

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2006120625

DECISION

Administrative Law Judge Clara L. Slifkin (ALJ), Office of Administrative Hearings (OAH) Special Education Division, State of California, heard this matter on February 13, 2007, through February 16, 2007, in Los Angeles California.

Ayodele Carro of Quinn, Emanuel, Urqhart, Oliver & Hedges, and Maronel Barajas of Disability Rights Legal Center (DRLC), represented Petitioner (Student.) Student's mother (Parent) was present every day during the hearing.¹ Also present during the hearing were Paula D. Pearlman, DRLC's Deputy Director of Advocacy Programs and Daniel Jimenez, also from DRLC. On February 13, 2007, Heather McGinagle, Director of DRLC, was present.

¹ Student's counsel requested a Spanish interpreter for Parent at the hearing. However, on the first day of hearing Parent informed the ALJ that she could speak and understand English. Student's counsel agreed that the interpreter should be excused. The ALJ excused the interpreter

Donald Erwin, Assistant General Counsel, Office of General Counsel, Los Angeles Unified School District appeared on behalf of Respondent Los Angeles Unified School District (District). Due Process Specialist Sharon Snyder was also present during the hearing.

On December 19, 2006, Student filed a request for Due Process Hearing. OAH issued a notice of hearing for February 13, 2007. The hearing was convened on February 13, 2007, and testimony and evidence was received until February 16, 2007. At the request of the parties the record remained open until March 12, 2007, to allow submission of written closing arguments. Both parties filed timely closing arguments. Student's closing argument is identified for the record as exhibit YY. District's closing argument is identified as exhibit 11. The record was closed and the matter submitted for Decision on March 12, 2007.

ISSUES

1. Did the District fail to provide Student with a Free and Appropriate Public Education (FAPE) in its December 2, 2005 Individualized Education Program (IEP) for the 2005-2006 school year when it offered Student placement at Stoner Avenue Elementary School's (Stoner) special day class (SDC) ?²
2. Was the placement offered by District in the December 2, 2005 IEP the least restrictive environment (LRE)?

² At the commencement of the hearing, Student requested that the first issue be clarified to indicate District's offer was placement in a special day class at Stoner. The ALJ allowed the clarification over District's objection. During the hearing, Student withdrew a fourth issue: "Did District fail to provide Student with FAPE when it failed to provide Student counseling services pursuant to the December 2, 2005 IEP for the 2005-2006 school year?"

3. Was there a procedural violation resulting in a denial of FAPE because District failed to have a District representative with the authority to offer a non-public school (NPS) placement present at the December 2, 2005 IEP meeting?

CONTENTIONS OF THE PARTIES

Student contends that District failed to provide him with FAPE in the December 2, 2005 IEP for the 2005-2006 school year by failing to offer him an appropriate placement. More specifically, Student contends that the IEP failed to consider Student's challenges in all areas of curriculum, distractibility, inability to stay on task, difficulty in grasping new concepts, articulation problems, shyness and poor self-esteem. Student asserts that attending a SDC for the first part of the third grade did not meet his academic and social special needs. Student also asserts that Student's attending general education classes with a resource specialist program (RSP) for the second semester of third grade and first semester of fourth grade did not meet his academic and social special needs. Thus, Student argues, District must place him in a NPS to meet his unique needs.

Student also contends that placement at District's Stoner SDC class is not the least restrictive environment for him, and that a placement in a NPS would be Student's LRE. He argues that District's offer of placement in a SDC class is not the LRE because this was not calculated to ensure some educational benefit. According to Student, District's offer will result in his failure to make progress in academics and social skills. Student contends that District must fund his placement at a NPS, such as Summit View School for learning disabled students, which provides small classes and more individualized attention.

District contends its offer of placement and services were reasonably calculated to provide Student with some educational benefit and address his unique needs in the areas of academics and social skills. A SDC provides Student with a small group setting where he will receive more one-to-one attention.

