

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

In the Matter of:

STUDENT,

Petitioner,

and

MODESTO CITY SCHOOLS,

Respondent.

OAH NO. N 2005110121

DECISION

Keith J. Kirchubel, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on May 23-26, 2006, in Modesto, California.

Petitioner Student (Student) was represented by Bob Varma of the law firm of Varma and Clancy.

Respondent Modesto City Schools (District) was represented by Marcy Gutierrez of the law firm of Kronick, Moskowitz, Tiedemann & Girard.

The Petitioner called the following witnesses: Student, Ms. Patricia Diven, Student's tutor, Ms. Mary Jackson, District Special Education Director, Student's father, Mr. Glenn Harris, District Resource teacher, Mr. David Romano, District Administrator.

The District called the following witnesses: Mr. John Lagos, Student's Geometry teacher, Mr. Dan Eisel, Student's Biology teacher, and Ms. Valorie Fitzgerald, Student's English Teacher.

The following people were present at different times during the hearing: Katie Gaines, District Special Education Administrator, and Ken Ferro, District Administrator.

Oral and documentary evidence were received. The parties agreed to simultaneously submit closing briefs. The briefs were filed with the OAH on June 13, 2006.¹

ISSUES

1. Did the District deny Student a FAPE during the 2004-2005 school year by reducing the quantity of Slingerland-based tutoring offered in the spring semester from 2.0 hours per day to 1.0 hours per day?²

2. Did the District deny Student a FAPE during the 2005-2006 school year by offering no Slingerland-based tutoring services?

CONTENTIONS OF THE PARTIES

Student contends that he was denied a free appropriate public education (FAPE) from January, 2005, through the end of the 2005-2006 school year when the District discontinued providing Student 2.0 hours per day of simultaneous, multi-sensory ("Slingerland") tutoring. Student also asserts "stay put" rights to the same tutoring services on the basis of references contained in the proposed resolutions portions of his due process hearing request. The District contends that Student does not require the tutoring services in order to receive a FAPE and that his stay put rights were superseded by a settlement agreement reached by the parties in September, 2004.

¹ Student attached documents not admitted in evidence to his closing brief. These attachments were not considered by the ALJ.

² Student's request for due process does not allege that the District failed to identify Student's unique needs, then- present levels of performance or to define proper goals and objectives. Therefore, those aspects of the District's offers shall not be considered.

FINDINGS OF FACT

BACKGROUND AND PROCEDURAL HISTORY

1. Student is a 16-year-old male eligible for special education services within the category of specific learning disability. Student's disability is a visual processing disorder described as dyslexia. He is studious and applies himself to learning. He enjoys interaction with other people, learning about finance, and the study of history.

2. Student resides with his parents within the boundaries of the District. Student attended ninth grade at Grace Davis High School (Davis) within the District during the 2004- 2005 academic year and tenth grade at Davis during the 2005-2006 academic year.

3. Prior to the fourth grade, Student experienced significant difficulty and delays in learning as a result of his dyslexia. Student was substantially below grade level in language arts and mathematics. Beginning in fourth grade, Student was educated in a one-to-one setting by a credentialed tutor trained in a "simultaneous, multi-sensory" teaching method identified by the name Slingerland.

4. Student received four hours per day of one-to-one tutoring through his eighth grade year. His tutor throughout this period was Ms. Patricia Diven. Upon his transition to ninth grade, Student was functioning academically at or above his grade level.

5. On September 14, 2004, the parents and the District entered into a settlement agreement (Agreement) resolving educational issues pertaining to Student prior to the date of the agreement. The Agreement created a schedule for certain assessments to be performed on Student and provided that Student was entitled to receive two periods of instruction, five days per week from Ms. Diven through September 30, 2004. The authorization of Ms. Diven's services was conditioned on her being hired as an employee of the District.

6. The Agreement also stipulated that an Individualized Education Program (IEP) meeting was to be convened regarding Student prior to September 30, 2004. If a

dispute arose regarding the continuation of Ms. Diven's services in the course of the IEP meeting, the Agreement required Student to file for due process within one calendar day in order to preserve his right to receive those services beyond September 30, 2004.

7. The Agreement stated at paragraph number 6 that services provided by Ms. Diven under the terms of the agreement "shall not constitute stay put" under the Individuals with Disabilities Education Act (IDEA) and that the Agreement itself did not constitute an IEP.

8. On September 28, 2004, Student's parents and the District convened an IEP meeting to discuss Student's placement for his ninth grade year. The IEP team reviewed a report and findings dated September 22, 2004, by Bill Williams, District psychologist, following an assessment of Student.

9. At the conclusion of the September 28, 2004 IEP meeting, the District offered Student the following educational placement for the 2004-2005 academic year: 50 minutes of "push-in" resource support each day for the entire year, 120 minutes of "home hospital" instruction per day through January 23, 2005, and 60 minutes of "home hospital" instruction per day from January 24, 2005, through May 12, 2005. The "home hospital" services were offered in lieu of general education classroom instruction for the respective portions of the school day during each semester. The September 28, 2004 IEP document did not specify a provider of the home hospital services.

10. On October 4, 2004, the parents consented to the portion of the District's offer covering the period through January 23, 2005. In the same correspondence dated October 4, 2004, the parents stated that the tutoring services would be provided by Ms. Diven.

11. There was no evidence that the District rejected the parents' designation of Ms. Diven as the provider of home hospital services during the first semester of Student's ninth grade year. The District reimbursed parents for payments parents made to Ms. Diven during the period September 14, 2004, through January 21, 2005. In that period, Ms. Diven

provided two hours per day of home hospital services to Student, though she was not an employee of the District at that time. Student's father has not observed the tutoring sessions since Student entered high school.

12. A further IEP team meeting was convened on November 22, 2004, but Student's parents were not present. The team reviewed appraisals furnished by Student's teachers. His algebra teacher referred to him as a "very good student," evaluated his ability to complete assignments as "excellent," and characterized his test scores as "above average." His English teacher rated Student "excellent" in all areas and noted, "his writing is good and his test scores indicate he is on task and studying hard." Similarly, Student's science teacher stated that he was doing well in all areas. The team discussed Student's goals and objectives but made no proposal to change his placement and services for the 2004-2005 academic year.

13. On January 26, 2005, the IEP team, including the parents, convened to discuss Student's placement for the second semester of ninth grade. Student's teachers in his health, earth science, algebra and English classes gave very positive reports of his effort, performance, participation and citizenship. It was also noted that Student benefited from accommodations in the form of extra time to complete assignments and from additional instruction in the areas of math and English. Student's father advocated for continuation of two hours per day of home instruction. Ms. Mary Jackson, on behalf of the District, conveyed an offer of one hour per day of home instruction to be provided by a credentialed District tutor trained in multi-sensory methodology plus one period per day of push-in resource support for the time period January 26, 2005, through May 12, 2005.

14. On February 2, 2005, Ms. Jackson wrote to Student's parents to clarify the District's offer following the January 26, 2005 IEP team meeting. The letter restated the terms recited above and added that the offered home hospital instruction period was to be used to assist Student in meeting his IEP goals and objectives.

15. On March 7, 2005, counsel for parents wrote to counsel for the District expressing parents' acceptance of the January 26, 2005 IEP offer "with the exception of the reduction in hours for the home/hospital, one-to-one service." The letter attempts to inject Ms. Diven into the IEP offer on the basis of an asserted, but unsubstantiated lack of specificity in the IEP document. The January 26, 2005 IEP document and the February 2, 2005 confirmation letter expressly provided that Student's home instruction was to be provided by a credentialed District employee. The evidence established that Ms. Diven was not a District employee as of January, February, and March, 2005.

16. The March 7, 2005 letter constituted consent for the implementation of the IEP offer of one hour per day of home instruction by a credentialed District tutor trained in multi-sensory methodology with an end date of May 12, 2005.

17. No evidence was presented of a formal response by the District or its counsel to the parents' acceptance dated March 7, 2005. Ms. Jackson testified that the District considered the January 26, 2005 IEP offer to have been accepted. However, the District did not implement the home hospital instruction element of the IEP by tendering the services of a qualified tutor nor did it respond in writing to the March 7, 2005 letter.

18. During the second semester of the 2004-2005 academic year, Student's parents paid Ms. Diven to continue to provide two hours of home instruction per day.

19. On May 11, 2005, Student's IEP team convened to plan for his tenth grade year. His ninth grade teachers provided input on his then-present levels of performance. Student was performing well, earning four "A" grades (science, physical education, world geography and home instruction) and one "B+" grade (algebra). Student's English teacher commented on Student's good grasp of the subject matter and adequate level of class participation. She recommended that Student continue to take college preparatory high school classes. Student earned a "B" grade in English according to his transcript. Student's geography and religions teacher commented that Student's "best area involves reading assignments" and evaluated his test scores as above average. The District offered

continuation of one hour per day of home instruction and one period per day of push-in resource support through June 10, 2005, and then elimination of the home instruction for Student's tenth grade year. The District's offer for the 2005-2006 academic year consisted solely of one period per day of push-in resource support. Parents did not consent to the offer.

20. On October 18, 2005, Student's IEP team reconvened regarding his tenth grade educational placement. At that time, the team reviewed standardized test results reported by Diana Crofts. The results indicated that Student's academic performance was at or above grade level in all areas except spelling. However, most of the scores were low compared to previous testing of Student conducted in May of 2003 and May of 2004. Ms. Crofts did not testify regarding the administration of the September, 2005 testing, but the evidence established that at least one of the scores was adversely impacted when Student's father removed him from the test before Student had completed the writing assessment.

21. The validity of the 2005 standardized test results was not conclusively established. For example, Student's "reading fluency" – defined as "how fast Student reads correctly" – was evaluated at a grade equivalent of 4.6. Conversely, Student's "reading comprehension" which necessarily depends on his ability to read correctly, was evaluated at a grade equivalent of 8.9. Ms. Diven and Ms. Fitzgerald established that Student has no trouble with reading at or above his grade level with the benefit of extra time for assignments. Ms. Diven and Ms. Fitzgerald also established that Student writes well, both in terms of the structure and content of the writing.

22. Ms. Blickenstaff testified regarding the September, 2005 test results. She established her own familiarity with the test protocols, comparability of various tests over time, and interpretation of results. Ms. Blickenstaff established that test score regression suggests the need for further evaluation. She also established that appraisals by Student's teachers are entitled to equal weight in a comparison with standardized test results. Given that the administration and anomalous results of a single day of standardized testing in

September, 2005, were not adequately explained, the ALJ finds that the evaluations by Student's teachers in various subjects, across many months of observation and testing were entitled to significantly greater weight with regard to his academic performance.

23. Following the October 18, 2005 IEP meeting, the District's offer consisted of only one period per day of resource support, modified to a "pull-out" delivery model. Parents did not consent to this offer.

24. On October 25, 2005, Mr. Glen Harris, Student's Resource teacher, wrote an addendum to the October 18, 2005 IEP document. In the addendum, Mr. Harris expressed "great reservations" regarding the recommendations of the IEP to offer resource class but no one-to-one tutoring. Mr. Harris stated that he was not certain that the change in placement was proper for Student. In testimony at hearing, Mr. Harris established that he had been Student's Resource teacher during ninth grade and the first two months of tenth grade. Mr. Harris believed that Student's best interest would be served by continuing the tutoring program in place at the time because he believed Student was comfortable and making academic progress. Mr. Harris was not sure that the continuation of the tutoring program was necessary in order for Student to receive educational benefit in high school.

25. Student filed a request for due process with the OAH on November 1, 2005, seeking a determination that the District's offers for the 2004-2005 and 2005-2006 academic years did not satisfy the requirements of a FAPE. Student contends that the District failed to provide the services of a qualified instructor, trained in the Slingerland methodology, which he describes as "the only research based technique documented to work" for Student.

IDENTIFICATION OF STUDENT'S UNIQUE NEEDS

26. The testimony of Student, his father, Ms. Diven, his high school English, geometry and biology teachers, as well as the report by Mr. Williams established that during the 2004-2005 and 2005-2006 academic years, Student's unique needs were related to his visual processing disorder. He had difficulty with spelling and copying information

with speed and accuracy. His ability to successfully acquire new language or concepts was directly related to his understanding of the context of the information presented. For example, Student accessed new vocabulary most readily when it was presented as part of a passage or article where the meaning and relevance of the word was discernible. The same was true for new mathematical concepts presented in Student's algebra class. He required additional time and context to understand new ideas embedded in algebraic expressions.

