District took the initiative and formulated a proposed transition plan

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<sup>7</sup> The District was also required to provide Petitioner with a program which educated him in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of her disabilities was 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); Code § 56031.) LRE is not an issue in this case.

as a starting point to discuss the transition, but the parents would not address the transition issue unless it met their understanding of what was required by the settlement agreement.

12. From March 2005 to the end of the school year, a full educational plan was in place to provide Student a FAPE. The District did not violate their procedural responsibilities in formulating and implementing the IEP for the 2004-2005 school year.

**Was the District's offer for the 2004-2005 school year designed to meet Student's unique needs and was it reasonably calculated to provide Student with some educational benefit? Did the services comport with those required by the IEP?**

13. As discussed in factual finding 2, Student has extensive disabilities and unique needs. The IEP offered and implemented during the 2004-2005 school year demonstrates that the District's offer of FAPE for the 2004-2005 school year was designed to meet Student's unique needs, and that its offer was reasonably calculated to provide Student with some educational benefit.

14. As stated in factual findings 17 and 18, the parties agreed that the only challenge for the entire 2004-2005 school year was to the OT services, otherwise, S/L goals and services, and the classroom and academic goals would be challenged only for the time period that they were not in place during the 2004-2005 school year.

15. As stated in factual findings 22 and 23, OT goals and services were appropriate and properly addressed Student's unique needs and were designed to provide educational benefit to Student. There is no dispute that Student attended school on a regular basis up until February 22, 2005, when he was removed from school by his parents. Ms. Isono, or her partner, Ms. Williams, provided consistent services to Student after he was removed from school except for a one month period. The District appropriately offered and provided Student proper OT goals and services during the 2004-2005 school year, and he received educational benefit from those services.

16. The ALJ concludes that the District's offer and implementation of OT goals and services for the 2004-2005 provided Student with a FAPE for the 2004-2005 school year and were reasonably calculated to provide Student with some educational benefit in his areas of unique need.

17. As stated in factual findings 24 to 29, Student's S/L goals were appropriate and designed to meet his unique needs in this area. The goals include oral motor and sound production skills. Ms. Marchetti was well qualified for the position she holds and still works for the District at another SDC location. The IEP reflects that Student was making progress on the goals while service was being provided by Ms. Marchetti. The District hired another highly qualified S/L therapist, Ms. Willock, who was prepared and ready to provide S/L services to meet the needs and goals addressed in Student's IEP when he returned to school.

18. Any service interruption in the provision of OT and S/L services during the 2004-2005 school year is attributable directly to the parent's removal of Student from the District. The District made efforts to bring Student back to school and continued to negotiate through the IEP process. The parent's interpretation of the August 2003 settlement agreement impacted the parent's interaction with the District particularly as it pertained to the transition plan. The parent's decision to withdraw Student from school based upon any District action is misplaced. The District provided trained, qualified staff to implement a well designed IEP tailored to the unique needs of Student. Any interruption of service to Student is not due to any conduct of the District.

19. The ALJ concludes that the District's offer and implementation of S/L goals and services for the 2004-2005 provided Student with a FAPE for the 2004-2005 school year and were reasonably calculated to provide Student with some educational benefit in his areas of unique need.

20. As stated in factual findings 30 to 34, the District reasonably attempted to implement a transition from SI to PLAY. Offering PLAY as the replacement NPA was proper and appropriate, and would have maintained or exceeded the educational benefit that SI was providing. Ms. Markowitz' qualifications were well established. The District's actions in developing the transition plan during the 2004-2005 school year did not result in any loss of educational benefit to Student and did not deny him a FAPE.

21. As stated in factual finding 4, SI remained in place to provide classroom and in home behavioral support during the 2004-2005 school year. SI did not stop providing service to Student until February 2005.

22. The ALJ determines that the District did offer and implement a FAPE for Student during the 2004-2005 school year.

**II. Has the District offered and/or provided Student a FAPE for the 2005 extended school year (ESY)?**

**III. Has the District offered Student a FAPE, including an appropriate transition from Stepping Stones to District behavior analyst and District 1:1 aide, for the 2005-2006 school year?**

Because the issues related to the District's offer of FAPE for ESY 2005 and the 2005-2006 school year are so intertwined and occurred during the same IEP meetings, Issue II and III will be analyzed together.

*Compliance with IDEA procedures*

23. As stated in factual findings 12 to 16, the annual IEP was required to be held prior to March 25, 2005, but that date was not available to a number of participants including the parents. The meeting was held on April 5, 2005, approximately 10 days later. Thus, a 10

day delay in the holding of the annual meeting is not unreasonable. Further, the parents implicitly waived the requirement when they indicated they were not available prior to March 25. There was no loss of educational benefit to Student since there was no indication of any significant change in the goals and services that needed to be provided. Student had been out of school since the end of February 2005. The District used due diligence in trying to organize an IEP meeting date that accommodated the many individuals who needed to be present, which was particularly difficult in light of the contentious nature of this particular IEP process. Therefore, there was no denial of FAPE to Student for the delay in not holding his annual IEP before March 25.

