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

In the Matter of: CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N 2006100142

DECISION

Administrative Law Judge (ALJ) Darrell L. Lepkowsky, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 29, 2007, at the offices of the Chula Vista Elementary School District, and on February 1, 2 and 5, 2007, at the OAH offices in San Diego, California.

Attorney Sundee M. Johnson, Atkinson, Andelson, Loya, Ruud & Romo, appeared on behalf of petitioner Chula Vista Elementary School District (District) on the first three days of hearing. Attorney Justin R. Shinnefield, of the same law firm, appeared on behalf of the District on the final day of hearing. Dr. Deborah Wenbourne, the District's Coordinator of Special Education, attended the hearing on behalf of the District for most of the hearing. During Dr. Wenbourne's brief absence from the hearing, Patricia Ludi, the District's Executive Director of Pupil Services and Instruction, attended on behalf of the District.

Attorney Ellen Dowd, Law Offices of Ellen Dowd, appeared on behalf of respondent (Student). Student's mother attended each day of hearing. Student did not attend.

The District filed a request for a due process hearing on October 4, 2006. Due to a medical emergency, Student requested a continuance of the case, which OAH granted, and the hearing ultimately proceeded on the dates indicated above. At the due process hearing, the ALJ received sworn oral testimony and documentary evidence. At the conclusion of the hearing, the parties agreed that the record would remain open in order for the parties to submit for evidence copies of the tapes of the individualized education plan (IEP) team meeting held on August 21, 2006, which is the subject of this hearing, as well as for the submission of post-hearing closing briefs. Both parties timely submitted copies of the IEP meeting tapes to the ALJ on or about February 13, 2007.[1] Both parties timely filed their briefs on February 21, 2007. The ALJ closed the record and deemed the matter submitted as of February 21, 2007.[2]

At hearing, the parties stipulated that the Decision in this matter would be due no later than March 21, 2007, four weeks from the date on which post-hearing closing briefs were due.

ISSUE

Did the District's offer of placement and services contained in Student's IEP dated August 21, 2006, constitute a free and appropriate public education (FAPE) for Student, in the least restrictive environment, for the 2006-2007 school year?

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[1]The District submitted four cassette tapes, which were jointly marked and admitted as petitioner's 10. The auditory quality of the tapes is uneven. Student submitted three compact diskettes, which were marked and admitted as respondent's exhibit N. The majority of the meeting is audible on this exhibit

[2]The District's brief was marked and admitted as petitioner's exhibit 11. Student's brief was marked and admitted as respondent's exhibit O

CONTENTIONS OF THE PARTIES

The District asserts that its IEP placement offer would provide Student at least some educational benefit in the least restrictive environment. While the District acknowledges that there were some procedural errors in the IEP process, it contends that any errors are harmless and thus do not constitute substantive violations of Student's rights under the reauthorized Individuals with Disabilities Education Act of 2004 (IDEA). The District therefore contends that the IEP developed on August 21, 2006, offers a FAPE to Student.

Student contends that the District committed numerous procedural violations during the IEP process that impeded Student's right to a FAPE, significantly impeded the opportunity of Student's mother to participate in the decision-making process regarding the provision of FAPE to Student, and resulted in a deprivation of educational benefits to Student. Specifically, Student asserts that the District did not complete all of the assessments for Student, failed to have a general education teacher at the IEP meeting, and failed to have Student's private school teacher at the meeting. Student further contends that the District offered a "take it or leave it" placement plan which prevented Student's mother from participating in the IEP process, and that the District failed to consider a continuum of placement options for Student. Student also contends that these procedural violations resulted in an incomplete IEP and therefore resulted in a denial of FAPE for Student. Therefore, Student contends that the ALJ should deny the District's request to have the IEP dated August 21, 2006, declared a FAPE.

PROCEDURAL MATTERS[3]

On or about January 23, 2007, Student filed a motion for judgment on the pleadings. In response to the issuance by OAH of a notice of motion, the District filed an opposition to Student's motion on or about January 26, 2007.

The gist of Student's motion was that the District's failure to include a general education teacher constituted a per se procedural violation of the IDEA, which resulted in a defective IEP that could not be enforced. As evidence of this procedural flaw, Student references the August 21, 2006 IEP that the District included in its evidence notebook. Student also cited to Code of Civil Procedure, section 438, as a statutory basis for permitting her motion.

The District's opposition asserted that the case law cited by Student in her motion indicated that an IEP team meeting *might* be invalidated by the absence of required members, but that factual determinations are needed before such a finding can be made. The District noted that such factual determinations went to the heart of its case.

The ALJ reviewed the parties' briefs and heard argument regarding the motion on the first day of the hearing. The ALJ denied the motion for judgment on the pleadings.[4]

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[3]Official notice is taken of the pleadings filed with regard to the Student's motion for judgment on the pleadings, pursuant to Evidence Code section 452, subdivision (d)

[4]The ALJ also denied Student's renewed motion, made after testimony was received the first day of hearing

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Student was born on December 19, 1997. At the time of the hearing, Student was nine years old and attended a Maria Montessori school. Although Student and her parents have resided within the District's boundaries for many years, she has never attended a District elementary school. Student was found eligible to receive special education services in 2002 under the category of other health impaired (OHI) due to a documented health impairment of epilepsy.[5] The epilepsy was found to negatively influence Student's progress in school by affecting her strength, vitality, and alertness. There is no dispute that Student is eligible for special education services.

BACKGROUND INFORMATION

2. The District and Student entered into a settlement agreement on May 11,2006.[6] The District agreed to complete a comprehensive assessment plan for Student within 15 days of the execution of the agreement. Student's mother agreed to allow the District reasonable assess to Student, agreed to make Student reasonably available for assessments, including at Student's present private school placement, and agreed to provide updated health information for Student in a nurse's health form.

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[5]Epilepsy is sometimes referred to as a seizure disorder. It is a common chronic neurological condition that is characterized by recurrent unprovoked seizures. These seizures are transient signs and/or symptoms due to abnormal excessive or synchronous neuronal activity in the brain. Epilepsy is usually controlled, but not cured, with medication

[6]The settlement agreement resolved matters not at issue in the instant proceeding

3. Although the time for completing assessments and holding an IEP team meeting is normally tolled during school summer vacations,[7] the parties agreed to convene an IEP meeting prior to the beginning of the 2006-2007 school year.

4. The District completed the assessment plan (entitled an evaluation plan, using terminology from federal statutes) on May 12, 2006. Assessments were designated in the areas of academic achievement, psycho-motor development/perceptual functioning, language/speech communication development, cognitive functioning, social/emotional adaptive behavior, a health screening (including a vision and hearing screening), and additional assessment in the form of observation at Student's private school.

5. Although Student's mother received the assessment plan on or about May 14, 2006, she did not sign and return it to the District immediately. Rather, she requested the names of the assessors before she would sign the plan. Being informed of the assessors' identities and/or approving them was not a condition of the settlement agreement nor a legal right given to parents. However, the District acceded to the request of Student's mother and provided her a list of proposed assessors.

6. Student's mother signed and returned the assessment plan on or about June 27, 2006. She indicated on the form that the family would be vacationing beginning August 24, 2006, and that, therefore, the IEP meeting for Student would have to take place prior to that date.

7. By the time Student's mother signed the assessment plan, both Student's Montessori school and the District's schools, which followed a traditional (approximately late August/early September to mid-June) schedule, were no longer in session.

8. District employees did not begin to contact Student's mother to arrange

[7]See Education Code, section 56043, subdivision (f)(1)

for assessment dates until late July or early August 2006. Assessments did not begin until August 8, 2006.[8]

9. The District sent the notice of IEP meeting to Student's mother on or about July 12, 2006. The notice set the IEP meeting for August 21, 2006. It also indicated that team members to be present would include a District representative, a coordinator, a speech and language specialist, an occupational therapist, a psychologist, an autism team representative, a special education teacher, and a general education teacher. The IEP took place as scheduled on August 21, 2006. Student's mother has never approved the IEP.

PROCEDURAL VIOLATIONS THAT MAY CONSTITUTE A DENIAL OF FAPE

10. A school district must comply both procedurally and substantively with the IDEA. While not every procedural flaw constitutes a denial of FAPE, procedural flaws that inhibit a student's right to receive a FAPE, significantly prevent a parent's opportunity to participate in the IEP process, or cause a deprivation of educational benefit to a student, will constitute a substantive denial of FAPE.

11. The IDEA provides that an IEP must contain a statement of the current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP in order to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals. The failure of the IEP to include the required elements is a procedural violation of the IDEA. An IEP that is not properly formulated may also constitute a denial of a FAPE if the IEP thereby fails to address the student's unique needs, or is not reasonably calculated to provide the student with some educational

[8]There was a change in assessors for approximately three of the assessments. However, Student's mother permitted the assessments to proceed

benefit.

12. The District asserts that it offered a legally adequate FAPE to Student. While acknowledging that there were a few procedural errors in the IEP process, the District asserts that the errors were harmless. Student contends that none of the procedural violations committed by the District amounted to harmless error, and therefore the violations resulted in a substantive denial of FAPE to her.

FAILURE TO COMPLETE THE ASSESSMENT PLAN

13. An IEP required as a result of an assessment plan must be developed within 60 calendar days from the date a district receives a parent's signed consent to the assessment, not including days of school vacation that exceed five school days, unless the parent agrees, in writing, to extend this time. This means that all assessments must be complete by the time an IEP is developed so that the IEP can properly address the student's present levels of performance and unique needs and so that the IEP team can propose appropriate goals for the student.

14. The District contends that its assessments of Student provided sufficient information in order for it to determine Student's unique needs and to suggest appropriate goals and educational services for Student in order to meet those unique needs. Student contends that the District failed to complete the assessments determined necessary for Student in the assessment plan and therefore any offer of placement and services to her was deficient based upon lack of adequate information regarding Student's unique needs.

15. Special education teacher Daneida Cooper administered the Woodcock-Johnson III Tests of Achievement to Student on August 16, 2006. There is no dispute that this academic assessment was fully completed. There is also no evidence that the assessment or its results were not valid. There were no procedural violations of the IDEA with regard to the academic assessment of Student.

16. Adapted physical education specialist Tammi Sheldon administered an

adaptive physical education assessment to Student on August 8, 2006. The assessment consisted of Ms. Sheldon's review of the last IEP written for Student, the administration of the Test of Gross Motor Development, Second Edition, to Student, and observations by Ms. Sheldon of Student's playground skills. There is no dispute that this test was fully completed. There is no evidence that this assessment or the results obtained from it were not valid. There were no procedural violations of the IDEA with regard to the adaptive physical education assessment of Student.

17. Speech pathologist Ruth Young administered a speech and language assessment to Student on August 16, 2006. Ms. Young included in her assessment report the results of a speech and language assessment administered to Student by Children's Hospital in May 2006. Ms. Young administered the Test of Auditory-Perceptual Skills-Revised to Student. She also administered a test using an informal language sample. There is no dispute that the speech and language testing was not fully completed. There is no evidence that the assessment or its results obtained from it were not valid. There were no procedural violations of the IDEA with regard to the speech and language assessment administered to Student.

18. An assessment by a District autism coordinated education team was one of the assessments designated in Student's assessment plan dated May 12, 2006. The need for this assessment appears to be based upon an indication that Student may have autistic-like tendencies, such as a tendency to engage in perseveration.[9]

19. The District assigned school psychologist and itinerant autism specialist Sarah Llorente to conduct the assessment. She did not contact Student's mother until the week prior to the IEP meeting of August 21, 2006. She and Student's mother

[9]The extent of Student's autistic-like behaviors was not at issue in the instant proceeding. Neither party disputed that, whatever characteristics Student may have, an assessment by an autism specialist was appropriate

exchanged phone calls for about five days. Ms. Llorente and Student's mother finally spoke on or about August 18, 2006, the Friday prior to the IEP meeting. Ms. Llorente wanted to arrange an observation of Student for that very day at either Student's home or at her soccer camp. Student's mother refused to consent to the observation. She felt that she was not given adequate notice since Ms. Llorente proposed to do the observation that day. Student's mother also believed that an observation of Student at home or at summer camp was not relevant to the preparation of a school-based IEP.

20. The assessment that Ms. Llorente proposed consisted solely of observation of Student's social skills. The observation would include Student's interaction with her peers and adults, her ability to transition (from one task and/or setting to another), her organized play, and her adaptive skills.

21. Neither Ms. Llorente nor any other District representative suggested continuing the IEP meeting to a date after Student returned to the Montessori school so that Ms. Llorente or one of her colleagues could complete a school-based observation of Student. Nor has anyone from the District attempted to arrange an observation of Student at her private school since school started in September 2006. As of the date of the due process hearing, the District had yet to administer the assessment.

22. An observation by the autism team was a necessary component of Student's assessment plan. The IEP dated August 21, 2006, notes that baselines were still pending in the area of social skills for the classroom. The failure to administer any part of the autism assessment resulted in an inability to determine Student's unique needs in this area and a corresponding inability to propose goals and objectives to address those unique needs, had they been determined to exist. Therefore, the failure to perform this assessment denied a FAPE to Student. Therefore, there were no goals in the proposed IEP that addressed this area of Student's needs.

23. Occupational therapists Jennifer Canaris and Evangeline (Vangie)

Mamalakis conducted an occupational therapy assessment of Student on August 16, 2006.[10] The assessment included a sensory profile completed by Student's mother as well as an interview with her, a review of Student's records, observations of Student with software and technology, and subtests seven and eight of the Bruininks-Oseretsky Test of Motor Proficiency. To be complete, the assessment should have included observations of Student in her classroom and interviews with Student's teacher. The occupational therapists were not able to complete the latter portions of the assessment because the Montessori school was not in session at the time the assessment took place. There is no evidence that the parts of the assessment that the therapists completed or the results they obtained were not valid.

24. The occupational therapists were not able to give a complete recommendation for occupational therapy support for Student based upon the lack of classroom observation. Their report explicitly states, "Occupational support of [Student's] educational programming and needs will be addressed more specifically following observation of [Student's] performance in the classroom setting." The IEP dated August 21, 2006, states that baselines were still pending for sensory modulation in an academic setting. Since these baselines were still pending based upon lack of information, no goals in these areas could be developed or services recommended in spite of the fact that the IEP recognizes sensory modulation in the classroom as an area of Student's need.

25. The occupational therapist and the IEP document itself both indicate that the occupational therapy assessment had not been completed as of the date of the IEP meeting. Goals and objectives, and appropriate related services necessary to implement them, were incomplete. As of the date of the due process hearing, the District had not completed the occupational therapy assessment. The failure to

[10]Ms. Canaris did not testify at the due process hearing

complete the occupational therapy assessment therefore denied a FAPE to Student.

26. School psychologist Ryan Estrellado administered a psychoeducational assessment to Student on August 8 and 9, 2006. Mr. Estrellado administered the Woodcock- Johnson Tests of Cognitive Abilities, Third Edition, to Student. There is no evidence to dispute either the validity of this test or the results Mr. Estrellado obtained from it.

27. Mr. Estrellado also administered the Behavior Assessment System for Children, Second Edition (BASC-II), to Student. This test is a measure of a student's social emotional adjustment. It consists of surveys that the school psychologist gives to a Student's parent and teacher to complete, as well as to a Student if she is old enough for the resulting responses to be considered valid. Since the Montessori school was not in session, Mr. Estrellado did not give the BASC-II survey to Student's teacher. Mr. Estrellado did not give it to Student to complete herself because of her age.

28. Student's mother reported on the BASC-II that Student has often stated "I want to die" or "I wish I were dead." She also reported that Student often threatened to hurt others. Mr. Estrellado pursued these comments by requesting elaboration from Student's mother. She reported that Student generally made these statements when she was angry and that it was her impression that the statements were due primarily to Student's impulsivity. Student's mother did not indicate to Mr. Estrellado during his interview with her, that Student had ever acted on these feelings or that there was a reason Student's mother believed she would ever act on them in the future. Student's mother did not inform Mr. Estrellado, or any member of the IEP team, that Student had ever engaged in any type of aggressive behavior toward others or had ever tried to harm herself. Student's mother offered no contrary information at the IEP meeting of August 21, 2006, nor did Student offer any evidence at the due process hearing that would indicate that Student had aggressive or self- destructive tendencies.

29. Mr. Estrellado made a professional decision, based upon the information available to him at the time, that Student's remarks about hurting herself or others were not indications of aggressive behavior that required further investigation. Student offered no evidence that would call into question Mr. Estrellado's professional opinion. Therefore, the assessments that Mr. Estrellado administered were adequate for the purposes of FAPE.

30. However, Mr. Estrellado did note that further assessment was necessary to determine if Student actually had autistic-like tendencies. Therefore, as detailed in paragraphs 18 through 22 above, the area of autistic-like tendencies was an area of need indicated in Student's assessment plan. The District should have completed assessments to address those areas before an IEP was developed. As of the date of the due process hearing, the assessment was still incomplete. As stated in paragraph 22, the failure to complete such assessments denied a FAPE to Student.

31. Although the assessment plan indicated that vision and hearing[11]screening assessments and a health assessment were to be administered, none was done by the date of the IEP meeting. Student has an acknowledged minor hearing loss as well as visual processing deficits. Her underlying eligibility classification is based upon epilepsy, which is a significant health impairment. At the IEP meeting, Student's mother indicated that she would fill out a health questionnaire once the District provided one to her. She also indicated that Student had recently had a physical, which included a vision screening, and that she would provide these to the District. The District did not suggest continuing the IEP meeting in order that the hearing test be completed and reviewed, or in order to review the information in the health form or vision screening done by Student's private doctors. The failure to review

[11]A hearing test was submitted from Children's Hospital. It appears that Student's mother and the District both accepted the results of that test

this information resulted in significant gaps in the IEP team's understanding of Student's unique needs and any resulting services or accommodations that she might require because of the those unique needs. The failure to complete the health and vision assessments therefore resulted in the denial of a FAPE to Student.

32. In sum, as acknowledged in the IEP dated August 21, 2006, baselines for Student were still pending for social skills in the classroom and sensory modulation in an academic setting. The District IEP team recommended that the current assessment plan be continued in the areas of baseline information from observations for sensory needs, motor planning, sensory modulation within an academic setting, and vision and hearing screening. The District's failure to follow its own recommendations to continue the assessment process resulted in the development of an incomplete IEP which could not address all of Student's need and could not, based upon incomplete information, contain complete goals and objectives. Therefore, the IEP of August 21, 2006, is deficient because Student was denied educational opportunities and her right to a FAPE was impeded.

FAILURE TO INCLUDE STUDENT'S PRIVATE SCHOOL TEACHER AT THE IEP MEETING

33. The failure to include a student's private school teacher in the IEP process, where the student is presently attending a private school, constitutes a procedural violation of the IDEA which results in a denial of FAPE to the student, unless the failure to do so is the result of harmless error.

34. There is no dispute that no teacher from Student's private Montessori school attended the August 21, 2006, IEP meeting. The District asserts that it was not able to include the teacher because Montessori was not in session at the time of the IEP meeting and that it had no way, therefore, of attempting to secure his or her attendance. The District further contends that, in any case, the failure to have the private school teacher in attendance was harmless error. Student argues that the District's failure to include the Montessori teacher resulted in a denial of FAPE to her.

35. The Notice of IEP meeting sent to Student's mother did not show any intent to include any Montessori teacher. Although the Montessori school was not in session, Student and her mother were in email contact with Student's Montessori teacher throughout the summer. The District did not ask Student's mother if there was any way to contact the Montessori teacher and did not suggest that the IEP meeting be continued until after the Montessori school began in September in order to attempt to obtain the participation of the teacher.

36. Student had never attended a District elementary school. Without input from the Montessori school, the IEP team did not have current information about Student's educational progress. When compounded with the failure to observe Student at her Montessori school and the failure to communicate with the Montessori teacher to obtain input for the assessments, the absence of the private school teacher does not constitute harmless error. The absence of information from the Montessori teacher interfered with the opportunity of Student's mother to participate in the formulation of Student's IEP.[12]

FAILURE TO INCLUDE A GENERAL EDUCATION TEACHER AT THE IEP MEETING

37. A general education teacher, either from the student's current or future educational placement, must participate in the formation of the student's IEP. A harmless error analysis is applied to the failure to secure his or her attendance at the IEP meeting. If the court finds no harmless error, the failure of the general education teacher to participate in the IEP process will result in a finding that the district substantively denied a FAPE to the student.

38. Current law permits a parent to waive the participation at the IEP meeting of any of the participants who are normally required to be present, including the

[12]Had the Montessori teacher refused to participate in the assessment process or in the IEP meeting, the resulting analysis of these issues would be different

general education teacher.

39. There is no dispute that a general education teacher did not attend the IEP meeting. The District offers little explanation for the absence of a general education teacher but asserts that the absence is harmless error. The District points to the fact that several of the educators attending the IEP meeting had general education credentials and the principal from the proposed elementary school attended the meeting and was familiar with all the programs at his school. Student contends that the failure to include a general education teacher amounted to a per se violation of the IDEA.

40. The notice of IEP meeting sent to Student's mother on July 12, 2006, indicated that a general education teacher would be present at the IEP meeting. There was no reason given for the absence of such a teacher when the team convened the meeting on August 21, 2006. The District never requested Student's mother to waive the presence of the general education teacher. The District did not request that the meeting be continued to a future date or that an additional IEP meeting be held in order for the District to ensure that a general education teacher be present.[13]

41. The Montessori school where Student has attended for her elementary school years provides education to Student in a general education setting. The placement ultimately proposed for Student by the District at Sunnyside Elementary

[13]There is evidence that the District had difficulty obtaining the presence of a general education teacher for the August 21, 2006, IEP meeting because its schools on traditional schedules were not in session. However, the majority of the educators present at the IEP meeting were from Rogers Elementary School, which was on a non-traditional schedule, and had been in session since approximately July 18, 2006. There was no explanation given by the District as to why one of the general education teachers from Rogers could not have attended the IEP meeting

school included education and services to be received in a general education setting for 66 percent of Student's day. In other words, in the proposed placement, Student would be spending the majority of her school day in a general education classroom.

42. It was therefore necessary for a general education teacher to be present at the IEP meeting to be able specifically to describe the classroom curriculum to Student's mother as well as the classroom dynamics, how Student's program would be implemented in the classroom, and how any proposed modifications for Student would be implemented. Finally, because Student was transferring from a private school setting to a public school setting, the opinions of a general education teacher during the IEP process could have promoted specific discussions about transition, and the development of the transition plan, as well as addressing any concerns of Student's mother. The absence of a general education teacher at the August 21, 2006 IEP team meeting interfered with the opportunity for Student's mother to participate in the formulation of Student's IEP.

PARTICIPATION OF STUDENT'S MOTHER IN THE IEP PROCESS

43. A school district is required to conduct a meaningful IEP meeting, which includes the ability of a student's parent to participate fully in the IEP process. Full participation includes the school district informing the parent of the child's problems and not only permitting, but inviting, the parent to express opinions and disagreements with the district's recommendations. It also includes involving the parent in revisions to the IEP and to district proposals.

44. Student asserts that the District denied her mother the ability to participate actively in the IEP process because the District failed to consider the full continuum of placements available for Student, specifically, a private school placement, and because the District had predetermined the placement that they were going to offer for Student. The District asserts that it came to the IEP meeting with an open mind to consider a variety of potential placements for Student.

45. Student's mother was encouraged to participate in the IEP during the entire IEP meeting. District team members asked for her opinions and her questions when each presented the assessments he or she had administered. Student's mother was asked to give input to the process, to give suggestions to the IEP team and to comment about the proposed goals and placement. Although she asked a few questions about the assessments, Student's mother declined to give comments about the goals because she insisted that she wanted to discuss a placement for Student before the team discussed goals and objectives.[14] There is no evidence that Student's mother was discouraged from participating in the IEP process.

PREDETERMINATION OF PLACEMENT

46. A school district may commit a procedural violation of the IDEA if it comes to an IEP meeting without an open mind and several options to offer for discussion with all team members. A district fulfills its obligation in this regard if it does suggest different potential placements, and discusses and considers any suggestions and/or concerns a parent has concerning the child's placement.

47. A school district is also required to make a formal written offer that clearly identifies its proposed program. It is proper for District IEP team members to discuss among themselves the parameters of programs available to a student and to write a draft of a program they may want to discuss with a student's parents. It is also proper for a district to invite to the IEP meeting educators who are part of a potential program or placement that the district wishes the IEP team to consider.[15]

[14]As District representatives pointed out to Student's mother, a student's needs must first be determined, then the goals to address her needs. Only once the needs and goals are determined is it appropriate to determine an appropriate placement where the goals can be implemented

[15]Indeed, Student seeks a finding that the District committed a procedural

48. Student contends that the District had already determined to place Student at Sunnyside Elementary School before it participated in the IEP meeting on August 21, 2006. Student cites to two facts to support her contention: the fact that Student's "home school" was identified as Sunnyside on the assessment, and the fact that the Sunnyside Principal attended the IEP meeting. The District contends that it considered a number of placements, and came to the meeting with an open mind to any suggestions or possibilities.

49. Principal Schlottman was the only educator from Sunnyside Elementary School who attended the IEP meeting. He gave no indication at the meeting that he had been informed that Student was destined to attend his school, or that his was the only placement that was going to be considered. To the contrary, when he had to leave the meeting early, Mr. Schlottman gave a "pitch" for his school and the variety of programs available there. He specifically stated, "If it turns out that Sunnyside is on the table" he would be glad to have Student attend school there. There was no indication that Sunnyside, or a specific placement at Sunnyside, had been predetermined. The District gave specific reasons why Sunnyside itself was its recommendation, and why it ultimately believed that a general education classroom at that school was appropriate for Student. District educators consistently requested input from Student's mother during the IEP meeting; she chose not to offer any recommendations or suggestions for placement, although she had been aware for over a month of the date the IEP meeting would be held.

50. The reference to Sunnyside Elementary School in the assessment plan, which the District originally created seven months before the District re-submitted it to Student's mother, was inadvertent. Sunnyside is as close to Student's home as is

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violation of the IDEA by failing to have a general education teacher from the proposed school placement attend the IEP meeting

Student's home school. She had never attended elementary school in the District. The Sunnyside Principal did not consider his school to have been "selected" as Student's placement before the IEP meeting began. There is no convincing evidence that the District predetermined a placement for Student or was unwilling to consider any suggestions that it Student's mother may have had. No procedural violation occurred.

CONTINUUM OF PROGRAM OPTIONS

51. School districts are required to ensure that a variety of potential educational placements are available to special education students, including placements in general education classes, special day classes, and resource classes at district schools, and placement at certified non-public schools if appropriate. There is no requirement that every possible program option available in a school district be addressed at an IEP meeting.

52. Student had attended general education classes, albeit at a private school, during her elementary school years. There was no evidence that the District would not be able to meet her needs at one of its elementary schools. The IEP team discussed various potential placements possible within the District at the IEP team meeting held August 21, 2006. Placements considered included a special day class, resource classes, and general education classes, and a combination of all these. The final placement proposed by the District was a combination of general education and resource classes.

53. At the IEP meeting, Student's mother did not offer any opinion as to why she might have considered a comprehensive elementary school to be an inappropriate placement for Student. She offered no opinion as to why any of the placements discussed by the District members of the IEP team were not appropriate for her daughter. Student's mother did not suggest any alternative placements that she wanted the team to discuss and consider, and she specifically did not suggest any non-

public school that she believed would be an appropriate placement for Student.[16]

54. The District was not required to discuss the "continuum of program options" at the meeting. Rather, the District was required to ensure that a continuum of program options was available to meet the needs of all students.

55. The IEP team considered general education, resource programs, and special education placements for Student. Ultimately, the District's IEP team proposed a program that combined placement in a general education classroom with resource specialist support, along with specific related services to be provided on the elementary school campus. Student did not establish that the District failed to have available a continuum of program options to meet the needs of children such as Student.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PROOF

1. The District, as the petitioning party seeking relief, has the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

THE GENERAL PRINCIPLES OF THE IDEA

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education. (FAPE) (20 U.S.C. § 1400; Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational

[16]The Maria Montessori School, where Student presently is enrolled, is not a certified non-public school and, therefore, could not be considered as a placement option by the District. (Ed. Code, §§ 56034, 56163.)

standards, and that conform to the student's individualized education program. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.C. 3034] (hereafter *Rowley*), 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. (*Rowley, Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, Id.* at p. 201.)

4. California's definition of special education includes both specially designed instruction to meet the unique needs of individuals with exceptional needs and related services to enable them to benefit from such specially designed instruction. (Ed. Code, § 56031). Related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

REQUIREMENTS OF AN IEP

5. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including a statement of the child's present levels

of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child's present levels of academic achievement and functional performance and a description of how the child's progress toward meeting the annual goals will be measured. Finally, the IEP must include when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.) [17]

PROCEDURAL VIOLATIONS

6. The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Rowley, supra,* 458 U.S. 176 at p. 205, the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's individual education program (IEP) to determine if it was reasonably calculated to enable the student to receive some educational benefit (See also, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.)

7. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed.Code, § 56505 (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E);

[17] In October 2006, amendments to the Code of Federal Regulations (C. F.R.) to correlate to the reauthorized IDEA became effective. Unless otherwise specified, the citations herein are to the version of the C.F.R. that was in effect when the IEP that is the subject of this Decision was drafted

Ed. Code,§ 56505, subd. (j); *Rowley*, *supra,* 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*W.G.* v. *Board of Trustees, supra,* 960 F.2d at p. 1482.)

8. Procedural errors during the IEP process are subject to a harmless error analysis. In *M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, fn. 9, the Ninth Circuit decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA. Utilizing the harmless error analysis, the court determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at pp. 652, 658.)[18]

FAILURE TO COMPLETE ASSESSMENTS

9. If a child is referred for assessment, the school district is obligated to develop a proposed assessment plan within 15 calendar days of the referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56043, subd. (b).) An IEP required as a result of an assessment of a

[18]Judge Alarcon, the author of the opinion in M.L., utilized a structural defect analysis in concluding that the failure of a general education teacher to participate in the IEP process denied M.L. a FAPE

student must be developed within a total time not to exceed 60 calendar days from the date the school district received the parent's written consent to assessment, not counting school vacations in excess of five schooldays, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).)

PARTICIPATION OF A STUDENT'S PRIVATE SCHOOL TEACHER AT THE IEP MEETING

10. The Ninth Circuit has found that a school district's failure to include a representative from a private school that a child is currently attending violates the procedural mandates of the IDEA. (*W.G.* v. *Board of Trustees, supra,* 960 F.2d at p. 1484.) In *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1074, the Ninth Circuit held that failure to include the Student's private school teacher at the IEP was a FAPE denial. The Court made this finding even though the child had been attending a private school in another state. The *Shapiro* court reasoned that the statute required the teacher of the student be present at the IEP, and even though the child was receiving services in another state, the current teacher of the child was required to attend. (*Id.*)

PARTICIPATION OF A GENERAL EDUCATION TEACHER AT AN IEP MEETING

11. Education Code section 56341, subdivision (b)(2), provides that the IEP team shall include not less than one regular education teacher of the pupil, "if the pupil is, or may be, participating in the regular education environment." The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, "including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program modifications or supports" pursuant to 20 U.S.C. § 1414(d). In *M.L., et al., v. Federal Way School District, supra,* 394 F.3d 634, the Court of Appeals for the Ninth Circuit concluded that as long as a general education placement was a possibility, the participation of a general education teacher

in the creation of the IEP was required, and the absence constituted a denial of FAPE. In *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 34 F. 3d 1396, the Ninth Circuit found that either a teacher from a student's current placement, or one from his or her proposed placement, was required to participate in the IEP process.

12. Current law expressly permits a parent to waive the participation of a regular IEP team member even if that member's area of curriculum or related services is being modified or discussed at the meeting. However, both of the following must occur: (1) the parent and the local educational agency consent to the excusal after conferring with the IEP team member and (2) the member submits in writing to the parent and the individualized education program team, input into the development of the individualized education program prior to the IEP meeting. The parent's consent must be in writing. (20 U.S.C. § 1414 (d)(1)(C); Ed. Code, § 56341, subds. (g) & (h).)

PARENTAL PARTICIPATION IN THE IEP PROCESS/ PREDETERMINATION OF PLACEMENTS

13. In determining the educational placement of a disabled student, the public agency must ensure that the placement is based on the child's IEP. (34 C.F.R. § 300.552.) Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County School Board* (E.D. Va. 1992) 806 F.Supp.1253, 1262; *Deal v. Hamilton County Board of Education*, (6th Cir. 2005) 392 F.3d 840.)

14. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd. (b)(1).) The IEP team

must consider the concerns of the parent for enhancing his or her child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(C) (2)(III) [during IEP meetings], 300l533(a)(1)(i) [during evaluations]; Ed. Code, §§ 56341.l subd. (a)(1) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in an IEP].)

15. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*W.G. v. Board of Trustees, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

16. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer that 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 to accept the offer. (*Ibid.*)

CONTINUUM OF PROGRAM OPTIONS

17. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360.) There is no requirement that every possible program available in a school district be addressed at an IEP meeting.

DETERMINATION OF ISSUES

Did the district's offer of placement and services contained in student's IEP dated august 21, 2006, constitute a free and appropriate public education (FAPE) for student, in the least restrictive environment, for the 2006-2007 school year?

No, it did not. Because of the following procedural violations, Student's access to a FAPE was impeded, she was deprived of some educational benefits, and her mother was denied the opportunity to participate in the IEP process.

1. The District's failure to complete assessments. The inability to complete all necessary assessments in order to determine Student's unique needs, and thus be able to determine appropriate goals and an appropriate placement, was the result of a convergence of several factors, such as the timing of the settlement agreement between the parties, their decision to assess over the summer months in spite of applicable tolling periods, the parties' decision to hold an IEP meeting before the start of the next school year, and the unavailability of teachers (and assessors) due to summer vacation. Student's mother delayed more than a month in signing the proposed assessment plan. However, even if she had signed it within 15 days of receipt, as required by law, the statutory timeframe to complete the assessments would have encompassed most of the summer of 2006. The District likely would have been faced with same scenario: school instruction would have ended at Student's private school and at the District's traditionally scheduled schools. The District would have been in the same position after Student's mother signed the assessment plan on June 27, 2006: scrambling to find appropriate assessors and unable to assess Student at her private school. Although the District acknowledged in the IEP itself that assessments were not complete and had to be continued, it chose not to try to postpone the original IEP meeting or to set a second IEP meeting after the fall school semester had begun and the assessors could complete their assessments.

Based upon factual findings 10, 11, 18 through 25, and 30 though 32, and

Applicable Law 5 through 9, the District's failure to complete assessments in the area of autistic-like behaviors, social skills, sensory modulation, hearing screening and health screening, was not a harmless error. Due to the District's failure to complete the assessments, it was unable to determine all of Student's unique needs and to propose goals and objectives to address those needs. As a result, the District was unable to offer a placement that would provide some educational benefit. The failure to complete the assessments deprived Student of educational benefits and/or opportunities, and impeded her right to a FAPE, resulting in a substantive violation of the IDEA.

2. The District's failure to include Student's private school teacher and a general education teacher in the IEP process. The District failed to invite to the IEP process either Student's private school teacher or a general education teacher from one of its elementary schools. The District did not ask Student's mother to waive the presence of either teacher and Student's mother did not volunteer to do so.

Although Sunnyside Elementary School, which was the ultimate placement offered by the District to Student, was not in session on the day the IEP meeting was held, Rogers Elementary was is session on that date and, in fact, the District was able to secure the participation of various educators from that school. There was no reason given for the absence of a general education teacher. The District's assertion that it met its obligation under the IDEA by having educators present who possessed general education credentials begs the question. The purpose of the IDEA's requirement that a general education teacher be present is specifically to ensure that questions concerning the placements being offered will be able to be answered by an appropriate person who can respond to queries concerning how a program will be implemented in his or her classroom. Where, as in this case, a general education class is contemplated, it is vital that a general education teacher be involved in the IEP process. The District neither explained the absence of a general education teacher, attempted to have one participate by telephone, nor attempted to re- schedule the IEP meeting so that one

could be invited.

Nor was the fact that the Montessori School was on summer break justify the District's failure to at least attempt to have Student's private school teacher participate in the IEP process. Student had never attended elementary school in the District. Other than the few hours spent with her during assessments, no District educator was personally familiar with Student. The District's ability to determine Student's present levels of performance would significantly would have been enhanced by the participation of her most recent teacher.

Based upon Factual Findings 10, 11, and 33 through 42, and Applicable Law 6, 7, 8, 10, 11, and 12, the failure to attempt to secure the participation of Student's private school teacher and a general education teacher in the IEP process was not harmless error. The failure to involve these teachers in the IEP process significantly impeded the opportunity of Student's mother to participate in the IEP process, denied educational benefits or opportunity to Student, and impeded Student's right to a FAPE. This resulted in a substantive denial of FAPE to Student.

3. Because the District has failed to meet the procedural requirements of the IDEA, it is unnecessary for the ALJ to address whether the District's proposed IEP substantively met the requirements for a FAPE.

ORDER

The District's request that the IEP dated August 21, 2006, be deemed an offer of FAPE to Student is denied.

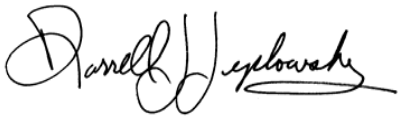
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the only issue presented for decision.

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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: March 21, 2007



DARRELL L. LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings
Special Education Division