STUDENT'S EXPERIENCE WITH SLINGERLAND TEACHING METHODOLOGY

27. Ms. Diven qualified herself as an expert in the simultaneous multi-sensory teaching methodology described as "Slingerland." Slingerland identifies three modes of sensory input related to learning: visual, auditory and kinesthetic. The Slingerland methodology emphasizes the importance of delivering instructional content by all three modes. For the introduction of a new word a Slingerland student sees the word, sounds out its component phonemes, and writes it simultaneously. Ms. Diven explained that Slingerland is appropriate for use with dyslexics because they typically have difficulty assimilating new material presented by only one or two modalities. Additionally, the tutor spends time assisting the student with understanding the context of newly presented material. Focusing on *why* the author wrote a particular statement helps the student connect successive phrases and attain understanding. Ms. Diven established that these methods had been effective for Student beginning in the fourth grade.

28. Ms. Diven and Ms. Blickenstaff established that the Slingerland methodology is intended to become a resource that Student masters and uses on his own in response to his disability. Ms. Diven, who has worked closely with Student for seven years, established that he has a good sense of his own needs and abilities. Student testified that he has retained and can implement on his own roughly ninety percent of the strategies instilled through the Slingerland tutoring.

29. Ms. Diven established that Student successfully generalizes the skills he has learned in English to other academic topics. This finding was supported by the testimony

and written appraisals of his other instructors. Student was exposed to significant new vocabulary across his curriculum as discussed in more detail below. In health, science, and social studies, he effectively acquired new vocabulary and topical understanding without the benefit of one-to-one tutoring. The evidence established that Student is reading to learn, not learning to read.

STUDENT'S 2004-2005 SCHOOL YEAR PROGRAM

30. Throughout his ninth grade year during 2004-2005, Student received two hours per day of one-to-one tutoring from Ms. Diven at her home. Ms. Diven established that this tutoring focused exclusively on Student's English vocabulary and algebra assignments. One of these hours was credited as a "Resource" period on Student's ninth grade transcript.

31. Ms. Fitzgerald taught Student's ninth grade college preparatory English class. She described the class as "high functioning" and placed Student in the top ten percent of the class academically. Student performed well on daily language activities that he completed on his own during class. Ms. Fitzgerald established that Student communicated effectively in writing and his written product was at grade level. She stated that Student's intellectualism comes across on paper. Student read and was tested on such works as To Kill a Mockingbird, Homer's Odyssey, and Shakespeare's Romeo and Juliet. On one assignment, Student recited a speech from Shakespeare that Ms. Fitzgerald described as a "phenomenal interpretation" in terms of the memorization, inflection and characterization of the delivery.

32. Written appraisals of Student's work in other classes, together with his academic transcript evidence his ability to succeed in the general curriculum with the benefit of minimal accommodations. Student testified that he was able to acquire new vocabulary without difficulty and earn "A" grades in his health, geography/religions, and science classes even though these subjects were not touched on in his tutoring sessions with Ms. Diven. With regard to algebra, this was an area of emphasis with Ms. Diven during

ninth grade. Student required the most help understanding how abstract concepts were expressed in algebraic equations and formulas.

STUDENT'S 2005-2006 SCHOOL YEAR PROGRAM

33. Student continued to receive two hours of tutoring per day with Ms. Diven during his tenth grade year. The District assigned Student to a period of "Resource" time that conflicted with Student's tutoring schedule. Student regularly missed the Resource period in order to attend his tutoring. The District considered Student's absence to be unexcused despite the lack of agreement regarding his tenth grade educational program. Student's transcript reflects that he received a grade of "F" for the resource period based on lack of attendance.³

34. During tenth grade, Student's tutoring with Ms. Diven focused exclusively on geometry. However, Student failed to establish a correlation between his success in his geometry class and the 10 hours per week of one-to-one tutoring purportedly delivered using the Slingerland methodology. First, Student and Ms. Diven demonstrated a tutoring lesson during the course of the hearing wherein Student was to calculate the surface area of a rectangular solid. Ms. Diven did the vast majority of the talking and all of the writing during this exemplar lesson. Although she testified to the benefits of kinesthetic stimulus,

³ California Education Code section 49070 states that a parent may file a written request with the superintendent of the District to correct or remove any information recorded in the written records of his or her child. If the superintendent refuses to order the correction or removal of the information, the parent may appeal to the governing board of the District. Under California law, appropriate issues for a special education due process hearing include the propriety of a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to the child. (Educ. Code §56501) Accordingly, the ALJ makes no finding regarding the propriety of Student's 2005-2006 resource grade.

she never once handed Student the pencil. Ms. Diven, not Student, sketched the figure. Ms. Diven, not Student, wrote the formula. When Student correctly expressed the answer in square units, Ms. Diven incorrectly prompted Student to change his answer to cubic units. In summary, the unique benefit of this lesson was in no way evident. Second, Ms. Diven testified to spending no more than two hours total tutoring Student on geometry proofs. Student's geometry class spent two months on proofs and Student earned an 83 percent score on the proofs test as compared to the class average of 63 percent.

35. Mr. Lagos established that he uses a simultaneous multi-sensory approach to promote learning in his geometry class. He used lecture and questions/answers, he used visual cues such as drawing figures and solving problems on the blackboard, and he used manipulative shapes and construction exercises employing rulers and compasses for kinesthetic stimuli. Mr. Lagos established that Student performed academically in the upper quarter of this college preparatory class despite the introduction of unique concepts, methods and vocabulary that cause problems for many students. Student was engaged in his geometry class, making positive eye contact with the instructor, providing appropriate feedback during class and performing well on tests and quizzes. This evidence was more credible and persuasive regarding Student's performance in geometry class than the testimony of Ms. Diven who conceded she had never observed the class.

36. Student also performed at or above grade level in his college preparatory tenth grade English class despite the lack of any Slingerland tutoring by Ms. Diven during the 2005-2006 academic year. Ms. Fitzgerald established that Student succeeded across the curriculum in units involving the elements of literature, vocabulary, writing in persuasive style, poetry, daily oral language activities, and further study of Shakespeare. With respect to vocabulary, which was formerly an area of weakness for Student, Ms. Fitzgerald embedded that with other learning in the context of the material covered. Student also benefited from what Ms. Fitzgerald described as the "circle strategy" for accessing new vocabulary. This method introduced the definition of a word, its synonyms and antonyms,

connotation and correct usage all at the same time. Ms. Diven testified to a similar method for teaching vocabulary to Student when that topic was covered in tutoring during prior years.

37. Mr. Eisel, Student's tenth grade biology teacher, established that Student performed in the upper 20 percent of the class academically without the benefit of Slingerland-based tutoring. Mr. Eisel described science as a "foreign language" in that students are required to learn new vocabulary and concepts in each unit. Mr. Eisel had Student employ a study technique that is appropriate to his need for context in acquiring new vocabulary: Student started by reading the chapter summary, then browsed the various chapter headings and photographs/captions, and lastly read for detail. Mr. Eisel urged Student to be able to say what one paragraph was about before moving on. As noted above, Ms. Diven used a similar technique in her tutoring with Student, emphasizing an understanding of why the author wrote something and connecting ideas as Student progressed through a passage. Student also benefited from the kinesthetic aspect of lab assignments. He actively participated in his biology class, demonstrating mastery of the vocabulary of the subject and asking what Mr. Eisel termed to be "higher order questions" as compared to Student's peers. Student's performance on class exercises and tests indicated a grade-level understanding of the material.

38. Ms. Diven and Student's father described Student as severely dyslexic in that there is a large disparity between Student's intelligence and his ability to express that intelligence. Neither witness provided any specific example of the disparity during the 2004- 2005 or 2005-2006 academic years. The testimony of Student's teachers, supported by appraisals of his work, established through multiple examples that Student is able to express himself in ways that are appropriate, engaging, and academically at or above his grade level. Student's own testimony at hearing regarding his own history, his classwork and his interests was clear and understandable.

APPLICABLE LAW

1. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Ed. Code § 56000.) 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).) Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Cal. Educ. Code § 56031.) 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 Education Code section 56363, subdivision (a), similarly 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.”

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 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. (Id. at 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity”

that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (Id. at 201.)

3. To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) To constitute a FAPE as required by the IDEA and *Rowley*, a district's offer must be designed to meet a student's unique needs and be reasonably calculated to provide the student with some educational benefit. Additional requirements are that the District's offer must conform to the IEP, must be in the least restrictive environment (LRE), and provide the student with access to the general education curriculum. (See 20 U.S.C. § 1412(a) (5) (A); 34 C.F.R. §§ 300.347(a), 300.550(b); Education Code § 56031.)

4. Federal and California special education law is designed to ensure the protection of the rights of children with disabilities and their parents. Specifically, a student's parent(s) must be included in the IEP process and have the opportunity to present information and express concerns regarding the student's needs and educational plan. (20 U.S.C. §1400(d)(1)(B); Educ. Code §§ 56341, 56341.1, 56341.5.) A failure to abide by the procedural requirements of the IDEA may form the basis for a finding of denial of FAPE if the failure results in a loss of educational opportunity to a student or seriously infringes on a parent's opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. Special education law requires that to the maximum extent appropriate, children with disabilities should be educated with children who are not disabled. Removal of children with disabilities from the regular educational environment should only occur when the nature or severity of the child's disability is such that he or she cannot benefit from a satisfactory education with the use of supplementary aids and services. (20 U.S.C. §1412 (a)(5)(A), Educ. Code §56031.) In addition, the following factors are relevant to a determination of appropriate placement: 1) the educational benefits available to the child

in a regular classroom supplemented with appropriate aids and services, as compared to the benefits of a special education classroom; 2) the non-academic benefits to the handicapped child of interaction with nonhandicapped children; 3) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and 4) the costs of supplementary aids and services necessary to mainstream the handicapped child in the regular classroom setting. (*Sacramento City Unified School District v. Rachel Holland* (9th Cir. 1994) 14 F.3d 1398, 1404.)

6. Federal and State special education laws generally provide that a special education student is entitled to remain in his or her "current educational placement" pending the completion of due process hearing procedures unless the parents and the public educational agency agree otherwise. (20 U.S.C. § 1415(j); Cal. Educ. Code § 56505(d).) For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP that has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Board of Education*, (6th Cir. 1990) 918 F.2d 618, 625.) The purpose of the stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2nd Cir. 1982) 694 F.2d 904.)

7. An agency that is responsible for making a free appropriate public education available to a child with a disability shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child. (20 U.S.C. §1414(a)(1)(D)(i)(II).) If the parent of such child refuses to consent to services, the local educational agency shall not provide special education and related services to the child by utilizing the procedures set forth in 20 U.S.C. §1415. (20 U.S.C. §1414(a)(1)(D)(ii)(II).)

8. In this case, the burden of persuasion regarding the issue presented rests on the Student as the party seeking relief. (*Schaffer v. Weast* (2005) 126 S.Ct. 528.)

ANALYSIS

APPLICATION OF STAY PUT

At the telephonic prehearing conference held on May 10, 2006, Student's counsel first raised the issue of "stay put" as a separate element of his case. Student was directed to file a motion for stay put and did so on May 15, 2006. That motion was denied without prejudice on the first day of hearing on the basis that Student had not adduced sufficient evidence to establish his last agreed-upon and implemented educational placement. Student offered additional evidence throughout the course of the hearing over the objection of District's counsel who contended that the issue was not properly raised in Student's due process hearing request. Those objections were overruled on the basis that Student's legal right to stay put does not have to be separately pled to be at issue. The amount of time spent receiving additional evidence on both sides of the issue of stay put was minimal in comparison to the primary issue of FAPE.

Substantively, the District contends that Student is not entitled to receive Slingerland- based services provided by Ms. Diven as a stay put placement at any time after September, 14, 2004, on the basis of paragraph number 6 of the settlement Agreement. Student argues that he complied with the terms of the Agreement so that the provisions of paragraph number 6 do not apply to this case. Neither position is correct.

The Agreement provided Ms. Diven's Slingerland-based tutoring services to Student on an interim basis, pending the assessments and IEP team meeting described in paragraphs number 1 through 5 thereof. Paragraph number 4 stated that the tutoring services would terminate on September 30, 2004, unless 1) the parents failed to produce Student for assessment, or 2) the provisions of paragraph number 5 dictated a different termination. Pursuant to paragraph number 5, if parties failed to reach agreement regarding Ms. Diven's services by September 30, 2004, then Student would continue to receive those services at District expense until October 19, 2004, so long as Student requested a due process hearing within one calendar day after the impasse arises. Student

did not comply with this latter provision because he did not file for due process until November 1, 2005. Accordingly, the Agreement does not provide a basis for Ms. Diven's services beyond September 30, 2004.

With regard to the application of paragraph number 6, the District argues that the agreement that Ms. Diven's services "shall not constitute stay put" applies in perpetuity, regardless of any subsequent IEP offer and acceptance. This position is without merit. Paragraph number 6 of the Agreement clearly contemplates that the interim tutoring services provided under the Agreement through September 30, 2004, shall not constitute a basis for stay put. Its application is not broader than that. The District had the ongoing duty to evaluate Student's needs and offer educational services appropriate to those needs. Both parties were empowered to make subsequent agreements regarding Student's placement and services that superseded the September 14, 2004, Agreement and did so on October 4, 2004, and March 7, 2005.

In this case, the decision to grant or deny Student's request for stay put necessarily turns on the nature of stay put relief. As noted above, the purpose of stay put is to preserve a student's educational placement *prospectively* during the pendency of a dispute regarding that placement. This decision will effectively terminate any dispute regarding Student's placement. Student's request to determine stay put retroactively is misplaced. Properly construed in the context of the facts in evidence, Student's request is really an argument that the program implemented by the District failed to comport with the agreed-upon placement. Therefore, while Student failed to demonstrate a proper basis for his motion to stay put, the evidence of how Student's educational program was implemented was nonetheless relevant to the issue of FAPE during the years in question.

2004-2005 ACADEMIC YEAR

The dispute in this matter centers on the necessity of Slingerland-based tutoring for Student given his unique needs. During Student's ninth grade year, the District offered 2.0 hours per day of simultaneous multi-modal home instruction for the period September 28,

2004, through January 23, 2005, and 1.0 hour per day from January 24, 2005, through May 12, 2005. This offer was based on the recommendations of the District's psychologist, Mr. Williams. Accordingly, the District cannot now plausibly maintain that these services were not necessary when they were offered. On October 4, 2004, Student accepted the offer of 2.0 hours per day for the first semester. Although the September 28, 2004, IEP did not designate a provider for the tutorial services, parents retained Ms. Diven to work with Student and the District reimbursed parents to the extent of 2.0 hours per day. Ms. Jackson described this reimbursement as a "good faith" gesture on the part of the District, but that testimony was not credible. She must have determined that parents were entitled to reimbursement or else this payment would have constituted an unlawful gift of public funds.

On January 26, 2005, the District reiterated its offer of 1.0 hour per week of simultaneous multi-modal home instruction to terminate on May 12, 2005, but clarified that the provider would be a District instructor. That clarification was restated in Ms. Jackson's letter of February 2, 2005. On March 7, 2005, Student's attorney consented to the District's January 26 offer with the exception of the change from 2.0 to 1.0 hour per week. This letter constituted parent's consent to implement the offered placement of RSP and 1.0 hour per week of District-provided home instruction.⁴ The expression of disagreement with the "reduction in hours" preserved the issue of whether one hour was adequate to constitute a free appropriate public education (FAPE) for Student.

Subsequent to Student's acceptance, the District never tendered any home instruction services in conformity with the IEP. Ms. Jackson testified that the District anticipated that the parents would reject any provider other than Ms. Diven. That is a

⁴ That the District would provide a qualified tutor was clear in the offer, despite counsel's attempt to cloud the issue by his assertion of a lack of specificity. Acceptance of the offer was not expressly conditioned on Ms. Diven's services.

matter of speculation. Once the parents agreed to the offer, the District was bound to attempt to implement it. There was no evidence that it did so or, at a minimum, confirmed in writing that the parents would reject a qualified District employee proposed as a provider. The District's failure to take any action in this regard amounts to a denial of FAPE for the period March 7, 2005, through May 12, 2005.⁵

Determining an appropriate remedy for this failure requires consideration of Student's educational needs and also a balancing of the equities between the parties. As far as Student's needs, the District determined at the time that 1.0 hour a day of tutoring was adequate, while the parents advocated for 2.0 hours per day. Student's high achievement across the spectrum of his classes during ninth grade established that he had generalized much of the Slingerland-based training of the previous five years and was able to apply it successfully. The testimony of Ms. Fitzgerald, Student's ninth grade English teacher, was unrefuted regarding the skills he demonstrated in class in the areas of reading, writing, verbal class participation, and vocabulary acquisition. Student's other instructors echoed these sentiments in the admitted written appraisals. Given these facts, the offer of 1.0 hour per day of tutoring was reasonably calculated to confer educational benefit on Student.

The District's offer of service created a reasonable expectation that it would be provided upon the parents' consent. Student's parents continued to pay for Ms. Diven's services to avoid any interruption. Ms. Jackson conceded that the District knew that the parents were continuing to pay Ms. Diven to provide tutoring to Student during the entire spring semester. Yet the District neither sent its own employee to instruct Student in his home program, nor even wrote to parents to convey an intention to begin such services.

⁵ This period comprises 50 school days. An IEP dated May 11, 2005, proposed to extend the offer of 1.0 hour per day of home instruction through June 10, 2005, but there was no evidence that parents accepted the extension.

The failure to do so unfairly shifted the financial burden of the tutoring services onto Student's parents.

The District failed to implement 1.0 hour per day of simultaneous multi-modal tutoring during the period March 7, 2005, through May 12, 2005, although the District agreed that the services were appropriate and the parents consented to receipt of the services. That failure denied Student a FAPE during the 2004-2005 academic year. Student is therefore entitled to reimbursement of \$2,000 representing the incurred expense of 1 hour per day of tutoring at Ms. Diven's established rate of \$40 per hour, during the above-referenced period.

THE 2005-2006 ACADEMIC YEAR

On May 11, 2005, and again on October 18, 2005, The District offered Student one resource period per day but no home instruction component to his tenth grade educational program. Student's parents refused to consent to the offer, asserting that Student still needed at least 2.0 hours per day of home instruction to benefit from his education. They continued to pay for 2.0 hours of tutoring with Ms. Diven per day. The District did not tender any home instruction services during the 2005-2006 school year.

Student did not establish that he required Slingerland-based home instruction in order to advance in the high school curriculum. Ms. Diven tutored him exclusively in geometry throughout the entire year, and yet no correlation was found between his performance in the class and the method she employed. Student succeeded on the strengths of his own ability and his generalization of ninety percent of the skills learned from fourth through ninth grades. Moreover, Student's tenth grade teachers used teaching techniques that assisted Student in attaining above-average academic performance in their classes. Mr. Lagos used auditory, visual and kinesthetic stimuli to introduce the novel principles of geometry. Ms. Fitzgerald taught English vocabulary in a manner closely related to Ms. Diven's methods in prior years. Similarly, Mr. Eisel's method of teaching reading and engaging Student in kinesthetic learning through lab assignments allowed

Student to advance to the top 20 percent of his biology class without any Slingerland tutoring whatsoever.

Although Student established that the District changed and implemented Student's tenth grade placement without the consent of his parents, Student did not establish that the change of placement resulted in any lost educational benefit. Student no longer required specialized tutoring during the 2005-2006 academic year, and therefore the District's failure to offer or provide any such services during that period did not amount to a denial of FAPE during that period.

ORDER

Within ten days of the date of this Decision, Student shall provide to the District evidence of expenses incurred for services provided by Ms. Diven during the period March 7, 2005, through May 12, 2005, totaling no less than \$2,000.00.⁶ Within twenty days of receiving Student's evidence of payment, the District shall pay Student the sum of \$2,000.00.

PREVAILING PARTY


The Student prevailed on the issue related to the 2004-2005 academic year and the District prevailed on the issue related to the 2005-2006 academic year. (Ed. Code §56507.)

RIGHT TO APPEAL THIS ORDER

The parties have the right to appeal this Decision to a court of competent jurisdiction within ninety days of the receipt of the same. (Ed. Code § 56505, sub. (k).)

⁶ Such evidence may take the form of actual invoices, or records of payment to Ms. Diven.

DATED: June 30, 2006.

A handwritten signature in black ink, appearing to read "Kirchubel", is positioned above a solid horizontal line.

KEITH J. KIRCHUBEL

Administrative Law Judge

Office of Administrative Hearings

Special Education Division