

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005070351

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter at Los Angeles, California on August 7, 2006 to August 9, 2006.

Petitioner (Student), appeared by her parents, and Attorney N. Jane Dubovy, A2Z Education Advocates. Attorney Mandy Favaloro also appeared on behalf of Student.

Respondent, Los Angeles Unified School District (District), appeared by Attorneys My Huynh and Devora Nevara, District's Office of the General Counsel. Sharla J. Bauman, MPT Senior Physical Therapist also appeared on behalf of the District.

The Due Process Hearing Request was filed on June 27, 2005. The case went off calendar on July 20, 2005, at Student's request.

The record was opened and the matter was heard on August 7, 2006, to and including August 9, 2006. Student moved at the hearing to exclude District's documentary evidence on the ground that the evidence was untimely served in violation of California Education Code sections 56505, subdivision (e)(7), 56505, subdivision (e)(8), and 34 C.F.R. section 300.509. District opposed the motion alleging District timely served Student its documentary evidence. District also argued that Student was not prejudiced because District's Exhibits A – C were the same as Student's Exhibits 10-11 and 13. Student withdrew the motion to exclude Exhibits A – C but still sought exclusion of District's Exhibits D – G based upon untimely service. Student's motion was granted as to District's

Exhibits E – G and denied as to District’s Exhibit D on the ground that Petitioner was not prejudiced by its inclusion. Student’s Motion for a Subpoena Duces Tecum, filed August 3, 2006, was also denied. District moved to exclude the report of David Griffin, Student’s proposed expert witness, on the ground that it was untimely served. The District’s motion was granted.

Evidence was received, and the record remained open so that the parties could submit written closing briefs on or before August 21, 2006. Student’s Closing Argument is identified for the record as Exhibit 21. Respondent’s Closing Argument is identified as Exhibit J. The record was closed and the matter submitted for decision on August 22, 2006.

ISSUES

1. Did the District deny Petitioner a free appropriate public education FAPE in the May 2005 Individual Education Program (IEP) by failing to provide sufficient prior written notice of its proposal to change Student’s placement and services by not including:

A.. A description of the school, classroom location, safety and evacuation procedures, bathroom location and campus layout;

B. An explanation of the change in placement;

C. A description of other options considered by the District that may be appropriate for Student;

D. Notice of the change in aide services to an additional adult assistant (AAA), including description of the AAA’s qualifications, role in the classroom, and hours in the classroom; and

E. Failing to provide Student’s parents with sufficient information to adequately understand the offer, thereby depriving parents of the opportunity for meaningful participation in the IEP?

2. Did the District deny Petitioner a FAPE in the May 2005 IEP by failing to offer a placement for the remainder of the 2004 -2005 school year and the 2005 – 2006 school year, based upon Student’s unique needs that address:

A. Access and mobility,

B. Safety procedures,

C. Use of a walker, and

D. Other access that provides an academic and non academic benefit to the Student.

3. If Student prevails on any or all of the claims must the District, reimburse Student's parents for expenses related to unilaterally placing Student in a private school for the 2005-2006 school year, provide Student with a trained one-to-one aide (1:1 aide) for failure to provide FAPE during the 2005-2006 school year, convene an IEP meeting to implement any programs and/or services that may be ordered?

4. If Student prevails on any or all of the claims, may the ALJ order prospective placement at Student's current private school placement?

CONTENTIONS OF THE PARTIES

Student contends that District denied Student a FAPE in the May 31, 2005 IEP by failing to provide sufficient prior written notice to Student's parents of its proposal to change Student's placement and services under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1415 (b)(3) and 1415(c)(1) and by failing to provide sufficient information to Student's parents to adequately understand the offer as required under *Union School District v. Smith* (9th Cir. 1987) 15 F.3d 1519, 1525. Student asserts that in failing to comply with the requirements under the IDEA, District infringed upon the right of Student's parents to meaningfully participate in the IEP process. Student further contends that District denied Student a FAPE in the May 31, 2005, IEP by failing to offer a placement and the necessary related services based upon Student's unique needs. Student seeks reimbursement to parents for tuition paid during the 2005 – 2006 school year at a private parochial school, an order of prospective placement at an unspecified location, a trained 1:1 aide and an order requiring District to convene an IEP meeting to implement any programs and services that may be ordered.

District contends that the District provided a FAPE in the May 31, 2005 IEP for the remainder of the 2004 – 2005 school year and for the 2005 – 2006 school year by offering an appropriate initial placement, not a change in placement, which meets Student's unique needs. District further contends that it did not violate either the Parents' or Student's procedural or substantive rights under the IDEA. District asserts that Student's parents fully participated in the May 31, 2005 IEP meeting and District provided prior and subsequent written notice of its offer to Student's parents. District also asserts that Student's request for prospective placement at a non certified private parochial school is not allowable under the IDEA and is expressly prohibited under the California Education Code.

FACTUAL FINDINGS

Jurisdiction

1. Student is nine years old and lives with her parents within the boundaries of the District. Student is eligible for special education services as a child with an orthopedic impairment diagnosed as Congenital Spinal Dysgenesis with paraplegia. As a result of the

impairment, Student is paralyzed below the waist. At the time of the May, 31, 2005 IEP, Student was eight years of age and was scheduled to enter the 3rd grade for the 2005 – 2006 school year.

2. Student has attended St. Martin of Tours (St. Martin), a private parochial school, in Brentwood, California, beginning in the 2002-2003 school year to the present.

3. St. Martin is not a certified nonpublic non sectarian school or agency under contract with the District to provide alternative special education services to Student as required under California Education Code sections 5365, 5366, and 5366.1.

Student's Private School Placement

4. Student's parents unilaterally placed Student at St. Martin where the Parents have paid her tuition. At the time of the May 31, 2005 IEP, St. Martin had 250 students with 32 students per classroom with an aide. Student was enrolled there in a general education curriculum. Student's parents have also paid for a Non Public Agency assistant (NPA aide) to assist Student at school with her self-care needs. The annual tuition at St. Martin for the 2005 – 2006 school year was approximately \$5,775.00.

5. Student wears Reciprocal Gate Orthoses (braces) to the hip bilaterally for support to ambulate and uses a Reverse Kaye walker to assist in her ambulation. Student has also used a manual wheelchair at her current placement without her braces, independently, to enable her to participate with her peers in certain class activities about twice per week and on field trips.

6. The NPA aide assisted Student in activities including locking and unlocking her braces, transitioning from a sitting to standing position at her walker, mobility around the school campus, and safety. At the time of the May 31, 2005 IEP, Student wore diapers while at school. The NPA aide also assisted Student with her toileting needs, which required changing Student's diapers, as needed.

Student's IEP Team meetings

7. The District initially determined Student was eligible for special education services in the IEP of March 31, 2000. Student's parents participated as members of the IEP team.

8. The next IEP team meeting convened by the District was for the triennial IEP on May 28, 2003. Student's parents participated as members of the IEP team. Thereafter, the District conducted annual IEP reviews.

9. The District convened the next IEP Team meeting on May 28, 2004. Student was scheduled to enter the second grade. Student's parents attended and participated in the IEP team meeting. The IEP team had previously determined that Student's orthopedic

needs were severe and found Student eligible for designated instruction services (DIS) in the areas of physical therapy (PT) and adapted physical education (APE). The IEP focused on Student's present levels of performance, as well as goals and objectives, based upon her orthopedic impairment. The IEP team discussed in detail Student's areas of strength and Student's areas of need based on the District's physical therapy and adapted physical education assessments. The IEP team identified new goals and objectives in both physical therapy and adapted physical education. The IEP team also addressed in detail the adaptive equipment and assistive technology suggested for Student to participate within the educational program. The IEP team also identified Student's needs for supports for participation in general education activities, including a wheelchair, a walker, and home-to-school transportation. Student's parents fully participated in the IEP team discussions.

10. The District IEP team members recommended that the DIS services be provided at Student's district school of residence. The IEP team discussed the offer contained in the IEP which offered Student placement at Student's school of residence, Palisades Charter Elementary School (Palisades Elementary), in the general education curriculum for the remainder of the 2003 – 2004 school year and for the 2004 – 2005 school year. The IEP described the offered placement as having a student population of 380 students with a 20:1 student to teacher ratio with an aide from kindergarten to 3rd grade and 24:1 student to teacher ratio for the 4th and 5th grades. The IEP offer further detailed that Palisades Elementary was a high performing school and offered a variety of enrichment classes with fully credentialed experienced teachers. The IEP noted that all of the classrooms were accessible and the school provided ramps for access to some areas on the school campus, a handicap accessible bathroom and elevator access to Student's classroom. The IEP offered an additional adult assistant (AAA) for safety, hygiene and as required. The IEP offered accommodations consisting of preferential seating, early dismissal/late arrival without penalty, notice before transitions to other areas of the campus, access to elevators and use of a wheelchair. Finally, the offer included home-to-school transportation, a lift bus and an AAA for 6 hours a day at school.

11. On June 17, 2004, Student's parents gave written notice in the IEP document of their disagreement with the District's offer of placement at Palisades Elementary. Parents cited reasons based on "distance, safety, social consistence (sic), and ADA issues." Parents included additional written comments in the section of the IEP entitled "Parents Concerns and Comments." Parents filed a Request for Due Process Hearing. The dispute was resolved without a hearing with the parents opting to continue Student's placement at St. Martin at their expense and District provided Student with a 1:1 aide at the District's expense for the 2004 – 2005 school year.

The May 31, 2005 IEP Team Meeting

12. The District convened Student's next annual IEP team meeting on May 31, 2005, at Palisades Elementary. The IEP team members in attendance included Student's parents; Ms. Tami Weiser, Principal at Palisades Elementary; Paula Denen, Assistant Principal at Palisades Elementary; Leslie Yates, Special Education Resource Teacher;

Christine Maxwell, General Education Teacher; Ellen Prell, Adapted Physical Education Specialist/ Designated Instruction Services staff member; and Nadine Iba, Physical Therapist/Designated Instruction Services staff member. The IEP team met to conduct a review of Student's present levels of performance and annual goals and objectives.

13. The IEP indicated Student had achieved her PT goals and objectives but had not achieved the APE goals and objectives established in the May 28, 2004 IEP. The IEP discussed Student's present levels of performance in the areas of reading, mathematics and written language. The IEP also contained a detailed discussion of the assessments and the assessment processes used to determine Student's present levels of academic performance and the test results. Based upon the assessment test results, Student was found to have achieved grade level standards in the areas of reading, mathematics and written language. Student scored above average in the area of academic knowledge.

14. The IEP team reviewed the PT assessment report prepared and presented by Nadine Iba and contained in the IEP. The IEP included a detailed discussion of Student's present levels of performance in the area of physical therapy, and the assessment processes used, which included observations of Student by Ms. Iba, Student's teachers both at St. Martin and at the proposed placement¹, and reports by Student's parents. The PT assessment also noted Student's areas of strength, and indicated that Student was friendly, outgoing, well spoken, and confident in her abilities. Student was able to ambulate independently with the use of her braces and walker around her school campus with the assistance of her 1:1 aide as needed. The assessment identified Student's areas of need to include the use of adaptive equipment to access her educational environment, adult assistance to access the bathroom to tend to her toileting needs, which included changing Student's diapers, adult assistance to access hard to reach areas of the campus and intermittently throughout the day as needed depending on Student's energy level. The assessment identified the assistive technology and /or equipment used in Student's current educational environment including braces, a walker and a wheelchair, which were supplied by Student's parents and medical providers. The IEP team discussed the PT goals and objectives contained in the IEP that provided for supervision by classroom staff to monitor Student's equipment needs and to assist Student to access her educational environment 5 hours a day five days per week.

15. The IEP team reviewed the APE report and assessment prepared and presented by Ellen Prell contained in the IEP. The IEP detailed Student's present levels performance, the assessment processes used and Student's areas of strengths and needs. The IEP noted that while Student had not met the APE goals established in the May, 2004 IEP, she showed improvement in her posture and throwing skills. The IEP team discussed the APE goals and objectives contained in the IEP that included provision of DIS services as a pullout from Student's general education classroom for 60 minutes per week.

¹Student's father accompanied Student to Palisades Elementary on May 23, 2005 where Ms. Iba observed Student transition the areas of the campus Student would need to access during the school day and/or week.

16. The IEP team reviewed the individual education evaluation report similar to that contained in the May 28, 2004, IEP concerning Palisades Elementary. The proposed IEP described the handicap accessible areas of the school, reported that a ramp was scheduled to be built in the summer of 2005 for access to the computer lab, and noted that there was no change in the student-to-teacher ratios and overall school performance at Palisades Elementary since the May 2004 IEP.

17. The proposed IEP offered Student placement at Palisades Elementary for the remainder of the 2004 – 2005 school year and for the 2005 – 2006 school year in the 3rd grade. The offer was in all respects the same as the offer contained in the May, 28, 2004 IEP including support services which identified the use of an AAA for hygiene and safety. The AAA was to serve in the same capacity as Student's 1:1 aide provided by the District at St. Martins. The IEP concluded with the statement that the offer was contingent upon parents' consent to Student's enrollment in a public school. The IEP did not refer to or describe other options considered by the IEP team. The IEP team, including Student's parents, discussed the offer and parents' concerns about the offer. Student's parents informed the IEP team members that they were considering intermittent catheterization for Student which would affect her toileting needs at some point in the future, but confirmed that she presently wore diapers. Student's parents did not provide written comments in the space provided in the IEP for parents concerns. Student's parents did not consent to the offer at the IEP team meeting. Instead Student's parents requested and were given a copy of the IEP draft to take with them and to discuss with their attorney before they could respond to the offer.

18. Student's parents did not mention or request a school safety plan or evacuation procedures during the IEP team meeting. Student's parents did not request more information about the qualifications of the AAA. Student's parents did not request a map of the school campus at the IEP team meeting.²

19. Student's parents did not comment in writing or provide further input to the IEP nor did they follow up or contact the IEP District team members with questions concerning Student's safety or the details of the AAA's qualifications. When Student's parents had not responded to the IEP offer, the IEP was completed and closed on the District's computer program by Leslie Yates on June 3, 2005.

20. District mailed the IEP offer to Student's parents on June 6, 2005, by certified mail, return receipt requested. The receipt for the mail was signed at parents' residence

² Parents testified they made repeated requests for safety procedures and evacuation procedures. The testimony of Paula Denen and Nadine Iba is that Student's parents never raised a concern at the IEP team meeting on May 31, 2005, about Palisades Elementary's safety or evacuation procedures. Paula Denen also testified that school maps were always available on request and were in the administrative office if anyone wanted a copy, the parents never requested a copy or raised it at the IEP meeting. Based upon the observations of the witnesses and giving due consideration to their demeanor, it is found that District's witnesses were more credible as to what was discussed at the IEP team meeting.

address on June 7, 2005.³ The copy of the IEP served as a formal written offer. The IEP adequately identified the program and services proposed by the IEP District team members and provided Student's parents with the opportunity to decide whether the offer of placement was appropriate and whether or not to accept the offer.

21. Student's parents rejected the District's offer by a letter from their attorney dated June 14, 2005. The letter set forth four specific grounds for rejection of the offer; the offer was the same as the offer made in the May, 2004 IEP, the offer was not based on Student's unique needs or calculated to ensure educational benefit, the facilities at Palisades Elementary were not fully accessible to a child with Student's unique needs, and the provision of an AAA was inappropriate for a child with Student's unique needs. The letter informed the District that parents considered St. Martin Student's "stay put." The letter also provided notice to the District that Student's parents would be filing a Request for Due Process Hearing.

22. The District's IEP offer of May 31, 2005, was presented to Student's parents at the IEP team meeting of May 31, 2005 and provided Student's parents sufficient notice of the District's proposed offer of FAPE. The IEP included a description of the District team members' proposed IEP, explained why the action was proposed, described each assessment and report that formed the basis for the proposed action, described the factors relevant to the District's proposed action, requested parents consent and provided notice to Student's parents of the procedural safeguards afforded under the IDEA. The IEP did not describe other options considered by the IEP team and the reasons for rejecting those options. The IEP clearly identified the proposed action and provided Student's parents the opportunity to participate in the IEP process and to decide whether the proposed action was appropriate.⁴

23. The IEP team's failure to include in the IEP a description of other options considered by the IEP team and the reasons for rejecting those options was procedural error. The procedural error did not result in a loss of educational opportunity to Student nor did the error seriously infringe upon the opportunity of Student's parents to participate in the process of formulating the May 31, 2005 IEP and did not result in a denial of FAPE.

Appropriateness of the IEP of May 31, 2005

³ Student's parents testified at the hearing that they did not receive the IEP in the mail. Paula Denen testified that the IEP was the only other documentation the District needed to mail to the parents and it was mailed to their residence on June 6, 2006, and that she received the certified mail receipt back signed by someone at parents' home. Ms. Denen was more credible on this point for two reasons. First, Ms. Denen had not received a response to the IEP given to parents at the IEP team meeting and she was instructed to mail the IEP to Student's parents. Second, the letter from Student's attorney dated June 14, 2005, referred to information contained in the document that District mailed to the parents. It is also noteworthy that the letter made no reference to parents' request for a safety plan or evacuation procedures at the proposed placement.

⁴ Testimony of parents is that they have participated in all of Student's IEPs. They are both educated and they both believed the May 31, IEP offer was the same as that contained in the May 28, 2004 IEP, which they did understand.

24. The IEP established that Student's unique educational needs were based solely upon her orthopedic impairment, which consisted of the need for safe access to the classrooms, other areas of the school campus and the restrooms to meet her toileting needs at Palisades Elementary. The IEP offered access to an elevator to Student's classroom on the second floor of the main school building, access to a gate for ingress and egress to the school, access to more than one handicap compliant bathroom to meet her toileting needs, which at the time of the IEP included a changing table and a plinthe. The offer also provided for preferential classroom seating, late arrival and early departure from the classroom without penalty, handicap accessible ramps at various locations throughout the school campus and an aide to assist student for safety, hygiene, and to meet her other needs. There is no credible evidence that Student had any social or emotional impairment nor is there any evidence that Student's placement at Palisades Elementary would impede development of Student's self esteem or her independence.⁵

25. The IEP established that Student performed at or above average academically and would be placed in the general education curriculum at Palisades Elementary. Student offered no evidence that the general education curriculum was inappropriate. The IEP established that the school held a high academic performance ranking. The IEP also established that except for Student's orthopedic impairment Student was both socially and academically typical of the students attending Palisades Elementary. The offer of placement at Palisades Elementary comported with the IEP and was reasonably calculated to provide Student with some educational benefit.

26. The IEP offered Student a program in the least restrictive environment. It is undisputed that Palisades Elementary was Student's school of residence. The IEP established that Student would be placed in a class with 19 other typically developing peers for 100 percent of the day supplemented with appropriate aids and the support of an aide in the form of an AAA. The IEP provided detail of the types of classes available to Student and the level of expertise of the teachers at Palisades Elementary. The IEP offered additional supplementary aids and services including home-to-school transportation and a lift bus. There is no evidence that the IEP offer would deprive Student of either an academic or a non academic benefit. In fact, the evidence demonstrates unequivocally that because of Student's bright, energetic and outgoing personality the students at Palisades Elementary would derive great academic as well as non academic benefit from their interaction with her both in the classroom as well as on campus.⁶

⁵ Testimony of Student's expert, David Griffin was not credible on the issue of access. Mr. Griffin's testimony was based largely on conjecture and speculation. His analyses of the access issues in this case were flawed and he had no knowledge of the IEP in this case.

⁶ Student testified that she was quite active and had friends at St. Martin. She liked to be independent and liked to participate in various school activities. She did say she would be sad if she had to leave St. Martin. However, based upon the undersigned's observations of Student at the hearing, she appeared to be very bright, confident and engaging and would likely not have any difficulty making friends as she acclimated to a new school environment.

APPLICABLE LAW

1. Student has the burden of persuasion in an administrative hearing challenging an IEP. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. [126 S.Ct. 528, 163 L.Ed 2d 387].)

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a) (1) (A);⁷ Educ. Code, § 56000) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State’s educational standards and that conform to the student’s IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o)) “Special education” is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031) “Related services” or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA- Procedural and Substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [*Rowley*].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child’s unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child’s IEP. (*Id.* At pp. 206-207.)

4. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents’ right to participate in the IEP process. (*Rowley, supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. Sch. Dist. Of Greenville County* (4th Cir. 2002) 303 F.3 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F. 3d 877, 892.)

5. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings concerning the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code §§ 56304, 56342.5; 34 C.F.R. § 300.501, subd. (a), (c).) Education Code section 56341.1 requires the IEP team to consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil. School officials and staff do not predetermine an IEP simply by meeting to review, discuss, and take notes regarding a

⁷All statutory references are to the Individuals with Disabilities Education Act (IDEA), Title 20 of the United States Code, unless specifically noted otherwise.

child's evaluation and programming in advance of an IEP meeting, so long as they "come to the meeting with suggestions and open minds, not a required course of action." (Compare *N. L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-695, fn. 3; see also *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 994, with *Deal v. Hamilton County Bd. Of Ed.* (6th Cir. 2005) 392 F.3d 840, 858; see also *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, citing *W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. The District is required to give written prior notice to the parents of a child whenever the Local Education Agency either proposes to initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education of the child. (20 U.S.C. § 1415, subd. (b) (3) and 34 C.F.R. § 300.503 (a) (1).) The notice should include Description of proposed action; explanation of why District proposes it; description of each evaluation, procedure, assessment, record or report District used as basis for proposed action; description of other options considered by IEP Team and reason why options were rejected; description of the factors that are relevant to District's proposal; statement that parents of a child with disability have protection under the procedural safeguards in this section; sources for parents to contact for assistance in understanding the provisions of this section. (20 U.S.C. § 1415, subd. (c) (1) (A), (B), (C), (D), (E) and (F).) If the notice described in this section relates to an action proposed by the agency that also requires parental consent the agency may give notice at the same time it requests consent. (34 C.F.R. § 300.503 (a) (2) and § 300.505.)

7. An IEP must include, in pertinent part, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414, subd. (d)(1)(A)(i), (ii), (iii) and (vii) (I); 34 C.F.R. § 300.347, subd. (a)(1), (2), (3) and (7) (i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G.*, *supra*, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

8. An IEP is evaluated in light of the information available at the time it was developed, and is not to be evaluated in hindsight. "An IEP is a snapshot, not a retrospective." It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

9. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. V. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and

whether or not to accept the offer. (*Ibid.*) Procedural errors do not necessarily deprive a student of a FAPE. Procedural flaws do not automatically require a finding of a denial of FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE. Thus, there must be a substantive harm to the student. (See Ed. Code § 56505, subd. (j): [Hearing officer may not base a decision solely on non substantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent's opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F.2d 1479, 1484 ("Target Range"); *DiBuo v. Bd. of Educ.* (2002 4th Cir.) 309 F.3d 184.)

10. The second prong of the *Rowley* test analyzes substantive appropriateness, specifically, the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The *Rowley* Court determined that a student's IEP must be designed to meet the student's unique needs, be reasonably calculated to provide student with some educational benefit, and comport with the student's IEP. (*Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each 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 Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. 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, subd. (a) (5) (A); Ed. Code § 56031.) (*Board of Education of La Grange School District v. Illinois State Bd. Of Educ.*, (7th Cir 1999) 30 IDELR 891 p. 4; 184 F.3d 912.)

11. The courts have considered the following factors in determining whether a proposed placement satisfies LRE requirements: 1. Educational benefit available to the student in a regular classroom setting, supplemented with appropriate aids and services, compared to educational benefits of a special education classroom; 2. Nonacademic benefits to the disabled child of interaction with non disabled children; 3. The effect of the presence of the disabled child on the teacher and other children in the regular education classroom; and 4. The costs of supplemental aids and services necessary to mainstream a disabled student in a regular classroom setting. (*Sacramento City Unified School District v. Rachel Holland* (9th Cir 1992) 786 F. Supp. 879.)

12. It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions

with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at pp. 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) An expert’s credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

13. The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted-but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

14. A judge may not render a decision resulting in the placement of an individual with exceptional needs in a non public, nonsectarian school, or resulting in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Education Code section 56366.1. (Ed Code § 56505.2)

15. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412, subd. (a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371.) Parents may receive reimbursement for their unilateral placement if the placement met the child’s needs and provided the child with educational benefit. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14.)

Determination of Issues:

Issue I: Did the District deny Petitioner a FAPE in the May 2005 IEP by failing to provide sufficient prior written notice of its proposal to change Student’s placement and services by not including:

A. A description of the school, classroom location, safety and evacuation procedures, bathroom location and campus layout;

B. An explanation of the change in placement;

C. A description of other options considered by the District that may be appropriate for Student;

D. Notice of the change in aide services to an AAA, including description of the AAA's qualifications, role in the classroom, and hours in the classroom; and

E. Failing to provide Student's parents with sufficient information to adequately understand the offer, thereby depriving parents of the opportunity for meaningful participation in the IEP?

Procedural Appropriateness of the IEP of May 31, 2005

16. Student's assertions notwithstanding, the procedural requirement of prior written notice does not apply to the May 31, 2005 IEP offer. It is undisputed that Student's parents received notice of the IEP team meeting. To require prior written notice of the IEP offer is contrary to the prohibition under the IDEA against School officials and staff predetermining the outcome of the IEP and dictating to Student's parents the required course of action. The evidence also overwhelmingly demonstrates that the IEP offer was not an offer by the District to initiate or to change Student's placement or a refusal to initiate or change Student's placement. Student had not attended a public school or a private school under contract with the District to provide services from which a change in placement was proposed. The law also permits the District to give notice to Student's parents at the same time it requested their consent to the offer, i.e. at the May 31, 2005 IEP team meeting. Even if prior written notice was required on the facts in this case, the evidence also demonstrates that Student's parents were given ample prior and subsequent written notice of the District's offer to place Student at her school of residence and to provide DIS services. The prior written notice was provided in the IEP document presented to Student's parents at the IEP team meeting as allowed by law on May 31, 2005. The District followed up by mailing the IEP and the formal offer to Student's parents six days after the IEP team meeting.

17. The IEP substantially complied with the procedural requirements under *Rowley and Union, supra*. Unlike the District in *Union, supra*, where the District failed to communicate an intelligible offer of any kind to Student's parents, the District in this case provided a substantially comprehensive and detailed offer of placement. The evidence is also clear that Student's parents were well educated and intelligent people who were well versed in the IEP process. Student's parents were and had been dedicated and active participants on the IEP team since the District's determination that Student was eligible for special education services. Parents' testimony that they did not understand portions of the IEP or that their concerns were not addressed at the IEP team meeting was not credible. In fact, Student's parents contradicted themselves when they testified that the proposed placement and offer presented in May 31, 2005 IEP was the same as the May 28, 2004 IEP which they sufficiently understood and with which they had disagreed, resulting in parents' filing a Request for Due Process Hearing. The testimony of Paula Denen and Nadine Iba

that Student's parents discussed their concerns but did not raise an issue or request the school safety/evacuation plan or the school map, which would have been provided on request, is more credible and a more plausible explanation of what took place at the IEP team meeting. It appears from the evidence that Student's parents were disappointed that the District renewed its previous offer of FAPE and chose not to participate in further discussions or identification of their concerns or need for further information about the offer. Student's Parents, who testified that they previously had a good working relationship with the District IEP team members, were an integral part of the IEP team and had a duty to point out the areas of confusion if any in the IEP and demand clarification or further details. They elected not to do so.

18. The District IEP team members did however fail to include a discussion of other options for placement and the reasons for not considering those options. Though this was procedurally incorrect, in that the District did not document in the IEP what other options may have been considered, it did not seriously infringe upon Student's parents right and opportunity to participate in the IEP process. Student conceded the diminutive impact of District's failure to discuss other options for Student in the closing brief by arguing that "even though it is not required by law the District should have included other options that were considered". The District's failure to address any options in writing however is a procedural flaw that did not deny Student educational opportunity or deprive or seriously infringe on Student's parents' right to participate in the IEP process.

19. Where a school district has repeatedly provided the parent with the opportunity to participate meaningfully in the IEP process, such as in this case, the District has not violated its obligations under 34 C.F.R. § 300.345, which requires the District to take steps to ensure that one or both of the parents is afforded the opportunity to participate in IEP meetings, so long as it affords the parents a subsequent due process hearing concerning District's proposed plan.

20. Based upon the Findings of Fact 7 through 23 and applicable law 1 through 9 and 12 to 13, it is determined that the Student failed to prove that the District violated Student's procedural rights under the IDEA. The evidence supports a finding that the District did not deprive Student's parents of a full and meaningful opportunity to participate in the IEP of May 31, 2005 and therefore did not deny Student a FAPE in the May 31, 2005 IEP.

Issue II. Did the District deny Student a FAPE in the May 2005 IEP by failing to offer a placement for the remainder of the 2004 – 2005 school year and the 2005 – 2006 school year based upon Student's unique needs that address:

- A. Access and mobility;
- B. Safety procedures;
- C. Use of a walker; and
- D. Other access that provides an academic and a non academic benefit to the Student?

Substantive Appropriateness of the May 31, 2005 IEP

21. The IEP identified Student's unique needs which consisted of the need for safe access to the classrooms, other areas of the school campus and the restrooms to meet her toileting needs at Palisades Elementary.

22. The IEP addressed all areas of access both in the physical access to the classrooms of the school which would allow Student to access the educational environment in the form of academic enrichment classes and other general education curriculum. The IEP was clearly reasonably calculated to provide Student with some educational benefit as evidenced by the high test scores at Palisades Elementary and in the level of expertise of the teachers at the school. The offer fully comported with the IEP.

23. The offered placement at Palisades Elementary also satisfies the legal requirements for placement in the least restrictive environment. Here, Student was to be placed in a general education class 100 percent of the time with a smaller student to teacher ratio than in her private school. Student's classroom day was to be supplemented with appropriate aids in the form of her braces, walker and wheelchair. The AAA was to perform the same services as Student's 1:1 aide. Contrary to Student's argument in its closing brief Student did not need an AAA qualified to change a catheter as Student was not using a catheter at the time of the IEP. The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams, supra.*) The IEP considered the fact that Student is a bright and highly independent person who would derive academic and non academic benefit from her interaction with non disabled students at the proposed placement. There is no evidence that student had self esteem or social problems which would impede her development. Except for Student's claim for reimbursement for tuition at St. Martin for the 2005 – 2006 school year Student has not raised the issue of cost of supplemental aids and services as parents have in the past declined District's offer of DIS services and have supplied Student's equipment through their medical provider. Based upon the evidence, the offered placement is in all respects appropriate under the standards established in (*Rachel H., supra.*)

24. It is understandable that Student's parents preferred St. Martin for Student because she was comfortable there and was familiar with the routine having attended there for several years, but the law is clear that where the IEP meets the requirements for substantive appropriateness under *Rowley, supra*, then the District has provided a FAPE even if Student's parents preferred another program and even if the preferred program would have resulted in greater educational benefit.

25. In this case Student has failed to offer any persuasive or credible evidence that the May 31, 2005 IEP offer was inappropriate and failed to meet Student's unique needs. Student's expert testimony was not accorded any weight because the witness was not competent to testify to the offer of FAPE.

26. Based upon Findings of Fact 1 through 26 and applicable law 1 through 27 it is determined that the District did not deny Student a FAPE in the May 2005 IEP and that the offer of placement at Palisades Elementary was appropriate and provided Student a FAPE.

27. Based upon the above findings, all other issues are rendered moot.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: District has prevailed on all issues heard and decided.

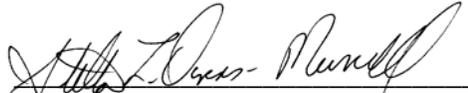
ORDER

Student's requests for relief on all claims set forth above are denied.

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).)

September 27, 2006


STELLA L. OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings
Special Education Division