District further contends that its offer provided FAPE to Student in the LRE. District

asserts that Student's proposed placement at the NPS would be a placement in a more restrictive environment. According to District, its proposed placement affords Student maximum interaction with non-disabled peers and Student's request for a NPS placement is unsupported by the evidence.

FACTUAL FINDINGS

JURISDICTION

1. Student, who turned 11 years old on December 19, 2005, has been receiving special education and related services as a child with specific learning disabilities (SLD), speech and language impairment (SLI) and other health impaired (OHI) due to his attention deficit hyperactive disorder (ADHD).³ He resides in District and attends fourth grade at Braddock Drive Elementary School (Braddock) where he is enrolled in general education classes with RSP, and pull-out services in speech and language and counseling. He has been receiving special education services since he was four years old.

BACKGROUND

2. Student is of average intelligence, challenged in all areas of the curriculum and has a short attention span. He attended Braddock during the 2001-2002, 2002-2003, 2003- 2004, 2004-2005, and 2005-2006 school years. During his first couple of years at Braddock, Student attended a general education class with RSP services and received designated instruction and services (DIS). In September 2004, Student was placed in an aphasia SDC class at Braddock. In October 2004, Student's SDC class was discontinued, due to a change in personnel. Student was transferred to another SDC class at Braddock. At the February 10, 2005 IEP, at Parent's request and the other team's concurrence,

³ The ADHD diagnosis was made by an outside evaluator, Didi Hirsch Mental Health Center.

Student returned to general education class with RSP and DIS services in speech and language and counseling. Since February 2005, Student has been in a general education program with accommodations, RSP, and DIS services.

WHETHER DECEMBER 2, 2005 IEP PROVIDED STUDENT FAPE

3. The District has provided FAPE if its program or placement was designed to address Student's unique educational needs and was reasonably calculated to provide some educational benefit in the least restrictive environment. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. The District's program must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services. If District's program met the substantive factors, then District provided a FAPE, even if Student's Parent preferred another program and even if his Parent's preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of the information available at the time it was developed, it is not judged in hindsight.

INFORMATION AVAILABLE TO THE IEP TEAM AT THE TIME THE DECEMBER 2, 2005 IEP WAS DEVELOPED

4. On February 10, 2005, the IEP team met to review Student's triennial assessments. The assessments revealed that Student's intellectual cognitive ability was within the average range. He had special needs in the areas of speech and language, visual and auditory processing, and attention (he is distracted by auditory and visual stimuli). His deficits in the areas of auditory and visual processing and attention impacted all academic areas. The District IEP team members acknowledged Student's significant discrepancy between ability and achievement in the areas of written language, reading, and math problem solving. The team also indicated that Student would benefit from a small-group placement. However, Parent requested that Student be moved from the

Braddock SDC class and placed into a general education class. Parent's request was based on her concerns about the behavior of some of the students in the SDC class.

5. The District team members offered Student: (1) a general education environment in District school of residence (Braddock) for the remainder of 2004-2005 school year; (2) RSP services for 60 minutes per day four times a week; (3) DIS services in speech and language for 30 minutes a week; (4) an extended school year (ESY) program for summer; and (5) a SDC placement at Braddock beginning in 2005-2006 school year. The IEP team proposed annual goals in Student's areas of unique needs in reading, written language, math, prevocational, and articulation. Accommodations and supports for Student included assistance with comprehension of curricular materials, pre-teaching, re-teaching, use of graphic organizers, preview of language as appropriate, small-group instruction, and extended time. Parent consented to the IEP including the District team's placement recommendations.⁴

6. Jose Salas, District's school psychologist, conducted assessments of Student in October 2005. On December 2, 2005, the IEP team convened a re-evaluation IEP (December 2, 2005 IEP) to discuss Student's psychoeducational report and placement. The team consisted of Christine Ahearn, administrator; Patience Tekulsky, special education teacher; Christine Hoshizaki, general education teacher; Diana Paris, speech teacher; Jose Salas, school psychologist; Parent; and Pablo Escobar, Student's attorney from DRLC. The team met for three and a half hours to review Student's Psychoeducational Report, to discuss Student's then-present level of performance and progress, accommodations, modifications, DIS services and placement. Placement and service options discussed included, general education classes, resource specialist

⁴ Parent consented to the February 10, 2005 IEP, but filed a due process complaint in June 2005. Pursuant to an agreement, the District requested that a District psychologist perform a comprehensive psychoeducational assessment of Student.

program, special day class, related services, and a NPS.

7. The IEP team members considered Student's academic progress since the February 2005 IEP when Student was placed in a general education classroom with RSP and services. Prior to the December 2, 2005 IEP meeting, Ms. Ahearn searched for a SDC classroom in another school. Ms. Ahearn had been informed that the first semester of third grade (2004-2005 school year), Student attended a SDC class at Braddock that Parent objected to because she believed that students in this class had behavior problems. Ms. Ahearn found a SDC class at Stoner located two blocks from Braddock, Student's neighborhood school, which she believed would be an appropriate placement for Student.

8. After a full discussion, the IEP team recommended that Student be placed for the remainder of the 2005-2006 school year in a SDC class at Stoner for 60 percent of his time and 40 percent of his time in general education classes. In addition, the IEP team offered Student DIS services in speech and language once a week for a total of 60 minutes and in counseling once a week for a total of 30 minutes. The IEP team recommended accommodations including, assistance with comprehension of curricular materials, pre-teaching, re-teaching, use of graphic organizers, preview of test language as appropriate, modeling, intermittent breaks and preferential seating. The IEP team also offered its Summer Intervention program.

9. The IEP team found that Student was comfortable in the RSP classroom where he responded well to instruction and worked well in a small class environment. Parent agreed with the other IEP team members that Student should be placed in a small classroom setting, but requested placement in a NPS. However, at the end of the December 2005 IEP meeting, Parent agreed to visit and observe the SDC class at Stoner and consider the District's placement offer. On January 17, 2006, Parent returned to Braddock to sign the IEP and rejected District's placement offer. Parent indicated that she intended to file a due process complaint. From the December 2, 2005 IEP to the present,

Student has attended Braddock in general education and RSP, the last agreed upon placement from the February 2005 IEP.

DISTRICT'S OFFER OF PLACEMENT WAS DESIGNED TO ADDRESS STUDENT'S UNIQUE EDUCATIONAL NEEDS AND PROVIDE SOME EDUCATIONAL BENEFIT

10. Jose Salas prepared the District's psychoeducational report for Student. Mr. Salas received his Master of Science in counseling with a specialization in school psychology from San Diego State University. Since 2003, he has served as a bilingual consultant and a due process case manager. From 2000 until 2003, he was the school psychologist at Budlong Avenue Elementary School.

11. District referred Student to Mr. Salas for a psychoeducational assessment in order to determine Student's special education placement (modification to the general education curriculum) and related services. The assessment consisted of a review of school records, parent and teacher interviews, classroom observations, Student interview, developmental history, vision and hearing screening, and assessments in the area of cognitive abilities, visual and auditory processing, fine and gross motor skills, and social and emotional behavior. The Woodcock Johnson III Tests of Achievement was administered in math and reading and classroom performance was reported in the areas of reading, writing and math.

12. Mr. Salas's tests, interviews and classroom observations were conducted on October 10, 11, and 13, 2005. He observed that Student required ongoing prompting and redirecting consistent with children who have ADHD. He found that Student fell within the average range on simultaneous processing (understanding relationships of words, figures or ideas) and in the low average range on planning processing, attention scale and progressive processing (ability to retain sequences). Mr. Salas indicated that Student had difficulty in coding information for short-term memory and remembering information presented visually. He found that in the social and emotional area, Student was polite and

cooperative but has anxiety, self-worth issues, withdrawal, and a high level of maladjustment. Mr. Salas opined that Student had difficulties in attention and hyperactivity, resulting in problems of organizing his work, completing tasks, following directions, and concentrating.

13. Mr. Salas made several recommendations to the IEP team to assist Student in academic and social-emotional growth. Some of these recommendations included: providing clear instructions, reviewing assignments and instructions, providing reduced homework and workload, redirecting Student's attention, reinforcing behaviors, gaining Student's attention before giving directions, providing small segments of work to decrease frustration, allowing short and frequent breaks, accepting non-written forms of reports (i.e., using computer and tape recorder), shortening assignments and prioritizing, allowing only essential items on Student's desk, seating Student near a study buddy, and sending weekly progress reports home to facilitate communication. Mr. Salas suggested that Student would benefit from a program that included a visual approach to learning new words by color coding words/sentences, use of index cards and spacing words. Finally, he indicated that Student's fine-motor skills were below age expectations and he may have difficulties copying from the board or book, and poor spacing of written words. Mr. Salas recommended strategies that assist Student, including the use of a computer and graph paper. The IEP team adopted all of Jose Salas's recommendations.

14. Dr. Jose Fuentes, Student's expert witness, prepared and provided an independent neuropsychological evaluation and testified regarding Student's unique needs and placement. Dr. Fuentes received his Master of Science in Marriage and Family Therapy, a Master of Arts in experimental psychology and his doctorate in clinical psychology from Loma Linda University. He is a clinical neuropsychologist in private practice, specializing in psychological assessments.

15. Dr. Fuentes assessed Student on January 2, 2007, and January 8, 2007, a year and three months after Jose Salas's assessment. He interviewed Student and Parent. He

used a battery of assessment tools but did not observe Student at school during his classes. Dr. Fuentes administered the Woodcock Johnson III Tests of Achievement and Cognition, the Peabody Picture Vocabulary and Expressive Vocabulary Test, and assessed Student in the areas of cognitive abilities, visual and auditory processing, fine and gross motor skills, social and emotional behavior, and adaptive functioning.

16. Dr. Fuentes's and Mr. Salas's recommendations regarding accommodations and modifications to the curriculum in order to improve Student's academic performance and meet his unique needs are the same. Their recommendations include: providing more time to complete assignments; reducing the quantity of work; providing activities to increase rate and fluency in reading (flashcards, educational software); removing time constraints on exams; shortening assignments; allowing Student to dictate; explaining instructions and directions; using prompts, visual aides, pictures, videos, books on tape, manipulatives, multisensory learning and metacognitive learning; breaking down assignments into smaller, more manageable units; keeping an assignment notebook; bringing in meaningful examples; promoting active reasoning; and providing rehearsal opportunities. Both experts agree that Student needs prompting and redirecting so that he can follow directions. In order to provide Student with the accommodations and modifications to the curriculum, both experts recommend a small classroom setting.

17. Dr. Fuentes's conclusions regarding Student's deficits and his recommendation regarding what type of classroom meets Student's unique needs are the same as Mr. Salas. They both conclude that Student has an auditory and visual processing problem and a long history of language deficits, including aphasia. Both experts find that Student requires a more individualized approach to his educational program in a small classroom setting to help ameliorate the effects of his learning disability. However, they disagree on placement.⁵ Dr. Fuentes recommends that Student be placed in an NPS and

⁵ One other area about which Dr. Fuentes and Mr. Salas differ is Student's need for

Mr. Salas recommends that Student be placed in an SDC classroom

18. Dr. Fuentes's January 2007 evaluation does not discuss placement or recommend a NPS. Only after Student's counsel asked several times about a placement recommendation at hearing, did Dr. Fuentes testify that he would recommend a NPS placement for Student. Dr. Fuentes did not identify any particular reasons why Student's needs could not be met in a SDC classroom. He was also unaware that Student was still attending a general education class with RSP services. In contrast, Mr. Salas observed Student in class and was more knowledgeable about Student's current placement and District services, programs and curriculum. Thus, Mr. Salas's testimony regarding Student's placement was more persuasive.

19. Jose Salas's psychoeducational assessment and Dr. Fuentes's neuropsychological evaluations support the IEP team's recommendations for services and accommodations that meet Student's unique needs. The IEP team addressed Student's special needs in speech and language by recommending that the District continue to offer speech and language services and increased this service from 30 minutes to 60 minutes per week. The IEP team addressed Student's unique cognitive needs by recommending a classroom that is structured and supportive with a small student-teacher ratio. The team also recommended setting clear expectations and limits, utilizing frequent intermittent breaks, rewarding attention, breaking tasks into workable and obtainable goals, and providing examples and steps to accomplish task. The IEP team addressed Student's unique social and emotional needs by recommending that Student be placed in a small group setting with one- to-one attention, where Student will receive immediate feedback and reinforcement for his accomplishments. The IEP team also recommended providing Student leadership opportunities in classroom, encouraging continued involvement in occupational therapy. Occupational therapy is not raised as an issue in Student's due process complaint which challenges District's offer of placement.

after-school activities, teaching and modeling problem solving methods, varying instructional style to increase tactile and kinesthetic activities, and counseling services focusing on improving self-esteem. The IEP team adopted these recommendations. District's offer of accommodations in the areas of speech and language, cognitive processing, and social and emotional behavior, meets Student's unique needs.

20. Student has special needs in the area of auditory and visual processing, visual motor abilities, and tasks constrained by time that impact his reading, writing and math skills. Student has not made progress in the general education class with RSP services in areas of basic reading skills, reading comprehension, listening comprehension, oral expression, written expression, mathematical calculation and mathematical reasoning skills. Student also has special needs in the area of inattention and selective attention, planning and organizing tasks, retrieval of information and concentration. Student was comfortable in the RSP room where he responded well to individualized instruction, and worked well in a small-class environment. Student requires a small classroom environment. As demonstrated below, the IEP team's offer of a SDC class at Stoner provides Student with an opportunity to be in a very small class where all of the accommodations and modifications to the curriculum can be implemented.

21. The IEP team's offer of placement at Stoner's SDC classroom, a small classroom setting, for 60 percent of the day, and in general education for 40 percent of his instructional time meets Student's unique needs. Ms. Maureen Roth's SDC class at Stoner had only seven students for the 2005-2006 school year and she also had a very experienced aide, Angela Carter, who has worked in this classroom for five years. Ms. Roth received her Master of Education with distinction from California State University at Northridge in 2004, specializing in mild/moderate disabilities. Since 2001, she has taught the upper level special day class at Stoner. Because of Ms Roth's education, experience and class curriculum, this program meets Student's unique needs.

22. Ms. Roth's class curriculum is very well suited to meet Student's unique

needs. Ms. Roth utilizes the Open Court reading program and Student can participate in the supplemental "Voyager" program. Both programs are tailored to a student's individual needs. Ms. Roth modifies the reading program for children with SLD by using books on tapes and the small class size gives her the opportunity to target the individual needs of each student. Even though District's offer included 40 percent of Student's time in general education classes, Ms. Roth follows her students to their general education classes. Ms. Roth co-teaches with general education teachers in science and social studies. Student was also offered DIS services designed to meet his unique needs: 60 minutes per week of speech and language and 30 minutes per week of counseling.

23. Ms. Roth's testimony supports Student's placement at Stoner and that Student would receive some benefit from this SDC class. Ms. Roth's primary teaching method utilizes the multi-modal learning or multi sensory approach. She is familiar with Student's December 2, 2005 IEP and the accommodations offered to Student are utilized in her classroom. Some of these accommodations include verbal prompts, visual cues, repetition of directions and instructions, modeling, manipulatives, criteria charts, thinking maps, small group or one-to-one instruction. In addition, Ms. Roth testified that these accommodations are a baseline and once Student is in her class she will specifically modify the program to meet Students unique needs. Ms. Roth's teaching methods and skills would facilitate Student's academic growth and provide educational benefit. The Stoner SDC classroom placement provides Student with some educational benefit. Thus, District's offer of placement in an SDC class at Stoner provides Student with an academic benefit.

24. District's placement offer of a SDC class at Stoner was a well reasoned decision made after three and a half hours of discussion at the December 2, 2005 IEP. District's offer of placement in Ms. Roth's SDC class at Stoner has provided FAPE because it was designed to address Student's unique educational needs and was reasonably calculated to provide some educational benefit in the least restrictive environment. Thus,

District's offer provided Student with FAPE.

THE DISTRICT'S PLACEMENT PROVIDES STUDENT WITH A BASIC FLOOR OF OPPORTUNITY AND STUDENT DOES NOT REQUIRE A NPS PLACEMENT

25. A district's program must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services. A school district can only place a student with special needs in a nonpublic school, if no appropriate public education program is available. If District's program met the substantive factors, then District provided a FAPE, even if Student's Parents preferred another program and even if his Parents preferred program would have resulted in greater educational.

26. Parent prefers a NPS placement for Student. Parent objected to Student's placement at Stoner because during her two short visits to Ms. Roth's SDC classroom, she observed students that misbehaved. Parent did not describe the behavior nor did she explain how the class behavior would interfere with Student benefiting from his special education. Ms. Roth's and Ms. Carter's testimony was more persuasive on this issue. Ms. Roth testified that her students were well behaved. She described in detail the positive reinforcement system she used to assure that her students were well behaved. Ms. Carter also testified that the SDC students in her class were well behaved.

27. Parent also requested a NPS because she was concerned about Student's shy behavior, not having friends and having low self-esteem. Student's teachers as well as Jose Salas described Student as polite, shy and well liked by his typically developing peers. Student does have unique needs in the area of social and emotional issues regarding self-esteem. In a small classroom setting such as the Stoner SDC classroom, Student's teacher can help Student realize his positive qualities and through the use of role play and discussions help him to recognize these attributes. In the SDC class, Student's academic performance should improve and this will help Student develop more self-esteem.

28. Finally, Parent argued that a NPS was appropriate because of Student's lack

of educational progress at Braddock. Since February 2005, Student has been in a general education class with RSP services for only 60 minutes a day. Student has not been making educational progress but he has not regressed in this setting. If Student attended Stoner's SDC class, he will make educational progress because this is a small class where Ms Roth will tailor the academic programs and accommodations to meet Student's unique needs. At the December 2, 2005 IEP, District offered Student placement in Stoner's SDC class where as demonstrated above he will have a better opportunity to succeed and receive at least some educational benefit.

29. As demonstrated above, District's offer was reasonably calculated to provide Student with some educational benefit. Student is entitled only to a "basic floor of opportunity" that consists of access to specialized instruction and related services. District's offer provided Student with a "basic floor of opportunity." A school district can only place a student with special needs in a NPS, if no appropriate public education program is available. District offered Student an appropriate public education program. Student is not entitled to placement at an NPS. District's offer provided Student with FAPE.

CONCLUSION REGARDING DISTRICT'S PROVISION OF FAPE IN DECEMBER 2, 2005 IEP

30. District easily met the threshold legal requirements for the provision of a FAPE. The February 10, 2005 IEP and December 2, 2005 re-evaluation IEP addressed Student's unique needs about which the parties do not disagree. This included Student's need for a small classroom setting where his academic needs can be met with the proper accommodations and modifications to the curriculum. The IEP was reasonably calculated to provide educational progress, including the areas of speech and language, reading, math, and social relationships affecting access to education. The IEP team discussed Student's needs, and placement alternatives. The mix of SDC class for 60 percent of the

day with some general education classes for 40 percent of the day would be more effective than his present placement in general education and one hour of RSP service a day.

LEAST RESTRICTIVE ENVIRONMENT (LRE)

31. A substantively appropriate IEP must be provided in the LRE, i.e., Student must be educated with his non-disabled peers to the maximum extent appropriate. Any analysis of the LRE must consider four factors: (1) the educational benefits to the child of placement in a full-time in a regular education class, (2) the non-academic benefits to the child of such placement, (3) the effect the disabled child will have on the teacher and children in the regular education class, and (4) the costs of educating the child in a regular education classroom with appropriate services, as compared to the cost of educating the child in the District's proposed setting.

32. As noted above, the December 2, 2005 IEP states that Student will be educated with his typically developing peers for 40 percent of each day. The IEP also provides for a SDC classroom for 60 percent of the day. An SDC class is the LRE where Student can receive an educational benefit. Ms. Roth explained that mainstreaming is important at Stoner and the goal of her SDC classroom is to return the students to general education. Student relates well with his peers in the general education setting and is well liked. Student's teachers (Christine Hoshisaki, Janet LeCates, and Gulnar Gulkap) testified that Student's interactions with his peers are age appropriate. Only Parent voiced a concern about the behavior of the students in Ms. Roth's SDC classroom. Ms. Roth testified that discipline is a high priority in her classroom. From the beginning of the year, she uses a behavior chart that includes her expectations of her students and this method has a positive affect on students' behavior. Neither Ms. Roth nor her aide indicated that their seven students had behavior problems. Thus, the SDC is the LRE for Student.

33. Student asserts that Student's placement at a NPS is the LRE because Student must be educated in an environment where he can receive an academic benefit. At Summit View NPS, almost all of Student's classmates have a learning disability. At a NPS, Student will not have the opportunity to model from her typically developing peers.

34. Based on the foregoing, Student failed to meet his burden of proving that District's placement is not the LRE environment because of the importance of Student being educated with his non-disabled peers. Student would benefit, both academically and socially, from the District's proposed program and there was no evidence to suggest that his inclusion with non-disabled peers would distract them or teachers. The December 2, 2005 IEP is the LRE for Student.

DISTRICT HAD A DISTRICT REPRESENTATIVE WITH THE AUTHORITY TO OFFER A NPS PLACEMENT, PRESENT AT THE DECEMBER 2, 2005 IEP MEETING.

35. An IEP team must include a representative of the District who is qualified to provide or supervise the provision of specially designed instruction, is knowledgeable of general curriculum and is knowledgeable of the availability of resources of the LEA. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits.

36. Christine Ahearn testified that she had been employed as an elementary educational support specialist at the Manhattan Beach Unified School District (Manhattan Beach) from 1999 until 2005. In Manhattan Beach, she was the administrative designee for over 80 SST and IEP meetings. She has also been a training consultant to the District's Open Court Reading Program from 1998 to present. Ms. Ahearn taught elementary school in the District from 1985 through 1998. Although she was assistant principal for elementary support at Braddock for a short period of time prior to Student's IEP, her 20

years of experience in general education and special education makes her well qualified to serve as a LEA representative. Ms. Ahearn was familiar with the general and special education curriculum, and the resources of the public agency. Her experience as an administrative designee made her qualified to supervise specially designated instruction and be familiar with SDC curriculum⁶. Contrary to Student's argument, the LEA representative is not required to be familiar with a NPS in the District. Student failed to prove that Ms. Ahern did not have the authority to offer a NPS. Because of Ms. Ahern's experience and knowledge, she is a proper representative of the LEA.

37. Parent participated in the IEP meeting and Parent's attorney was also present. All members required to be present at Student's December 2, 2005 IEP were present. There was no procedural violation. Thus, District offered Student FAPE.⁷

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The Student has the burden of proof as to the issue designated in this Decision. (*Schafferv. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)
2. A child with a disability has the right to a FAPE. (20 U.S.C. § 1412(a)(1)(A);

⁶ Curriculum requirements are set by the California Department of Education and are applied to all public schools.

⁷ Student raised for the first time in his closing brief a number of procedural issues that were not included in the due process complaint. Those issues include no prior written notice, informed consent, and District's duty to initiate a due process complaint when parent does not consent to placement necessary for a student to receive FAPE. The ALJ finds that these issues were not properly raised at hearing and thus are not considered in this decision.

Ed. Code, § 56000.)⁸ A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).)

3. The Supreme Court's decision in *Board of Education of the Hendrick Hudson School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] established a two-prong analysis to determine whether a FAPE was provided to a student. (*Id.* at p. 200 [*Rowley*].) First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. The second prong of the *Rowley* test requires the court to assess whether the IEP was designed to meet the child's unique needs, reasonably calculated to enable the child to receive some educational benefit, and comported with the child's IEP. (*Capistrano Unified Sch. Dist. v. Wartenburg* (9th Cir. 1995) 59 F.3d 884, 893, citing *Rowley*, at pp. 188-189, 200-201.)

4. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, at p. 207.) Nor does the IDEA require school

⁸ All statutory citations to the Education Code are to the California law, unless otherwise noted

districts to provide special education students with the best education available or to provide instruction or services that maximize a student's potential. (*Rowley*, at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Rowley*, at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.)

5 The public educational benefit must be more than *de minimus* or trivial. (*Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.* (3d Cir. 2000) 205 F.3d 572, 577.) If a parent disagrees with the IEP and proposed placement, he or she may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁹ An IEP is "a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was

⁹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Office of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer Sch. Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

developed. (*Id.*)

7. In addition, federal and state law requires school districts to provide a program in the LRE to each special education student. (See, 34 C.F.R. §§ 300.114, et. seq.) A special education student must be educated with non-disabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii); Ed. Code, § 56364.2.) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also 20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) A school district can only place a student with special needs in a nonpublic school, if no appropriate public education program is available. (Ed. Code, § 56365, subd. (a).)

8. A student must be placed in the least restrictive environment. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class, (2) the non-academic benefits to the child of such placement, (3) the effect the disabled child will have on the teacher and children in the regular class, and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects congressional recognition “that some settings simply are not suitable environments for the participation of some

handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.)

9 In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); See, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

10 Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (34 C.F.R. § 300.501(a)(c); Ed. Code, §§ 56304, 56342.5.) School officials and staff do not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.2d 688, 693 n.3.) However, a school district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal v. Hamilton County Bd. of Educ, supra*, 392 F.3d at pp. 858.)

DETERMINATION OF ISSUES

1. Did the district fail to provide student with a free and appropriate public education (FAPE) in its december 2, 2005 IEP for the 2005 to 2006 school year?

11. Based on Factual Findings 1 through 30 and Legal Conclusions 1 through 6, District's December 2, 2006 IEP for the 2005-2006 school year provided Student with FAPE.

2. Was the placement offered by district in the december 2, 2005 IEP the least restrictive environment (LRE)?

12. Based on Factual Findings 31 through 34 and Legal Conclusions 7 and 8, District's offer of placement at Stoner constituted the LRE.

3. Was there a procedural violation resulting in a denial of FAPE because district failed to have a district representative, with the authority to offer a NPS placement, present at the december 2, 2005 IEP meeting?

13. Based on Factual Findings 35 through 37 and Legal Conclusions 9 and 10, District had a District representative with the authority to offer placement present at the December 2, 2005 IEP meeting.

ORDER

All of the relief sought by Student is denied.

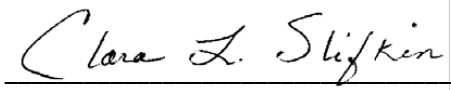
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issue 1, Issue 2, and Issue 3.

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 28, 2007

A handwritten signature in cursive script that reads "Clara L. Slifkin". The signature is written in black ink and is positioned above a horizontal line. To the right of the signature, there is a vertical red line that extends from the top of the signature down to the bottom of the typed name below.

CLARA L. SLIFKIN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings