

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

In the Matter of :

STUDENT,

Petitioner,

v.

MURRIETA VALLEY UNIFIED SCHOOL  
DISTRICT,

Respondent,

OAH CASE NO. N 2007080147

DECISION

Darrell Lepkowsky, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on September 27 and 28, 2007, at the offices of the Murrieta Valley Unified School District in Murrieta, California.

Attorney Ellen Dowd represented petitioner (Student) and his parents. Student's father was present on the first day of the hearing.

Attorneys Jack B. Clarke, Jr. and Airionna S. Whitaker, of Best, Best & Krieger LLP, represented respondent, Murrieta Valley Unified School District (District). Zhanna Preston, the District's Director of Special Education, was present throughout the hearing.

Student filed a request for due process on August 3, 2007. Neither Student nor the District requested a continuance in the matter. 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 post-hearing closing briefs and that the time for issuing a decision in this case would be tolled during the week the record remained open. Both parties timely filed their

briefs on October 5, 2007. The ALJ closed the record and deemed the matter submitted as of that date.

## ISSUES<sup>1</sup>

Whether the District failed to offer Student a free appropriate public education (FAPE) in the individualized education program (IEP) dated May 29, 2007, by:

- A. failing to offer placement or implement its offer of placement at the Big Springs School in Riverside, California, a certified non-public school, as agreed to in the IEP dated October 24, 2006.
- B. making a predetermined offer of placement and services, which did not permit Student's parents and advocate to participate meaningfully in the IEP process.

## REMEDIES SOUGHT BY STUDENT

Student seeks an order that the District be required to fund a placement for him at the Big Springs School in Riverside, California for the remainder of the 2007-2008 school year.

## CONTENTIONS OF THE PARTIES

This case concerns two series of IEP team meetings held for Student, the first in October and November of 2006, and the second in April and May of 2007. Student contends that at an IEP team meeting held October 24, 2006, the District offered to place

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<sup>1</sup> The issues are stated as determined on the first day of hearing and as based upon the evidence presented by Student at hearing. At the hearing, Student withdrew issue three of his complaint, which alleged that the District had failed to consider and implement recommendations of various independent assessors and professionals at the IEP team meeting held on May 29, 2007

him at the Big Springs School (Big Springs) once he demonstrated that he was ready for its program. Student contends that his parents agreed to this offer. Student further contends that by the IEP team meeting held on May 29, 2007, he was ready for the Big Springs program but that the District refused to implement its offer to place him there, instead only offering a placement at one of the District's elementary schools. Student also contends that the District had predetermined its offer of placement at the May 29, 2007 IEP team meeting and had no intention of considering any other placement, specifically refusing to consider Big Springs.

The District responds that it never offered to place Student at Big Springs on October 24, 2006. It alleges that although Big Springs, and its related non-public agency tutoring program in Murrieta, California, were discussed as possible placements for Student at the IEP team meeting held on October 24, 2006, no specific offer of placement was made by the District until the meeting held on November 2, 2006. At that time, the District offered a placement at Rail Ranch Elementary School, one of the District's schools, with corresponding related services. Student's parents did not accept the offer. The District further responds that it did not predetermine Student's placement prior to the IEP team meeting on May 29, 2007, or at any other time, and that it considered the concerns, comments, and input of Student's parents, advocate, and the Big Springs director, before making its offer of placement at its elementary school.

## PROCEDURAL MATTERS

On September 24, 2007, Student filed three motions in limine. The first motion requested that the hearing be limited to the issues stated in Student's due process complaint. Student's second motion requested that evidence concerning events occurring after the May 29, 2007 IEP team meeting be excluded as outside the scope of his due process complaint. The District, in effect, did not oppose these motions. The ALJ granted the motions.

Student also moved to exclude as evidence the confidential settlement agreement the parties signed in December 2006. The District opposed the motion, alleging that it was relevant to the issues raised by Student in the instant proceedings. After reviewing the agreement, and based upon Student's representations that the agreement was not evidence of, or part of, the alleged offer by the District to place Student at Big Springs, the ALJ granted the motion to exclude the confidential settlement agreement<sup>2</sup>

## FACTUAL FINDINGS

### BACKGROUND INFORMATION

1. Student is an eleven-year-old boy who was born on October 1, 1996. At all times relevant to the allegations in this case, he resided with his parents within the District's boundaries. Student is eligible for special education and related services under the category of speech or language impairment. His eligibility is not at issue in this case.

2. Pursuant to agreement between the District and Student's parents, and in anticipation of Student's annual IEP review in October 2006, Big Springs conducted a multidisciplinary educational assessment of Student between October 3 and 9, 2006.<sup>3</sup> The two stated goals of the assessment were to identify Student's strengths and weaknesses so that his IEP team could determine appropriate goals and objectives for him, and to

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<sup>2</sup> The ALJ did not base her decision to exclude the settlement agreement on Student's contentions that the agreement violated the IDEA or any procedural rights of Student's parents, or the allegation that the District had coerced Student's parents into signing the agreement

<sup>3</sup> It is unclear whether the District or Student's parents funded the assessments conducted by Big Springs.

determine if placement at the Big Springs School was appropriate. Three professionals from Big Springs conducted the assessment, including School Director Leslie Huscher.<sup>4</sup>

3. The Big Springs professionals made a number of observations and recommendations concerning Student based on their assessments, the majority of which are not at issue in this case. The only observation and recommendation at issue is that the Big Springs professionals believed that Student was not ready to attend the school as of October 2006. The Big Springs professionals stated that Student first needed to receive educational therapy in a one-on-one setting before he would be ready to attend the school. The Big Spring professionals then recommended that Student's skills be reevaluated at the end of the 2006-2007 academic year to determine if future placement "in a language-based program such as Big Springs School would be appropriate."<sup>5</sup>

WHETHER THE DISTRICT FAILED TO IMPLEMENT ITS OFFER MADE ON OCTOBER 24, 2006, TO PLACE STUDENT AT BIG SPRINGS ONCE HE WAS READY FOR ITS PROGRAM

4. A student eligible for special education and related services is legally entitled to a free appropriate public education that conforms to the student's individual needs.

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<sup>4</sup> Big Springs School, located in Riverside, California, is a certified non-public school (NPS), which offers full-time educational programs to a small number of students. Big Springs Educational Center is a certified non-public agency, which offers intensive instruction to students at a location in Murrieta, California. The non-public agency (NPA) program is a type of tutoring not meant to substitute for an entire educational program. Cody Educational Enterprises, owned by Ms. Huscher and her husband, is registered as doing business as both the Big Springs NPS and the Big Springs NPA.

<sup>5</sup> Page 9 of the Big Springs Multidisciplinary Educational Screening is missing from Student's exhibit A. Neither the ALJ nor the parties noticed this omission during the due process hearing.

Under state and federal law and federal precedent, one of the factors used in determining whether a school district provided a FAPE to a student is whether the education program and related services provided to the student conformed to his or her IEP as it was written. A failure to implement any provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material; a material failure to implement an IEP occurs when the program or services provided to the student fall significantly short of those required by his or her IEP. Further, federal precedent specifically finds that state contract law does not apply to the interpretation of an IEP, therefore it is inappropriate to frame challenges to an IEP as a breach of contract claim. Finally, a school district must make a formal written offer in the IEP that clearly identifies the program it is proposing.

5. Subsequent to the completion of assessments by Big Springs, Student's IEP team met on October 17, 2006, for his annual IEP review. Present at the meeting were Student's mother, his advocate Helen Robinson, and various District representatives, educators and service providers.<sup>6</sup> Student's mother indicated that she had been advised of and given a copy of the Notice of Procedural Safeguards, had received a copy of the assessment reports utilized in the development of the IEP, and had received a copy of the IEP at no charge, by initialing the appropriate spaces for each item. She did not indicate her consent or lack of consent to any portion of the IEP at this meeting.

6. In addition to the report and recommendations from Big Springs, the team reviewed additional assessments of Student. The team, including Student's mother and advocate, discussed the recommendations in the assessments, and reviewed and discussed Student's present levels of performance. Student's mother and advocate also discussed their priorities and concerns for Student. The team, including Student's mother, agreed to Student's present levels of performance. No offer of placement was made on

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<sup>6</sup> The composition of the IEP team at all IEP meetings referenced in this Decision is not at issue

October 17, 2006. Since the IEP team still had many issues to discuss, the team agreed to reconvene on October 24, 2006.

7. The IEP team reconvened as planned on October 24, 2006. Student's mother and father were both present, as was his advocate. In addition to many of the same District staff members who attended the meeting on October 17, 2006, program specialist Gary Diephouse was also present on October 24, and contemporaneously typed the team summary notes on a computer as the meeting progressed. Present by telephone was Leslie Huscher, the Big Springs Director.

8. The stated purpose of the reconvened IEP meeting was to continue discussion of Student's annual IEP. Marked on the IEP team summary as having been discussed at the meeting on October 24, 2007, was progress on Student's prior goals and Student's new goals and objectives.

9. Ms. Huscher reviewed the Big Springs assessments and recommendations with the other team members. She confirmed the school's written recommendation that Student receive intensive language instruction in a one-on-one setting as well as academic education therapy. Ms. Huscher believed that the Big Springs NPA could offer the type of educational therapy Student needed. Ms. Huscher further indicated that goals in writing, speech and language should correlate. Mr. Diephouse asked Ms. Huscher how a program at Big Springs NPA would differ from a special day class program offered by the District. Ms. Huscher indicated that the principle difference was that the Big Springs NPA offers a one-on-one program. She further stated that Student would not receive language arts or a mathematics curriculum at the District placement. Ms. Huscher also stated to the other IEP team members that Student was not ready for the Big Springs School in Riverside. She stated that the ultimate goal of the Big Springs NPA program was to get Student ready for the Big Springs School in Riverside. Ms. Huscher further recommended that Student be placed in a special day class at the District during the part of the day he would not be

attending the Big Springs NPA.<sup>7</sup>

10. Student's advocate, Helen Robinson, requested that the team begin discussing placement options rather than focusing on the goals to be proposed by the District team members since Big Springs could develop goals if placement there was considered. Mr. Diephouse explained that the IEP team needed to develop goals first and then determine an appropriate placement to implement the goals. District staff members then discussed some proposed goals for Student. Since the meeting was reaching its allotted two-hour time, the team agreed that the remaining time would be spent discussing the area in which goals for Student should be written. The District team members agreed to draft goals and provide them to Student's parents and advocate prior to the next IEP team meeting.<sup>8</sup> The team agreed that revisions to the goals would be sent by email to team members so that goals would be set at the subsequent meeting, allowing the team to focus on discussion of Student's placement. The team agreed to meet again on November 2, 2006.

11. At the October 24, 2006 IEP team meeting, Student's parents initialed their acknowledgement that they had been advised of their rights and previously been given a copy of the Notice of Procedural Safeguards. They also indicated receipt of the IEP at no charge to them. They did not initial either consenting to or denying consent to the IEP. Both Ms. Huscher and Ms. Robinson acknowledged during their testimony at the hearing

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<sup>7</sup> The IEP team summaries sometimes incorrectly identified the NPA as the Big Springs "School." It is clear from testimony at hearing that the NPA was the program discussed when considering the recommendation for one-on-one intensive tutoring for Student, on a part-time basis during his proposed school day. It is this intensive educational tutoring that Ms. Huscher considered necessary for Student before he could be deemed ready to attend the Big Springs School

<sup>8</sup> The appropriateness of the goals proposed for Student is not at issue in this case.



in this matter that the District team members did not make an offer of placement to Student at this meeting. Both acknowledged that a placement offer was to be deferred until the meeting on November 2, 2006, when the IEP would be completed.

12. The IEP team reconvened on November 2, 2006, as planned. Student's parents and advocate attended the meeting, as did Mr. Diephouse and other District staff members. Ms. Huscher did not attend either in person or by telephone. The meeting was specifically designated a continuation of the IEP meetings held on October 17 and 24, 2006. Marked on the IEP team summary notes as having been discussed by the IEP team for Student at the November 2 meeting were new goals and objectives, placement, and related services.

13. District staff sent draft goals to Student's parents and advocate for their review prior to the meeting. However, at the IEP meeting, Student's parents and advocate did not want to spend much time on the goals. They stated that they were requesting a placement for Student at Big Springs and wanted Big Springs to write goals to be implemented there.

14. Student's parents agreed that the draft goals were appropriate for a District placement. The IEP team discussed the goals, reviewed the prior IEP meeting notes to make sure they were covering all issues, and reviewed accommodations, supports, and services for Student. Student also participated for part of this IEP meeting and read to the team a paragraph he had written expressing his desire to attend Big Springs.

15. The team discussed the continuum of placement options available for Student, and discussed specific placement options such as a District placement in a special day class with one-on-one tutoring at the District before or after school. The team also discussed the advantages and disadvantages of Student's then-current placement as compared to a placement in a special day class. Finally, the team discussed placement at the Big Springs NPA, including the difference between the Big Springs NPA and the District programs.

16. At the end of the IEP meeting on November 2, 2006, the District IEP team members made a placement offer to Student. Although Student's parents and advocate had expected the District to offer placement at the Big Springs NPA to supplement a District placement for the remainder of the 2006-2007 school year, with an offer of placement at Big Springs School for the following school year if Student progressed enough to be accepted there, this did not occur. Rather, the offer consisted of placement in a special day class at Rail Ranch Elementary School five days a week for a full class day, with one-on-one tutoring offered two times a week for one hour each session. The offer also included two 30-minute sessions a week of speech therapy in a small group setting, and one 30-minute session per week of collaborative speech therapy.

17. Student's parents did not agree to the offer. At the November 2, 2006 IEP meeting they initialed the space on the IEP next to the acknowledgement that "I do not consent to this Individualized Education Program." Student's parents also hand wrote the comment that "we do not believe the placement level service is a FAPE."

18. On December 12, 2006, Student's parents added an addendum to the IEP of November 2, 2006. Inter alia, they stated that they did not agree to a full-day placement in a special day class.

19. The IEP team met again on May 29, 2007.<sup>9</sup> The meeting was an addendum to the IEP meetings held in the fall of 2006, which culminated in the District's offer of placement made at the end of the meeting held November 2, 2006. The purpose of the May 29, 2007 IEP meeting was to discuss placement for Student for the 2007-2008 school year, up to Student's annual IEP date of October 17, 2007.<sup>10</sup> Student's parents were not

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<sup>9</sup> The IEP team also met on April 25, 2007, to discuss Student's goals. That meeting is not at issue in this case

<sup>10</sup> The IEP team summary for May 29, 2007, incorrectly notes that the annual IEP date is October 17, 2006

able to attend this meeting; Student's advocate attended in their place. Big Springs Director Leslie Huscher also attended. She indicated that Student was now ready for placement at Big Springs. No team member offered any contradictory evidence of Student's readiness for Big Spring during this IEP team meeting nor did any District witness dispute his readiness through testimony at the hearing.

20. After discussions among the IEP team members present,<sup>11</sup> the District made an offer of placement for Student. The offer did not include placement either at the Big Springs NPA for any part of Student's day or at the Big Springs School.

21. Although Student's parents and advocate reasonably may have expected the District to offer Student a placement at Big Springs, the evidence does not support Student's contention that the District ever made such an offer on October 24, 2006, or at any of the IEP team meetings relevant to this case. The IEP documents in question do not indicate that a written offer of placement at Big Springs was made; to the contrary, the only written offer was that made on November 2, 2006, which offered a placement solely at a District elementary school. Since the District never offered a placement at Big Springs, it cannot be found to have failed to implement a non-existent offer. If Student's contention is merely that the District led him and his parents to believe that an offer of placement at Big Springs would be made in May 2007, that contention also fails since an IEP document is not a contract to which state breach of contract principles must be applied. Therefore, irrespective of the relative merits of the Big Springs program and irrespective of the fact that Student was ready to attend Big Springs by the May 29, 2007 IEP team meeting, the failure of the District to offer a placement at Big Springs on May 29, 2007, was not a failure to implement Student's IEP. Nor was the District under any obligation to make the offer. Student has therefore failed to substantiate his contention

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<sup>11</sup> The ALJ will discuss the extent of that discussion below in the section addressing the alleged predetermination of the District's offer.

that the District denied him a FAPE by its failure to offer placement at Big Springs.

#### PREDETERMINATION OF PLACEMENT AT THE MAY 29, 2007 IEP TEAM MEETING

22. A school district must comply both procedurally and substantively with the Individuals with Disabilities in Education Improvement Act (IDEIA). 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 such a denial. A school district may commit a procedural violation of the IDEIA 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. However, participation by the parents must not be mere form over substance; participation in the IEP process must be meaningful.

23. A school district is also required to make a formal written offer that clearly identifies its proposed program. However, 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. Furthermore, parents do not have a right to their choice of placement or choice of service providers, as long as the district's choice of program or providers offers a FAPE to the student.

24. Student contends that the District had already determined to place him in a special day class at Rail Ranch elementary school before it participated in the IEP meeting on May 29, 2007, and therefore denied his parents an opportunity to participate in the IEP process, resulting in a denial of FAPE to him. Student bases his assertion on the fact that District witnesses acknowledged having discussed Student's IEP before the May 29 meeting, and based upon his assertion that the Rail Ranch placement was the only one considered at the meeting. The District responds that it did not predetermine Student's

placement before the IEP meeting and that the evidence fails to support Student's assertion.

25. The IEP team meeting held on May 29, 2007, was not an annual meeting. Rather, it was an addendum meeting, held solely to determine a placement for Student between the date of the meeting and Student's annual IEP review, which was due by October 17, 2007. The IEP team, including Student's parents, his advocate, and the Director of Big Springs, had determined Student's present levels of performance, goals and objectives at previous IEP team meetings.

26. Lorie Coleman, a special education coordinator for the District who attended the May 29, 2007 IEP team meeting, credibly testified that she spoke with Student's teacher and school principal prior to the meeting to get their respective perspectives and input only because she knew they would not be able to attend the meeting. Ms. Coleman did not speak with other scheduled team members, such as speech and language pathologist Tracy Taylor, because she knew they would be at the meeting and would be able to share their comments and perspectives at the meeting. There is no evidence that Ms. Coleman spoke with anyone else prior to the meeting or that any of the other District team members discussed Student's placement prior to the meeting.

27. The May 29, 2007 IEP team meeting lasted about three hours. The team spent the majority of the meeting discussing Student's placement. Leslie Huscher, the Big Springs Director, gave significant input concerning the Big Springs NPS program. She discussed the make up of the program and how Student could benefit from it. The entire team reviewed the relative advantages and disadvantages of the Big Springs NPS and a District placement, requesting input from both Ms. Huscher and Student's advocate. Only after a full discussion of the merits of the Big Springs NPS program and the District elementary school program as they related to Student's unique needs did the District make its formal offer of FAPE.<sup>12</sup>

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<sup>12</sup> The FAPE offer on May 29, 2007, differed from the offer made by the District on

28. The evidence substantiates the District's position that Student's advocate as well as Ms. Huscher were able to participate meaningfully in the IEP process. The District team members fully considered Ms. Huscher's comments and recommendations at all IEP meetings she attended. She and Ms. Robinson were able to give input, ask questions, and voice their concerns about Student's placement and his IEP in general. The District was involved in the original decision to have Ms. Huscher and Big Springs assess Student. The District invited her to the IEP meetings, and asked for her comments and recommendations. There is no credible evidence, other than the fact that the District ultimately offered a placement at one of its own schools, that either Ms. Huscher or Ms. Robinson were prevented from meaningfully participating in the IEP process.

29. Furthermore, there is no evidence that the decision to offer a District placement rather than a placement at Big Springs, or any other non-public school, was the result of a District-wide policy against private placements. Likewise, Student offered no evidence that any District administrator or policy-maker higher up the school hierarchy than the District IEP team members was dictating placement decisions for special education students or for Student in particular. Nor did Student present any evidence that cost factors were the driving force behind the placement offer made by the District.

30. Although Ms. Robinson, who was generally a very credible witness, testified that she "felt" that the District had made the decision to offer Student its own program rather than the one at Big Springs, Student offered no compelling evidence to substantiate Ms. Robinson's "feeling." In sum, the only tangible evidence that Student presents to support his predetermination claim is the fact that the District offered Student

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November 2, 2006 by adding a general education component to Student's day. Rather than proposing that Student remain in the special day class for his entire school day, the offer of May 29 included an hour a day in a general education classroom for physical education and science.

a placement at a District elementary school rather than at Big Springs. However, the fact that the District ultimately believed that its program offered a FAPE to Student and that, therefore, it need not offer Student a placement at a non-public school does not, without other supporting evidence, compel the conclusion that the offer was predetermined.

31. Student has failed to produce persuasive evidence that the District predetermined his placement prior to the May 29, 2007 IEP team meeting. No procedural violation occurred.

#### APPROPRIATE REMEDIES

32. Since Student has not prevailed on either of the issues presented for hearing, it is not necessary to address his contention that he is entitled to a prospective placement at Big Springs.

#### CONCLUSIONS OF LAW

##### BURDEN OF PROOF

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

WHETHER THE DISTRICT FAILED TO OFFER STUDENT A FAPE IN THE IEP DATED MAY 29, 2007, BY FAILING TO OFFER PLACEMENT OR IMPLEMENT ITS OFFER OF PLACEMENT AT THE BIG SPRINGS SCHOOL IN RIVERSIDE, CALIFORNIA, A CERTIFIED NON-PUBLIC SCHOOL, AS AGREED TO IN THE IEP DATED OCTOBER 24, 2006?

2. Pursuant to the Individuals with Disabilities in Education Improvement Act (IDEIA), effective July 1, 2005, and California special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000. FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational

standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).)

3. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services or program a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. However, an IEP document is not a contract and, therefore, it is inappropriate to frame challenges to an IEP as a breach of contract claim. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770, 778-780.)

4. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (hereafter, *Union*.)

5. Student has presented no compelling evidence that on October 24, 2006, or any other date, the District offered to place Student at Big Springs even if he demonstrated readiness for its program. Although Student's parents and advocate may have reasonably expected the District to make such an offer based upon the District's acquiescence to having Big Springs conduct assessments of Student, the participation of Ms. Huscher as part of the IEP team, and Ms. Huscher's strong recommendation that Student be placed at Big Springs, the District did not meet their expectations. Student's 2006 annual IEP was not completed on October 24, 2006, and no placement was offered on that date. Indeed, the team had not formulated any specific goals for Student by the end of that meeting and contemplated doing so during the interim before the next team meeting so that the team could discuss the goals as well as placement. As Mr. Diephouse pointed out at the October 24 team meeting, it would not have been proper to discuss placement before the team had developed appropriate goals for Student.



All IEP team members present at the October 24, 2006 meeting who testified at hearing, including Ms. Huscher and Ms. Robinson, who Student called to testify in his case- in-chief, agreed that no concrete placement offer, pursuant to Union, was made on October 24. Therefore, the IEP team had to reconvene on November 2, 2006, to finalize the IEP and to determine a placement for Student. At the end of the meeting on November 2, the District team members made a concrete offer, pursuant to Union, of placement at a District elementary school.

6. Pursuant to Factual Findings 4 through 21, the District never offered to place Student at Big Springs School. Therefore, the failure to offer a placement at Big Springs at the May 29, 2007 IEP team meeting, in spite of Student's readiness for such a placement, did not amount to a failure to implement his IEP. A District cannot fail to implement a program or provision which it never offered. Student's parents may have reasonably expected that the District was going to offer a Big Springs placement. However, the expectations of Student's parents do not translate into a legal obligation of the District to make the offer of placement or to implement a placement that the District never specifically offered in a written IEP document. Pursuant to Conclusions of Law 2 through 5, there was thus no failure, material or otherwise, to implement Student's IEP and, consequently, no denial of FAPE to Student. *Did the District predetermine Student's placement prior to the IEP meeting of May 29, 2007?*

7. There are two parts to the legal analysis of whether a school district complied with the IDEIA. The first examines whether the district has complied with the procedures set forth in the IDEIA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*).

8. The IDEIA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd.

(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); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. 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. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483 (hereafter *Target Range*.)

9. 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. § 300.116.) 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 in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter, *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) However, merely pre-writing proposed goals and objectives does not constitute predetermination. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.)

10. 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. (*Target Range, 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].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms.S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) 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, supra*, 806 F.Supp. at p. 1262; *Deal, supra*, 392 F.3d at p. 857.)

11. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (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, supra*, 458 U.S. at p. 207.)

12. In the instant case, there is no compelling evidence that the District entered the IEP meetings with a predetermined IEP. While Lorie Coleman, one of the District team members, discussed the upcoming May 29, 2007 IEP team meeting with other District staff members, she did so only to obtain their opinions and recommendations due to their unexpected unavailability for the meeting. Unlike the circumstances in the *Deal* case, the Student presented no evidence that the District here had a policy of refusing to place special education students at private schools if such was necessary and appropriate, or that high-level District officials were dictating placement decisions concerning special

education students. Unlike the school district in *Deal*, the District here provided many opportunities for the Director of the Big Springs School to offer her opinions and recommendations and for both Student's parents and his advocate to contribute to the discussions concerning placement. There was no evidence of District attempts to stifle discussion concerning placement at Big Springs. To the contrary, considerable portions of the IEP meetings on October 24, 2006, November 2, 2006, and, significantly, the IEP meeting of May 29, 2007, were dedicated to discussing the respective merits of the Big Springs and District placements. Furthermore, there is no evidence that the District made statements either at or outside of IEP meetings that it would never consider a private school placement for Student.

13. Pursuant to Factual Findings 22 through 31, and Conclusions of Law 7 through 12, the evidence fails to support the Student's position that the District predetermined a placement for Student prior to the May 29, 2007 IEP team meeting. To the contrary, the evidence supports a conclusion that the District encouraged discussion of a Big Springs placement. None of the cases cited above or cited by Student in his closing brief stand for the proposition that a district is required to offer a placement that is suggested by a student, or that the failure to accept a student's suggested placement means, *ipso facto*, that a district has predetermined placement. Student has therefore failed to meet his burden of persuasion that the District's offer of placement at one of its elementary schools on May 29, 2007, was predetermined before the meeting occurred and has thus failed to prove that the District procedurally violated his rights under the IDEIA.

#### REMEDIES

14. IDEIA empowers courts (and Administrative Law Judges) to grant such requests for relief as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359 [105 S.Ct. 1996].) Equitable

considerations may be considered when fashioning relief for violations of the IDEIA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) However, because Student here did not prevail on any issues, Student is not entitled to the relief he has requested.

## ORDER

Student's requests for relief are denied.

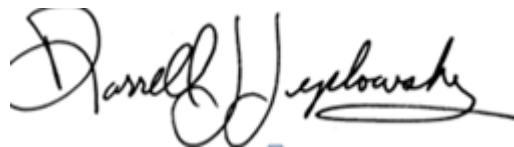
## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to each party has prevailed on each issue heard and decided. In the instant case, the District prevailed on all Issues heard and decided.

## RIGHT TO APPEAL THIS DECISION

The parties to this case may 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: October 19, 2007



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