24. During the IEP meetings held in April, May and June, appropriate discussions were occurring to determine the appropriateness of the goals and services to be provided for ESY 2005 and the 2005-2006 school year. Student had been removed from school by the parents, and there was a dispute about who would take over the behavioral program. While the District had an obligation to present a complete IEP, based upon the discussions that occurred at those meetings, the District was acting diligently in getting the necessary information to put together a complete IEP that addressed Student's unique needs and provided him educational benefit.

25. During the meetings, when it became apparent that certain goals needed to be improved and changed, continuing an IEP discussion to another date to allow the relevant team members to confer on an issue and present that at another meeting was perfectly reasonable, particularly since some information was not available prior to the IEP meetings.

26. The parents were present, actively participating, had the benefit of counsel at the meetings, and had the insights from trusted, long term service providers present for input. The parents had the opportunity to discuss and give input on the goals and objectives, specifically the behavioral goals, which were discussed at the June 14 IEP meeting, and it was the parents' attorney who indicated that the behavioral goals were not appropriate and needed to be rewritten. The District did so in an expeditious manner, and mailed the goals to the parents. The June 14 meeting including discussions about in home services and educational placement, and it was well known what was contemplated for ESY 2005 and the 2005-2006 school year.

27. In a letter from the District to the parents dated June 24, the District indicated that they would discuss the goals, wanted the parent's input, and were trying to schedule a further IEP meeting. The parents did not respond to that request. The District admits that it omitted the home portion of the offer. However, all parties knew that in home support was always contemplated as part of the plan and through District inadvertence, it was omitted from the final written offer sent to the parents. Similarly, PLAY had been offered as the provider, but when the parents would not consider PLAY, the District changed to a District behavior analyst as the service provider. Both were well known and discussed at the meetings. Neither the parents nor the parents' attorney called or otherwise attempted to find out why these were omitted, which seems illogical in light of the extensive discussions, input, history and extensive communication that had been going on in this case.

28. It was a procedural error for the District to omit portions from the final offer in the letter, but it was not the type of error given the circumstances in this case that impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

29. The District must not prevent the parents from participating meaningfully in the IEP process. (*W.G. v. Bd. Of Trustees of Target Range School District No. 23*, *supra*, 960 F.2d at 1483.) Further, the District is required to make a formal offer of FAPE to the student in writing, even though the parents have indicated they will not accept the offer. (*Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525-1526.) The facts of this case indicate that the District facilitated the parent's participation in the IEP process, and made a clear offer of placement. The District sent multiple emails and letters to the parents urging their input into the transition offer for Student. Furthermore, the offer, while technically flawed, reflected the multiple communications and discussions that had occurred involving the District, the parents, and the parents' attorney for over a year about establishing a transition for Student and returning him to the educational setting. The District's actions more than complied with the law and any delays or minor errors do not rise to the level of the violations that occurred in the cases cited above.

30. In summary, there was no lost educational benefit to Student and the parents were not denied a right to participate in the IEP process based upon the District's failure to hold an annual IEP before a certain date, and based upon the District's technical error when mailing the final offer to the parents on June 24.

31. Thus, the ALJ concludes that any procedural violations did not rise to the level of a FAPE denial as specified in the IDEA, and did not deny Student a FAPE for ESY 2005 and the 2005-2006 school year.

**Was the District's offer for ESY 2005 and the 2005-2006 school year designed to meet Student's unique needs and was it reasonably calculated to provide Student with some educational benefit? Did the services comport with those required by the IEP?**

32. As stated in factual finding 17 and 18, the parties stipulated that there would be no challenge to the OT, S/L, AAC, classroom and academic goals for the 2005 ESY or the 2005-2006 school year.

33. As stated in factual findings 33 to 39, the in home program and behavioral services were reasonably designed to meet Student's unique needs and to provide him educational benefit, and they comported with the services he had been receiving.

34. As stated in factual findings 30 to 39, the transition meetings were designed to change the providers, not the level of service provided, and the District more than adequately addressed those issues. There was no loss of educational benefit to Student because services

remained in place while the transition plan was developed, even though it has yet to be implemented.

35. Therefore, based upon the foregoing, the ALJ finds that the District has offered Student a FAPE for both ESY 2005 and the 2005-2006 school year.

#### ORDER

1. The District's request that their program offers for 2004-2005, 2005 ESY and 2005-2006 school years be deemed a FAPE is granted.

#### PREVAILING PARTY

2. Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided. To the extent that a procedural violation was found during the 2005-2006 school year, it did not rise to the level of a FAPE denial, and, therefore, the District has prevailed on any issue related to a procedural denial of FAPE.

#### RIGHT TO APPEAL THIS DECISION

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

DATED: December 15, 2005

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RICHARD M. CLARK  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings