

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

SALINAS UNION HIGH SCHOOL
DISTRICT,

v.

PARENTS on behalf of STUDENT,

OAH CASE NO. 2008100752

PARENTS on behalf of STUDENT,

v.

SALINAS UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2009010187

DECISION

This hearing was held in Salinas, California, on March 3-4 and 9-12, and April 14, 2009 before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH). The hearing also convened by telephone conference on April 17 and 21, 2009.

Daniel Osher, Attorney at Law, appeared on behalf of Salinas Union High School District (District). Andrea Epps, Attorney at Law, also appeared on behalf of the District for portions of the hearing. Nancy Jones-Powers, Director of Special Education, attended the hearing on behalf of the District. On the first day of the hearing, John Macias attended in place of Ms. Jones-Powers.

David Tollner, Attorney at Law, appeared on behalf of Student and Parents. Mother and Father attended the hearing on behalf of Student.

On October 23, 2008, OAH received the District's due process hearing request (complaint), identified as Case No. 2008100752. On January 7, 2009, OAH received Student's complaint.¹ OAH identified Student's matter as Case No. 2009010187. On January 16, 2009, OAH granted a motion to consolidate both cases and a motion to continue the consolidated case. That order also specified that all applicable timelines and hearing dates would be those of OAH Case No. 2009010187. On February 5, 2009, OAH received Student's amended complaint, which restarted the applicable timelines.

During the hearing, documentary and testimonial evidence was admitted. The ALJ determined that there was good cause for a brief continuance of the hearing to allow the parties to prepare their closing arguments. The parties delivered their closing arguments orally during a telephone conference on April 21, 2009.² On that date, the record was closed and the matter was submitted for decision.

STUDENT'S ISSUES

1. At the May 20 and 29, 2008 individualized education program (IEP) meetings, did the District deny Student a free appropriate public education (FAPE) by

¹ Student's complaint originally named both the District and Spreckels Union School District (Spreckels) as responding parties. On or about February 11, 2009, following mediation, Student dismissed Spreckels as a party to this case.

² On April 20, 2009, each party also filed a short written supplement to its oral closing argument. Those written supplements are part of the hearing record and were considered as part of the parties' closing arguments.

denying Parents a meaningful opportunity to participate and by failing to consider a continuum of options?

2. At the May 20 and 29, 2008 IEP meetings, did the District deny Student a FAPE by failing to offer a multi-sensory language (MSL) program to develop his reading proficiency and instead offering a non-categorical English special day class (SDC) that did not meet his unique needs?

3. Did the District deny Student a FAPE by failing to provide speech-language therapy for 25 minutes per session twice a week, and occupational therapy (OT) consultation, pursuant to his IEP following Parents' consent to those services on September 12, 2008?

4. Beginning on October 23, 2008, did the District deny Student a FAPE by unilaterally altering his class schedule without prior written notice, refusing to reinstitute his prior schedule, and threatening truancy charges?

5. Did the District deny Student a FAPE by significantly impeding parent participation in the decision-making process when it failed to allow Dr. Rochelle Wolk to observe the proposed SDC class on January 15, 2009?

DISTRICT'S ISSUE³

In the May 2008 IEP, did the District offer Student a FAPE for the 2008-2009 school year?

³ The parties agreed that the District's issue is encompassed within Student's issues, and therefore this Decision does not address the District's compliance with legal requirements beyond those raised in Student's issues.

FACTUAL FINDINGS

JURISDICTION

1. Student is 16 years and three months old. During all times at issue in this case, he was a resident within the boundaries of the District, where he lives with his family. Student is eligible for special education services under the eligibility category of specific learning disability (SLD).

FACTUAL BACKGROUND: 1998 – MAY 2008

2. Student was initially determined eligible for special education in the first grade in October 1999 under the category of other health impairment (OHI). He attended public elementary school from kindergarten through spring of his second grade year, and then received home schooling from Mother, who is a credentialed teacher, through the end of his third grade year. In April 2002, during Student's third grade year, his eligibility category was changed to speech-language impairment (SLI). In June 2002, he began receiving mental health services from Monterey County Children's Behavioral Health (MCCBH), pursuant to California Government Code Chapter 26.5 (Chapter 26.5), as part of his special education program. For fourth, fifth, and sixth grades, Student attended a severe disorders of language SDC operated by the Monterey County Office of Education (MCOE). For seventh grade, during the 2005-2006 school year, he attended an SDC for learning handicapped students at Buena Vista Middle School, operated by Spreckels Union School District (Spreckels).

3. For his eighth grade year, during the 2006-2007 school year, Student attended Chartwell School (Chartwell), a certified non-public school (NPS), pursuant to a placement by his Spreckels IEP team. In November 2006, Parents consented to an IEP that identified Student's placement including full-time attendance at Chartwell. In May 2007, Student's IEP team convened with staff from both the District and Spreckels in

attendance, because Student was scheduled to transition from Spreckels, an elementary school district, to the District upon his completion of the eighth grade. However, the IEP team did not reach agreement at that meeting, and Parents did not accept the District's proposed placement at Salinas High School for the 2007-2008 school year. Instead, Parents placed Student at Chartwell for the 2007-2008 school year. Because Chartwell is not a high school and extends only to eighth grade, Student had a second year of eighth grade, although he attended different classes and had a different curriculum than he had during the 2006-2007 school year.

MAY 2008 IEP TEAM MEETINGS

4. On May 20, 2008, Student's IEP team convened for an IEP meeting to discuss his transition to the District and his program for the 2008-2009 school year. Prior to the meeting, District staff had prepared a draft IEP that contained, among other things, a proposed class schedule and proposed special education instruction and services at Salinas High School. The proposed special education instruction and services page listed the following: specialized academic instruction; speech-language services; OT consultation with staff; individual counseling [pursuant to Chapter 26.5 of the Government Code]; and "vocational assessment, counseling, guidance." The District's proposed program also included time in general education, including lunch and two elective classes; however, only special education instruction and services, not general education time, were listed on the page for proposed special education instruction and services. During the meeting, the team members discussed several topics, including assessment results, Student's needs and present levels of performance, goals, classroom placement, and accommodations. The team agreed to meet again on May 29, and agreed that Parents would observe some proposed classes at the District's Salinas High School prior to the May 29 meeting. Thereafter, Mother and John Aulenta, a private psychologist who conducted an independent educational evaluation (IEE) of Student at

Parents' request in February 2008, visited Salinas High School and observed special education English and math classes. Mother also observed two Read 180 classes.

5. On May 29, 2008, the IEP team reconvened. The team members again discussed several topics, including what classes were being offered and whether those classes would be appropriate for Student. During the discussion, the District representatives confirmed that the District was offering the special education program described in the draft IEP. Referring to the draft IEP, Ms. Jones-Powers explained that the District's proposal included specialized academic instruction in an SDC setting for 150 minutes a day, five days a week, with core academic classes in math, English, and science, with services in speech-language twice a week for 25 minutes per session, OT consultation twice a school year for 30 minutes per session, a vocational assessment, and counseling. At the end of the meeting, the District confirmed that this was its offer, although Ms. Jones-Powers would send out a final version of the IEP document once she finalized the mental health goal the team had discussed at the meeting.

SUMMER 2008

6. In July 2008, Mother telephoned the District to ask about the status of Student's program for the upcoming school year, because she had not received any further communication from the District about the IEP since the May 29 meeting. On August 1, 2008, Ms. Jones-Powers sent Parents a copy of the May 2008 IEP document, with a cover letter confirming that the District's offer of placement and services was the offer made at the May 29, 2008 IEP meeting. The cover letter stated that the District's offer of placement and services was the following: specialized academic instruction for 150 minutes a day, five days a week; language and speech services for 25 minutes a session, twice a week; OT consultation with staff for 30 minutes per session, twice a year; Chapter 26.5 individual counseling for 45 minutes per session, twice a month; and vocational assessment and counseling for 120 minutes for one session. The letter also

proposed an IEP meeting later in August to discuss changes in the Chapter 26.5 mental health services being offered by MCCBH.

7. Parents replied to Ms. Jones-Powers in a letter dated August 6, 2008. Parents wrote in part that they were enrolling Student at Lindamood Bell to address his IEP goals for language arts, and that the letter served as their ten-day notice of their intent to enroll Student in Lindamood Bell at public expense. Parents indicated that Student would be attending Lindamood Bell for part of the school day, but would be available to attend classes at Salinas High School for the remainder of the school day. Parents agreed to enroll Student in the following classes with aide support and modifications: Algebra Readiness (specialized academic instruction); Earth Science (specialized academic instruction); physical education for a non-competitive sport; and an elective of Business Tech, Tech Core or Woodshop. Regarding the proposed IEP meeting, Parents indicated that they would like to schedule the meeting for late September, to give them time to observe other English classes at Salinas High School.

8. On August 13, 2008, Ms. Jones-Powers replied to Parents' letter, writing in part that Parents' proposed placement in specific classes called for changes in Student's program and placement, which would need to be made by his IEP team. Ms. Jones-Powers' letter asked that Parents notify her if they wanted to schedule another IEP meeting to discuss such a placement. Ms. Jones-Powers also wrote that the District did not believe Lindamood Bell was necessary or appropriate, and expressed concern that "the timing of the program will seriously impact [Student's] ability to participate in the regular school program and take classes necessary for graduation." She further stated that the District's Alvarez High School offered classes taught by individuals trained in Lindamood Bell, and asked Parents to let her know if they were interested in discussing whether such a placement would be appropriate for Student.

9. On or about August 18, Mother went to Salinas High School to enroll Student in his classes. Mother met with Christina Pena, Student's guidance counselor, and Ellen Morley, a special education teacher who was also Student's case manager. In discussing which classes Student would enroll in, Mother told Ms. Pena and Ms. Morley that Student would not be attending an English class at Salinas High School, and would instead be attending a Lindamood Bell program in Monterey. When Ms. Morley questioned this, Mother stated that Ms. Jones-Powers had "said that it was okay." Based on Mother's representation, Ms. Pena and Ms. Morley did not enroll Student in an English class, and instead enrolled Student in only five classes, instead of the standard six classes to fill the high school's six-period school day.

2008-2009 SCHOOL YEAR

10. When the 2008-2009 school year began, Student attended Salinas High School for five class periods each day. Those classes were Algebra Readiness, Earth Science, Business Tech, Individual Studies, and Physical Education. Each school day, Mother drove him from Salinas to the Lindamood Bell Learning Center in Monterey, where he received instruction primarily using Lindamood Bell's Seeing Stars program.

11. In late August 2008, Ms. Morley spoke to Ms. Jones-Powers and informed her that Student was not enrolled in an English class at Salinas High School, and was attending Lindamood Bell instead. Ms. Powers replied that Student needed to be in an English class, based on his last IEP from Spreckels. Shortly thereafter, Ms. Morley told Mother that Student had to enroll in an English class. Ms. Morley and Mother arranged for Mother to observe prospective English classes, in an attempt to find an appropriate English class for him. Mother observed those classes in September and early October 2008, and also observed some of Student's then-current classes.

12. During this time period, the parties and their respective attorneys exchanged several letters. For example, in a letter dated September 12, 2008, Mr.

Tollner, the attorney for Student and Parents, wrote to Ms. Jones-Powers confirming that Parents accepted a portion of the District's proposed placement, specifically the Algebra Readiness, Earth Science, Physical Education, and Business Tech classes, a vocational assessment, and the designated instruction and services (DIS) of speech-language therapy, Chapter 26.5 mental health services, and OT consultation. In a letter dated September 17, 2008, the District's attorney, Mr. Osher, replied to Mr. Tollner that the District was particularly concerned about Student not attending an English class because of high school graduation requirements, and because Student's failure to attend a full school day violated California's compulsory education laws.

13. On September 24, 2008, Ms. Jones-Powers sent an e-mail to Ms. Pena and Ms. Morley, stating that Student "MUST be enrolled in an appropriate English class immediately. [Emphasis in original.] English is a required course & now he will be behind, which creates other issues." On or about October 1, Ms. Morley told Mother that she received a direct order from her boss, Ms. Jones-Powers, that Student had to be placed in an English class. Mother responded that she had not yet agreed to an English class and that the school could not change Student's schedule without parental consent. A few days later, Ms. Morley telephoned Parents and left them a voice message stating that she had to change Student's schedule and place him in an English class. Parents did not receive Ms. Morley's message. On October 9, Ms. Morley spoke with Claudio Montero, an administrator who handles pupil schedules.⁴ Ms. Morley had Mr. Montero change Student's schedule to enroll him in a special education English class taught by Vivian Moises during fourth period. Due to the conflict with Student's fourth period Individual Studies class, they moved Student to a sixth period Individual Studies class.

⁴ Ms. Morley spoke with Mr. Montero because Ms. Pena was not available.

14. Student continued to attend his five-period class schedule, which did not include Ms. Moises's special education English class. On October 15, 2008, Parents received a telephone call from the school attendance office, informing them that Student had been marked absent for sixth period. On October 16, 2008, Student was sitting in his fourth period Individual Studies class, which was taught by Ms. Morley. Another special education teacher, Jennifer Fanoë, entered the room and told Ms. Morley that she had been marking Student absent from her sixth period Individual Studies class. Student overheard Ms. Fanoë's statement. Ms. Morley did not want to discuss the situation in front of Student, so she asked Ms. Fanoë to step outside in the hallway with her. Student left class and called Mother from his cell phone, telling her what he heard Ms. Fanoë say and how upset he was about being marked absent for a class he did not know anything about. Mother told Student that he should go back to class and she would take care of the problem. That same day, Mother went to Salinas High School and spoke to Tim Swartz, an assistant principal. Mother told Mr. Swartz that Student's schedule had been changed in error, and asked him to change it back to Student's previous schedule, which had only five periods and did not include an English class. Mr. Swartz agreed to change Student's schedule back to the five-period schedule that Mother requested.

15. On October 22, 2008, Ms. Pena left a voice message for Mother and Student on the family's home answering machine, stating that she had scheduled a meeting for the following morning to change Student's schedule to add the fourth period English class and sixth period Individual Studies class. Later that day, Ms. Pena spoke to Mother and agreed to postpone the meeting until the following Monday, October 27. On October 27, Ms. Pena met with Father to discuss the schedule change. Ms. Pena told Father that she had received a directive from the school principal and the District's special education director that Student needed to have a six-period school

schedule that included English. Father explained in part that Parents had only accepted portions of the IEP, Parents objected to this schedule change, and Student was refusing to go to school because of the stress caused by the situation.

16. Following Ms. Pena's actions, the parties and their attorneys exchanged numerous letters regarding this dispute. For example, in a letter dated October 22, Ms. Jones-Powers wrote to Mother that, for the portions of the IEP to which Parents did not consent, the District was required to implement the stay put placement, which is the last agreed-upon and implemented placement. Ms. Jones-Powers's letter explained that, because a shortened day and a program without English had never been agreed upon or implemented, Student's stay put placement includes a special education English class. Parents and their attorney responded with letters objecting to the District's actions, and stating that the District had adopted Student's five-period schedule since the beginning of the school year.

17. On October 23, 2008, the District filed its due process complaint with OAH. On November 6, 2008, Student filed a motion for stay put at Salinas High School for a five-period school day without an English class, but with attendance at Lindamood Bell for English instruction. Thereafter OAH received the District's opposition to the motion and Student's reply to the District's opposition. On December 1, 2008, OAH issued an Order Denying Motion For Stay Put. The order held that "Parents' unilateral decision to remove Student from his sixth period class each day and take him to Lindamood Bell does not constitute a 'stay put' placement."

18. Student did not return to high school for the remainder of 2008. Parents tried to get him to return to school, but he refused, saying that he did not trust the school anymore because they changed his schedule. During this time period, he attended his Lindamood Bell sessions sporadically.

19. In December 2008, in correspondence between the parties' attorneys, the District confirmed that, while it still sought to have Student attend school for a full six-period day, Student was also permitted to attend a portion of the school day. Parents showed the District's letter to Student, and convinced him to return to school after the winter holiday break. Beginning on January 5, 2009, Student returned to attending his previous schedule of five periods per day at Salinas High School, without an English class. He continued to attend Lindamood Bell.

20. Throughout the time period from August 2008 to February 2009, the District continued to propose holding another IEP meeting to discuss Student's placement and other topics. However, Student's IEP team never reconvened. On August 6, 2008, Parents wrote to the District that they would like to schedule the IEP meeting for late September, to give them time to observe other English classes at Salinas High School. In a letter dated September 12, 2008, Mr. Tollner wrote that Parents would like to schedule a meeting in early October to allow time for the IEP team members to view Student's educational progress at Salinas High School. In October 2008, Mr. Tollner indicated that Parents were waiting for the results of an IEE, and therefore wanted to schedule the IEP meeting to take place in mid-to-late November. In a letter dated November 11, 2008, Parents wrote that they were no longer willing to attend an IEP meeting because the District lacked the open-mindedness necessary for a meaningful IEP. In a letter dated December 19, Mr. Tollner wrote that Parents would be willing to attend an IEP meeting in January 2009, so long as Parents and their independent assessor, Dr. Wolk, were permitted to observe the proposed English SDC beforehand. In a letter dated January 7, 2009, Mr. Tollner reiterated that the IEP could not take place until after Dr. Wolk's observation of the English SDC. Dr. Wolk observed the proposed class on February 19, 2009. In a letter dated February 17, 2009, the District proposed an IEP meeting for February 24, 25, or 26, to discuss the results of Dr. Wolk's IEE report.

PARENTS' MEANINGFUL PARTICIPATION IN THE IEP PROCESS

21. Student contends that the District denied Parents meaningful participation in the IEP process and failed to consider a continuum of placement options. In particular, Student points to the fact that the District prepared the IEP document, including the District's offer of placement and services, prior to the IEP meeting. The District argues that it did not deny Parents' opportunity to meaningfully participate, and that the District considered Parents' opinions and made changes based on that input.

22. 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. A local educational agency (LEA) must fairly and honestly consider the views of parents expressed in an IEP meeting. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. An LEA 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, which constitutes a procedural denial of FAPE.

23. School district staff may engage in preparatory activities to develop a proposal that will later be discussed and reviewed with parents at an IEP meeting. Prior to the May 20, 2008 IEP meeting, District staff prepared a draft IEP document that contained the District's proposal of placement and services for Student, as well as draft IEP goals, present levels of performance, and other information. Each page of this document was stamped with the word "DRAFT" in capital letters.

24. During the May 20 IEP meeting, Parents, their attorney, Chartwell staff, Spreckels staff and District staff participated in discussions about various topics, including the assessment results and what kind of goals, placement, services, and

accommodations Student needed. At that meeting, Ms. Jones-Powers and the District's attorney, Mr. Osher, both indicated to the team that the IEP document was only a draft. At the May 29 meeting, Mr. Aulenta, the independent assessor previously retained by Parents, joined the team and participated in the discussion. District staff listened and responded to questions and concerns from Parents, their attorney, Mr. Aulenta, and Chartwell staff. The District staff agreed to requests and suggestions from Parents and other team members, including adding new goals and accommodations. Evidence of the May 2008 IEP meetings, including the meeting transcripts prepared by Mother, indicates that the District members of the IEP team exhibited open minds during the IEP meetings, and that Parents participated in the development of the IEP. Moreover, this finding is supported by evidence of the District's efforts to schedule a subsequent IEP meeting to discuss other placement options once the District learned that Parents disagreed with portions of the proposed placement.

25. Student argues that the failure to consider additional placement options proves that the District had predetermined its offer. During the May 20 and 29 IEP meetings, the team discussed the District's proposed program, which consisted of a mixture of special education classes, general education classes, and one-to-one services for speech-language therapy and mental health counseling. Part of those discussions concerned whether Student's general education electives should be the Read 180 program or other classes, such as Business Tech or Keyboarding. The District exhibited openness towards other placement options, and did not adopt a "take it or leave it" position. During the May 29 meeting, Mr. Osher inquired about when Chartwell would be opening their planned high school, which Parents had stated would be the best placement for Student. Also during that meeting, when Mother expressed some concerns about the proposed English SDC, District staff suggested that Mother observe and consider other English classes as placement options. Following the IEP meetings,

when District staff arranged for Mother's observations of prospective English classes for Student, the prospective classes included both special education and general education classes. All of this was consistent with the District's position that it was open to other placement options.

26. Moreover, Ms. Jones-Powers proposed the SDC academic classes based in part upon Mr. Aulenta's recommendation for SDC placement for academic subjects. The assessment reports and IEP team members' comments indicate that Parents and Mr. Aulenta were already in general agreement that special education academic classes would be appropriate for Student. Thus, the focus on placement in SDCs for academic subjects reflected consideration of input from Parents and their expert. In light of all of the above, the IEP team's discussions of placement options did not establish that the District had predetermined Student's placement.

27. Student also contends that the District's failure to change its proposal after hearing concerns from Mother and Mr. Aulenta about the SDC English class established that the District had predetermined the placement. Considering the findings discussed above, the evidence does not support that contention. It is not necessarily a procedural violation when school employees are not persuaded by parents' position and continue instead to offer the same program. As discussed above, the evidence indicated that school officials considered the opinions of Parents and the other team members with open minds. Therefore, the evidence did not establish that the District predetermined the program offer.

CONTINUUM OF OPTIONS

28. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum must include instruction in regular

classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

29. As determined below in Legal Conclusion 9, the statutes and regulations regarding continuum of placements state only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. Evidence including testimony from Ms. Jones-Powers established that the District has a continuum of options available. There was no evidence or argument to the contrary. Hence, no procedural violation occurred on this basis.

CONTENTS OF DISTRICT'S FAPE OFFER/READ 180 CLASS

30. Before determining whether the District's placement offer was substantively appropriate, first it is necessary to determine what the offer contained. The District contends that its offer related to Student's reading and language arts needs included placement in both an English SDC and two class periods in Read 180, a general education program designed to improve reading skills for struggling readers. Student argues that Read 180 was not part of the District's IEP offer, and therefore cannot be considered here.⁵

31. One of the procedural requirements of special education law is that an LEA must make a formal, specific written offer of placement. A formal written offer alerts the parents to consider seriously whether the offered placement was an appropriate placement under the Individuals with Disabilities Education Improvement Act (IDEA), so

⁵ Student did not raise failure to provide a formal written offer as a procedural issue in this case. However, this decision considers the question in the context of whether Read 180 can be evaluated as part of the District's offer of FAPE.

that the parents can decide whether to accept or appeal the offer. An IEP document must include a statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child.

32. The May 2008 draft IEP document proposed mainstreaming time, including two class periods of general education electives, but that general education time was not listed on the IEP page for proposed special education instruction and services. The IEP document also contained a page entitled "Proposed Schedule," which listed several proposed classes for Student, including general education electives.⁶ One line of the Proposed Schedule read "Possibly Read 180." At the May 20 IEP meeting, during a discussion about proposed classes, Ms. Jones-Powers and Ms. Morley described the Read 180 class, stating in part that it was a 90-minute class designed to increase reading skills, that the students rotate between working on the computer and working in a small group with the instructor, that it is a class of 20 students with one teacher and one aide, that it is not specifically a special education class but has students with learning disabilities, and that it lasts for two class periods, so it would take up both of Student's elective periods. At the end of that meeting, Ms. Jones-Powers asked if the Parents wanted to observe the Read 180 class; Mr. Tollner responded that they wanted to "see everything that's being offered from the classroom setting perspective."

33. A few days after the May 20 meeting, Mother observed two Read 180 classes at Salinas High School. The IEP team reconvened on May 29. During that meeting, Mother told the IEP team about her concerns regarding the Read 180 classes,

⁶ Another page from the District's Student-Parent Handbook contained a general outline of a proposed schedule. The handwriting on that page listed a proposed schedule for Student of English, Science, Math, P.E. (Physical Education), and two elective classes.

including that some of the pupils exhibited behavior problems and that the class did not appear to teach decoding. Other team members then talked about whether and how the Read 180 program addresses decoding.

34. As determined in Factual Finding 6, on August 1, 2008, Ms. Jones-Powers sent Parents a copy of the May 2008 IEP document, with a cover letter confirming that the District's offer of placement and services was the offer made at the May 29, 2008 IEP meeting. Ms. Jones-Powers testified that, before she sent those documents, she revised the Proposed Schedule page of the IEP document to read "Read 180" instead of "Possibly Read 180," to reflect Parents' opinion about Student's need for more reading interventions. Ms. Jones-Powers further testified she included that revised page in the packet she mailed to Parents. In contrast, Mother and Father testified that they never received the Proposed Schedule page as part of the packet they received from Ms. Jones-Powers in early August, and that the first time they saw the revised schedule was in the evidence binder at the hearing.

35. Student argues that the explanation for this discrepancy is that Ms. Jones-Powers revised the Proposed Schedule page in preparation for hearing, and lied about it in her testimony. There is no evidence to support this theory. Ms. Jones-Powers was a credible witness, and there is no reason to believe that she lied about how or when she revised the Proposed Schedule page.

36. As the District suggests, Mother may have inadvertently misplaced the revised Proposed Schedule page when she received or filed the August 2008 packet. In the alternative, Ms. Jones-Powers may have made a mistake, such as by inadvertently omitting that page from the packet she mailed to Parents. It is difficult to determine with certainty who made the error. In any event, it does not matter, because the evidence established that the District included Read 180 as part of the program offered to Parents at the May 29 IEP meeting. As determined above, the Proposed Schedule

page listed "Possibly Read 180" on the draft IEP document, and the IEP team members discussed the Read 180 program at the May 20 IEP meeting. Because Read 180 was being proposed, Mother observed two Read 180 classes during the time period between the two IEP meetings. At the May 29 IEP meeting, the team members listened to and discussed Mother's concerns about the Read 180 classes she observed.

37. Considering all of the above, it is clear that Read 180 was part of the District's formal written placement offer. If, during or after the May 29 IEP meeting, Parents still had any confusion due to the word "Possibly" on the Proposed Schedule, they could have easily asked if Read 180 was part of the offer, but they did not do so. The key purpose of the "clear written offer" requirement is to fully inform the parents regarding what placement and services are being offered. Given that Parents were fully informed, the Read 180 program is considered as part of the District's proposed placement.

SUBSTANTIVE APPROPRIATENESS OF ENGLISH SDC AND READ 180 CLASS

38. When developing each pupil's IEP, the IEP team must consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. An educational program offered by a school district must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment (LRE). However, school districts are not required to offer instruction or services to maximize a student's abilities. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. As long as a school district provides an appropriate education, methodology is left up to the district's discretion.

39. Student's educational needs are well-documented in the evidence, and are not generally in dispute. In brief summary, Student has a learning disability and has

significant discrepancies between his ability and achievement in reading comprehension, math reasoning, and written expression. His particular deficits include auditory processing, language processing, reading fluency, phonemic awareness, and sensory-motor processing. His cognitive ability is in the low average range, with scatter among subtest scores, including particular weakness in working memory.⁷ He has receptive and expressive language deficits, and receives speech-language therapy as a DIS. His treating psychiatrist at MCCBH has diagnosed him with Anxiety Disorder, Not Otherwise Specified (NOS) and Mood Disorder, NOS, pursuant to the Diagnostic and Statistical Manual-Fourth Edition (DSM-IV). Because of his anxiety, he typically has difficulty with changes in routine.

40. Student contends that the proposed English SDC and Read 180 class are not designed to meet his unique needs related to reading and language arts, and are not reasonably calculated to result in meaningful educational benefit. In contrast, the District argues that the classes are designed to meet his unique needs and are reasonably calculated to result in meaningful educational benefit.

41. Student does not appear to dispute that an English SDC at a public high school could potentially be an appropriate placement for him, but rather argues that

⁷ In early May 2008, Spreckels assessed Student using the Wechsler Abbreviated Scale of Intelligence (WASI). Student obtained a verbal intelligence quotient (IQ) of 111, a performance IQ of 81, and a full scale IQ of 96. However, the District's expert witness, Dr. Robert Patterson, established that the WASI is only a screening test and not as reliable as a full cognitive battery. The WASI score was inconsistent with Student's other, slightly lower IQ scores and was not reflective of his functioning.

this particular SDC was inappropriate.⁸ The proposed English SDC is a class taught by Ms. Moises and one special education aide at Salinas High School. The class consists of approximately 20 pupils, most of whom are eligible for special education due to learning disabilities.⁹ The course curriculum is based on California state standards, but is tailored to the pupils' IEPs and progresses much more slowly than a general education English class. Ms. Moises is a credentialed special education teacher who has six years of experience teaching public school special education classes for pupils with mild to moderate disabilities, and also worked for five years as a substitute teacher at a private parochial school.

42. In her testimony, Ms. Moises described how she reviewed information about Student's needs related to reading and language arts, including recent IEE reports by Mr. Aulenta and Dr. Wolk and the May 2008 IEP and relevant IEP goals. Ms. Moises described how she would be able to work on those IEP goals and implement the recommendations from those IEE reports. Similarly, Student's Earth Science teacher, Carol Light, explained how Student's needs and IEP goals could be addressed, and the IEE reports' recommendations could be implemented, in Ms. Moises's English SDC. Ms. Light established that she was familiar with Student's needs because he is a pupil in her

⁸ For example, the February 2008 IEE report of Parent's private assessor, Mr. Aulenta, recommended that Student "will function most effectively in a special day class setting with small group instruction, and one-to-one assistance available when necessary."

⁹ However, the SDC is not limited solely to pupils with SLD eligibility, hence the description in Student's Issue 2 of a "non-categorical" SDC. Ms. Moises established that most of her pupils have learning disabilities, some have Attention Deficit Hyperactivity Disorder (ADHD), and one pupil has mental retardation.

class and because she has read his recent assessment reports. Ms. Light established that she is familiar with the English SDC and has shared materials with Ms. Moises.

43. The District's expert witness, Dr. Robert Patterson, testified about why the proposed English SDC would be appropriate to address Student's needs and result in educational benefit. Dr. Patterson explained that Student needs an English class to address his needs in reading and writing, and to gain the credits he needs to graduate from high school. Following his observation of Ms. Moises's English SDC, Dr. Patterson concluded that the class would be appropriate for Student because it has the key criteria, including a relatively small class size, a qualified teacher, and instruction in reading comprehension, writing, and spelling.

44. In contrast, Dr. Wolk testified that the English SDC would not be appropriate for Student for several reasons, including that the class did not use an MSL approach, the noise level of the class was too high for Student because of his auditory comprehension issues, the class lacked instructional focus, and there was no instruction in phonemics, phonology, decoding or reading comprehension.

45. For reasons described below, Dr. Wolk's testimony was not as persuasive as Dr. Patterson's testimony. Dr. Patterson is an extraordinarily well-qualified expert whose multiple degrees include a Psy.D. in Psychology and Family Therapy, a Master's degree in Developmental Psychology, and a Master's degree in Education. He holds numerous California credentials including General Elementary, General Secondary, Pupil Personnel Services, and School Psychology. He is both a licensed psychologist and a licensed educational psychologist. He has extensive experience in working in both the education and psychology fields, has published numerous articles, and has taught numerous courses, workshops, and lectures. Dr. Patterson presented as an excellent witness who was candid, independent, thoughtful, and credible. He frequently testifies in due process hearings against school districts on behalf of parents and students, which

enhances his credibility in the present case. During his testimony, he demonstrated exceptional knowledge and understanding about numerous pertinent topics, including the standardized tests utilized in special education assessments, the various reading methodologies, and the research regarding the effectiveness of those methodologies. Moreover, Dr. Patterson exhibited thorough knowledge and familiarity regarding Student's needs and functioning, reflective of the extensive time he spent reviewing Student's records.

46. Student argues that Dr. Patterson's testimony should be given less weight because Dr. Patterson has never assessed or even met Student. In some instances, it is prudent to discount the weight of expert testimony because an expert did not personally observe or assess the pupil, such as when facts about the pupil's needs or functioning are in dispute and further assessment or observation is relevant to determining those questions. However, when the pupil's records already contain undisputed, substantial information about his needs and functioning, an expert may be able to rely on that information and form knowledgeable opinions without the need for further assessment or observation. Such was the case here. Dr. Patterson established that there was ample information from Student's multiple assessments and other educational records. Dr. Patterson spent three full days reviewing Student's records, and also spent most of a day interviewing school staff and observing proposed classes at Salinas High School. He established that, based on all of that information, he was able to form opinions and make recommendations about what type of educational program Student needs. He credibly explained that, because of all of the available information and the type of evaluation he was conducting, meeting or assessing Student would not have been helpful in forming his opinion about what educational program Student needs.

47. Dr. Wolk was a qualified witness who was familiar with Student's needs. She is a licensed psychologist who holds a Ph.D. in Psychology. In addition to her private practice, she is an Associate Clinical Professor in Pediatrics at the University of California, San Francisco Medical Center. Nevertheless, she did not have the same level of credibility, knowledge, and expertise in education as Dr. Patterson, and therefore her opinions are given less weight. In addition, it is not clear to what degree her recommendation for what Student needs in order to make meaningful educational benefit can be distinguished from her recommendations regarding the importance of maximizing Student's abilities, which the law does not require.

48. Regarding Dr. Wolk's opinion that the English SDC was inappropriate because it did not use an MSL program, Dr. Patterson persuasively established that Student does not necessarily need a formal MSL program. Student benefits from multisensory techniques, and would not perform well in a lecture-only class. Testimony from Ms. Moises, Ms. Light, and Dr. Patterson established that Ms. Moises uses visual, auditory, tactile and kinesthetic techniques as part of the class instruction. As discussed further below, because the District has offered an appropriate program, the District is not required to offer an MSL program such as Lindamood Bell.

49. Regarding Dr. Wolk's testimony that the English SDC lacked instruction in phonemics, phonology, decoding or reading comprehension, testimony from Ms. Moises and Dr. Patterson established that reading comprehension was part of the curriculum in that class. Moreover, all of those areas are addressed within the Read 180 program, as discussed further below. Regarding Dr. Wolk's other critiques about the English SDC, while she raised some reasonable points, those concerns did not override the persuasiveness of Dr. Patterson's testimony and other credible evidence that the class was appropriate to address Student's needs.

50. Mother also testified regarding her opinion that the English SDC was not appropriate for Student. Mother is a credentialed general education teacher who has 19 years of experience teaching in public schools. Mother shared some of Dr. Wolk's opinions, which have already been addressed herein. Mother testified that she was very concerned about the level of behaviors that she observed the pupils exhibiting in the English SDC. However, Ms. Moises established in her testimony that the behaviors were atypical the day Mother observed, and diminished significantly as the school year progressed. In addition, Mother's opinions about the English SDC appear to be based in part on an incorrect impression she obtained from Karen Pfeiffer, another District special education teacher. During an IEP meeting, Parents reported that Ms. Pfeiffer had told them during a school tour that an SDC would be inappropriate for Student. Yet testimony from Ms. Pfeiffer established that she did not know Student, could not give an opinion about whether an SDC would be appropriate for him, and for those reasons would not have told his parents that an SDC would be an inappropriate placement for him. Thus, while Parents may have inferred that Ms. Pfeiffer recommended against SDC placement for Student, in fact she did not have any opinion or make any recommendation regarding Student's placement.

51. Regarding the Read 180 program, testimony from Dr. Patterson and Elise Laplace established that it was an appropriate program for Student. Dr. Patterson established that Student needs a comprehensive reading program that covers areas including phonemics, phonemic awareness, reading comprehension, and written language development. Dr. Patterson established that Read 180 meets those criteria and would be appropriate for Student. Dr. Patterson credibly described peer-reviewed research studies which found that, when the program is implemented with fidelity, Read 180 is an effective intervention for high school pupils reading below grade level. Testimony from Ms. Laplace, who taught Read 180 last school year and currently

oversees implementation of the program, established that Read 180 is implemented with fidelity at Salinas High School. Similarly, Dr. Patterson confirmed that, from his observations of the Read 180 program at Salinas High School, the program was being implemented effectively and with fidelity.

52. Both Mother and Dr. Wolk testified regarding their concerns about the Read 180 program, including that the program did not appear to address Student's need to work on decoding skills. However, Ms. Laplace credibly testified that the Read 180 computer program has a decoding component, and testimony from Dr. Patterson supported this. Both Ms. Laplace and Dr. Patterson were knowledgeable about and familiar with the Read 180 program, while Mother was less knowledgeable about the program, and Dr. Wolk's only knowledge of the program came from her single observation of the class on February 19, 2009. As a result, the testimony about Read 180 from Ms. Laplace and Dr. Patterson was more persuasive than the testimony from Mother and Dr. Wolk.

53. For all of the above reasons, the evidence established that the combination of the English SDC and the Read 180 class was designed to address Student's needs related to reading and language arts and was reasonably calculated to produce meaningful educational benefit. Because the District offered an appropriate program, there was no denial of FAPE, and this decision need not determine whether Parents' preferred methodology of an MSL program such as Lindamood Bell is appropriate for Student.

DELIVERY OF OT CONSULTATION IN CONFORMITY WITH THE IEP

54. One of the factors for determining whether an LEA has substantively provided a FAPE is whether the program delivered comports with the pupil's IEP. However, when an LEA does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the pupil's

IEP. A material failure occurs when the services provided to the pupil fall significantly short of those required by the IEP.

55. As determined above, the May 2008 IEP offered OT consultation with school staff twice a year for 30 minutes per session. In a letter dated September 12, 2008, Student's attorney wrote to the District confirming that Parents accepted a portion of the District's proposed program, including the OT consultation.

56. Occupational therapist Elisa Garcia established in her testimony that she provided the OT consultation specified in Student's IEP. As reflected in the invoice she sent the District, she consulted with staff for 30 minutes in September 2008 and 60 minutes in October 2008. Ms. Garcia further established that she provided additional consultation in 2009, which was not reflected in the invoice. Ms. Garcia explained that she consulted with the school psychologist, the Business Tech teacher, and Student's case carrier. There was no evidence or argument to the contrary.

57. Accordingly, the evidence established that the District implemented the OT consultation time provided in the IEP. While the provision of the additional consultation time was technically not "exactly as called for" in the IEP, it did not constitute a material failure to implement the IEP. Hence, there was no denial of FAPE on this basis.

DELIVERY OF SPEECH-LANGUAGE SERVICES IN CONFORMITY WITH THE IEP

58. The parties agree that the District failed to implement some of the speech-language time provided for in the IEP, but disagree regarding the extent of that failure. The May 2008 IEP offered speech-language services twice a week for 25 minutes per session. In a letter dated September 12, 2008, Mr. Tollner notified the District that Parents accepted that offer of speech-language services. The District's copy of that letter was stamped "RECEIVED" with a date of September 15, 2008.

59. There is no dispute that speech-language pathologist (SLP) Teresa Farrar established that she began providing Student's speech-therapy services on or about March 6, 2009. Rather, the parties disagree about whether Student received any speech-language services during the time periods that he attended school from September 16 to October 23, 2008, and from January 5 through February 2009.

60. Ms. Jones-Powers established in her testimony that Kimberly Bradshaw was the speech-language pathologist (SLP) assigned to deliver Student's speech-language services. Ms. Jones-Powers authenticated Ms. Bradshaw's log that reflected when Ms. Bradshaw had delivered those services to Student. Ms. Bradshaw maintained this log in the ordinary course of business and turned in the log to Ms. Jones-Powers each month. The District established that Ms. Bradshaw's log met the hearsay exception for a business record. In addition, Ms. Jones-Powers established that Ms. Bradshaw and Ms. Light both told her that Ms. Bradshaw had delivered speech-language services to Student during his Earth Science class. Ms. Jones-Powers's testimony on that point is hearsay that supports the non-hearsay evidence of Ms. Bradshaw's log.

61. In contrast, Parents testified that Student did not receive any speech-language services at Salinas High School prior to March 6, 2009, because Student would have told them if he had. As the District points out, Parents' testimony about the absence of Student's statement is offered for the truth of the matter asserted, and is therefore hearsay. There is no apparent hearsay exception for this testimony, nor has Student identified one. There is no other, non-hearsay evidence supporting Student's position on this question.

62. In light of all evidence, the District established that Ms. Bradshaw delivered speech-language therapy to Student in October 2008 and January 2009, and that Ms. Bradshaw was available to provide that therapy to Student in late October, November, and December 2008, but Student was absent. Based on testimony from Ms. Jones-

Powers, her written calculations, and Ms. Bradshaw's log, on days when Student attended school, he did not receive a total of 375 minutes of speech-language therapy for the period through February 20, 2009, and an additional 75 minutes through early March 2009, for a total of 450 minutes missed.

63. Appropriate equitable relief can be awarded in a due process hearing. An award of compensatory education need not automatically provide day-for-day or session-for-session replacement for the opportunities missed. Neither party submitted any evidence or argument regarding whether compensatory education should be awarded for the exact amount of minutes missed. In the absence of such evidence, and considering the recent time frame for the failure to provide the services, an award of the specific number of minutes missed is warranted. Thus, the District shall provide Student with 450 minutes of speech-language therapy services from an SLP to compensate for the sessions missed.

STAY PUT AND PRIOR WRITTEN NOTICE

64. Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. The placement identified in the last agreed upon and implemented IEP is generally the then-current educational placement for purposes of stay put. Absent an agreement between the parties, a parent's unilateral placement does not constitute an agreed-upon placement for purposes of stay put.

65. Stay put operates automatically upon due process filing. The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing.

66. Regarding stay put for a student transferring from one school district to another, if it is not possible for the new district to implement in full the pupil's last

agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible. If circumstances have changed since the IEP was first implemented, the student is entitled to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.

67. A special education program cannot be implemented until the student's parent consents in writing to all or part of the IEP. In California, if the parent does not consent to all the components of the IEP, then those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the pupil. In those circumstances, if there was a prior IEP in effect, the remaining goals, placement and services would stay the same as they were in the pupil's prior IEP.

68. A pupil must attend the public full-time day school for the full time designated as the length of the school day by the governing board of the school district. Exemptions from compulsory attendance requirements exist for children who are being instructed in a private full-time day school by persons capable of teaching, and for children being instructed in study and recitation for at least three hours a day for 175 days each calendar year by a private tutor if the tutor holds a valid state credential for the grade taught.

69. Pupils in a special class shall be provided with an educational program in accordance with their individualized education programs for at least the same length of time as the regular school day for that chronological peer group. When the IEP team determines that an individual cannot function for the period of time of a regular school day, and when it is so specified in the IEP, a student may be permitted to attend a special class for less time than the regular school day for that chronological peer group.

70. In the present case, at the May 29, 2008 IEP meeting, and again by mail in early August 2008, the District gave Parents written notice of its proposal for Student's placement. In a letter dated August 6, 2008, Parents agreed to enroll Student in only five specified classes. In a letter dated August 13, 2008, Ms. Jones-Powers replied to Parents' letter, writing in part that Parents' proposed placement in specific classes called for changes in Student's program and placement, which would need to be made by the IEP team.

71. On or about August 18, Mother met with Ms. Pena and Ms. Morley at Salinas High School to enroll Student in his classes. In discussing which classes Student would enroll in, Mother told Ms. Pena and Ms. Morley that Student would not be attending an English class at Salinas High School, and would instead be attending a Lindamood Bell program in Monterey. When Ms. Morley questioned this, Mother stated that Ms. Jones-Powers had said that the arrangement was okay. Based solely on Mother's representation, Ms. Pena and Ms. Morley did not enroll Student in an English class, and instead enrolled Student in only five classes, instead of the standard six classes to fill the high school's six-period school day. Thereafter, Student began attending Salinas High School for the five class periods agreed upon by his parents, but he did not attend a class during the high school's sixth period.

72. Salinas High School has six class periods per day, and all students not exempted from full-time attendance must attend class for all six periods. Pupils who attend the high school are subject to exemption if they are seniors who are ahead in their credits, or if they are pupils in special education whose IEPs provide for a shortened school day.

73. Student argues that his five-period school day was his current educational placement for purposes of stay put, because that is the placement he actually attended. This argument does not succeed because it is clear that the District never agreed upon a

five-period school day for Student, and neither the May 2008 IEP nor the November 2006 IEP, which was the last agreed-upon IEP from Spreckels, provided for a shortened school day.

74. Moreover, the school counselor's enrollment of Student in only five class periods at Mother's request did not constitute agreement by the District to the shortened school day. Credible testimony from both Ms. Morley and Ms. Pena at hearing established that they agreed to enroll Student in only five classes, without an English class, solely due to Mother's representation that Ms. Jones-Powers had approved that arrangement. Ms. Morley and Ms. Pena both testified credibly that all ninth grade students in the District take an English class. Mother's recollection that she told Ms. Pena and Ms. Morley only that Parents had informed Ms. Jones-Powers that they intended to enroll Student in Lindamood Bell instead of English was not credible in light of other evidence, including testimony from Ms. Morley and Ms. Pena. Ms. Morley established that, had Mother stated only that she informed Ms. Jones-Powers of Parents' request to enroll Student in Lindamood Bell instead of English, Ms. Morley and Ms. Pena would not have agreed to enroll Student in a five-period schedule without an English class. Thus, the District never agreed to enroll Student in a shortened school day without an English class, and the five-period day did not constitute an "agreement otherwise" for purposes of stay put. Parents' arrangement for Student's shortened school day was akin to a unilateral placement by Parents. Absent an agreement between the parties, a parent's unilateral placement does not constitute an agreed-upon placement for purposes of stay put.

75. The District's offer for Student's placement is contained in the May 2008 IEP. Had Parents not agreed to any portion of the May 2008 IEP, Student's stay put placement would have been pursuant to his last agreed-upon IEP, which was his Spreckels IEP from November 2006. That IEP provided for placement at Chartwell, a

certified NPS that serves pupils only through the eighth grade. Because that placement was no longer available to Student as a ninth-grader, any stay put placement pursuant to that IEP could not be the exact placement, but rather would be replicated as closely as possible taking into account the changed circumstances.¹⁰

76. Because Parents agreed to a portion of the May 2008 IEP, that portion was implemented. The remainder of Student's current educational placement for purposes of stay put would be the remaining portions of his November 2006 IEP. Student's last agreed-upon placement at Chartwell, pursuant to his November 2006 IEP, included attendance for a full school day and attendance at a special education English class.¹¹ Therefore, pursuant to the November 2006 IEP, Student's stay put placement was a full school day that included a special education English class, in addition to the portions of the May 2008 IEP that Parents agreed upon.

77. For all of the above reasons, the District's efforts to require Student to attend a full school day were not a violation of his right to stay put, because the shortened school day was not his stay put placement.

¹⁰ Determination of the stay put placement under the November 2006 IEP would be in light of changed circumstances, because there is no certified NPS in Monterey County serving high school students. Other than the dispute regarding the English class and the length of school day, the specifics of what that placement would entail were not at issue in this hearing.

¹¹ OAH's Order Denying Stay Put, issued on December 1, 2008, already determined that Lindamood Bell was not part of Student's stay put placement. Lindamood Bell is not comparable to Chartwell for several reasons, including that it is not a certified NPS or NPA, and its instructors do not necessarily have teaching credentials or college degrees.

78. Stay put is a right held by parents and students, and no court has construed stay put to be a remedy available to school districts. Thus, under most circumstances, OAH would not grant a school district's motion to compel a student to attend his stay put placement. However, a school district is not prohibited from requiring a pupil to attend a class schedule that is consistent with his stay put placement. Moreover, in the present case, Student's attendance for less than a full school day appears to violate compulsory attendance requirements. Student was not attending a full-time private school, his attendance at Lindamood Bell did not meet the school attendance exemption for instruction from a private tutor, and his IEP did not specify that he cannot function for the period of time of a regular school day. As a result, Student was not exempt from the Education Code's requirement that he attend school for a full day. Given those circumstances, the District's efforts to require Student to attend Salinas High School for a full school day, including sending truancy notices, do not constitute a procedural violation.

79. Student argues that the District was aware of his anxiety related to changes in routine. However, those facts concern Student's unique educational needs, which relate to the legal standard for the District's substantive offer of FAPE. Stay put is a procedural protection that applies automatically.¹² There is no legal provision applying

¹² Technically, application of stay put occurs automatically only upon filing of a due process hearing. However, other provisions of special education law require maintaining a transfer student in a placement that approximates as closely as possible his or her last IEP, even if there has not yet been a due process complaint filed. (See, e.g., Ed. Code, § 56325, subd. (a); *Ms. S. ex rel. G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1133-35.)

a substantive FAPE requirement to the procedural application of stay put, nor has Student argued that any such requirement exists.

80. An LEA is required to provide written notice to the parents of the child whenever the LEA proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child.

81. In the present case, the District's efforts to require Student to attend a full school day were not a proposal to initiate or change, or refusal to initiate or change, his educational placement or provision of FAPE. The District provided prior written notice of a proposed change of placement when it proposed the Salinas High School placement in the May 2008 IEP. Thereafter, once Parents agreed to a portion of that IEP, the District attempted to require Student to attend school for a full day pursuant to the remaining portions of his previous IEP from Spreckels. Stay put operates automatically; it is not a change in placement. Therefore, the District's attempts to require Student to attend a schedule consistent with his stay put placement did not constitute a proposal to change his placement, and thus did not trigger the District's obligation to provide prior written notice.

82. Finally, Student argues that, at the May 29 IEP meeting, Ms. Jones-Powers promised not to change his placement, yet then later violated that promise when the District sought to require him to attend a six-period schedule. As determined above, the application of stay put is automatic and was not a change in Student's placement. Moreover, the IEP transcript reflects that the statement of Ms. Jones-Powers was not a promise regarding implementation of the entire IEP. Instead, the statement was only a suggestion regarding implementation of an added provision that Parents, Student's teacher, and case carrier would meet after the first two weeks of the school year to monitor how Student was doing at his new school. In addition, that added provision was

not one that Parents accepted in their partial acceptance of the IEP. Thus, Ms. Jones-Powers' statement at the IEP meeting cannot be interpreted as any sort of promise or "agreement otherwise" regarding implementation of Student's stay put placement.

83. Thus, the District's efforts to maintain Student in a placement that approximated the remaining portions of his last agreed-upon Spreckels IEP, in addition to the portions of the District's May 2008 IEP accepted by Parents, did not violate Student's right to stay put. Moreover, because implementation of stay put is not a change in placement, the District did not violate its obligation to send prior written notice. Accordingly, no procedural violation occurred related to stay put or prior written notice.

EXPERT'S OBSERVATION OF PROPOSED PLACEMENT

84. Student argues that the District's refusal to permit Parents' expert, Dr. Wolk, to observe the proposed placement on January 15, 2009, violated Parents' right to participate in the IEP process. The District argues that no procedural violation occurred because Parents are not entitled to have their expert observe on any one particular day, and the District ultimately agreed to allow Dr. Wolk to observe on January 15. Furthermore, the District argues that, even if a procedural violation occurred, it did not deny Student a FAPE because Dr. Wolk was able to observe the proposed placement prior to giving her testimony at the due process hearing.

85. Parents' right to participate in the IEP process includes the right to have the parents' independent expert observe the proposed placement. If a public education agency observed the pupil in conducting its assessment, an equivalent opportunity shall apply to observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

86. In a letter dated December 19, 2008, Mr. Tollner requested that the District allow Parents to observe the proposed English SDC with "a specialist who can help them determine if it might work for [Student]." In a letter dated December 22, 2008, Mr. Osher replied that Parents and their specialist were welcome to visit, and the District would be in contact after the school's winter break to schedule the visit.

87. On or about January 5, 2009, Parents notified the District that January 15 was the only date their expert, Dr. Wolk, was available to visit. In a letter dated January 7, 2009, Mr. Osher wrote to Mr. Tollner that the District "is unable to accommodate Dr. Wolk" on January 15, and suggested scheduling for January 12 or 13 instead. In a response letter dated January 7, Mr. Tollner objected to this and requested again that the District allow Dr. Wolk to visit on January 15. In a reply letter also dated January 7, Mr. Osher wrote that "although the District is willing to permit Dr. Wolk to observe the class, it is not obligated to agree to a specific date on short notice." Mr. Osher again suggested January 12 or 13 as alternative dates for the observation. In the same letter, Mr. Osher wrote that the District would agree to continue the consolidated due process hearing in this matter to the week of March 2, 2009.

88. Testimony from Ms. Jones-Powers established that the District did not have any staff available to accompany Dr. Wolk on January 15, 2009, because it was a "prep day" for final exams and the school administrators were at a conference. After learning of Parents' objections to the District being unable to schedule the observation for January 15, Ms. Jones-Powers arranged for a school psychologist from a different school site to come to Salinas High School on January 15 to accompany Dr. Wolk. Ms. Jones-Powers left voicemail messages for Dr. Wolk to schedule the January 15 visit. Upon receiving Ms. Jones-Powers's messages, Dr. Wolk telephoned Mother and asked her to handle the matter. Ms. Jones-Powers did not receive any response from Dr. Wolk or Mother.

89. On January 15, Salinas High School staff were expecting Dr. Wolk to visit for the observation. Ms. Morley left voicemail message for Mother that morning, asking where Dr. Wolk was. Thereafter, the parties' rescheduled Dr. Wolk's observation for February 19, 2009. On that date, Dr. Wolk conducted her observation at Salinas High School.

90. Student argues that the District's refusal to permit Dr. Wolk to observe on January 15 violated Parents' right to participate in the IEP process because January 15 was the only date that Dr. Wolk had available before the hearing date scheduled at that time. This argument does not succeed. The District was required to allow Dr. Wolk to observe the proposed placement subject to reasonable availability. The District's refusal to schedule the observation on a single particular date, while simultaneously proposing timely alternative dates, did not violate Parents' right to have their expert observe.

91. In addition, Student's theory that the District attempted this delay to prevent Dr. Wolk from observing prior to the scheduled hearing is not persuasive, because the District had agreed to postpone the hearing until March 2009. In any event, the District subsequently attempted to accommodate Dr. Wolk's preferred observation date of January 15. Moreover, the District scheduled Dr. Wolk's February observation, and Dr. Wolk was able to complete her observation on February 19, 2009.

92. For all of these reasons, the scheduling of Dr. Wolk's observation did not violate Parents' right to have their independent expert observe the proposed placement. Hence, no procedural violation occurred, and accordingly the District did not significantly impede Parents' opportunity to participate in the IEP decision-making process. As a result, the District did not procedurally deny Student a FAPE on that basis.

LEGAL CONCLUSIONS

1. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

2. In an administrative hearing, the party petitioning for relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Here, the Student has the burden of proof on his issues, and the District has the burden of proof on its issue.

3. A child with a disability has the right to a FAPE under the IDEA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) In California, the term designated instruction and services (DIS) means related services. (Ed. Code, § 56363, subd. (a).)

AT THE MAY 20 AND 29, 2008 IEP MEETINGS, DID THE DISTRICT DENY STUDENT A FAPE BY DENYING PARENTS A MEANINGFUL OPPORTUNITY TO PARTICIPATE AND BY FAILING TO CONSIDER A CONTINUUM OF OPTIONS?

4. There are two parts to the legal analysis in claims brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].)

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it 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 child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f);

see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

6. 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(b)(3)(2006); Ed. Code, § 56341.5.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).)

7. School officials are permitted to engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting. (34 C.F.R. § 300.501(b)(1) & (b)(3)(2006); *T.P. and S.P. on behalf of S.P. v. Mamaroneck Union Free School District* (3d Cir. 2009) 554 F.3d 247, 253.) School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (Appen. A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed.Reg. 12478 (Mar. 12, 1999); see *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, n. 10.)

8. In *W.G. v. Target Range Unif. Sch. Dist.*, *supra*, 960 F.2d at p.1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Predetermination occurs "when an educational agency has made its determination prior

to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification." (citing *W.G. v. Target Range Unif. Sch. Dist., supra*, 960 F.2d at p.1484)].)

9. LEAs must ensure that a continuum of alternative placements is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a) (2006).) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); see also Ed. Code, §§ 56360, 56361.) These regulations require only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. Moreover, there is no requirement that the IEP team members discuss all options, so long as alternative options are available. (See *L.S. v. Newark Unified School District*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

10. Based on Factual Findings 4 to 5 and 20 to 29 and Legal Conclusions 4 to 9, Parents participated in the development of the IEP, and the District did not predetermine the IEP. The District members of the IEP team considered the input of Parents, their attorney, their independent assessor, and Chartwell staff, and made changes to the draft IEP based on that input. Like the school district in *L.S. v. Newark Unified School District, supra*, the District was willing to discuss other placement options and later made efforts to schedule another IEP meeting for that purpose. (*L.S. v. Newark Unified School District, supra*, at p. 7.) Therefore, the evidence established that the

District did not deny Student a FAPE by denying Parents a meaningful participation in the IEP process or failing to consider a continuum of options.

AT THE MAY 20 AND 29, 2008 IEP MEETINGS, DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER AN MSL PROGRAM TO DEVELOP HIS READING PROFICIENCY AND INSTEAD OFFERING A NON-CATEGORICAL ENGLISH SDC THAT DID NOT MEET HIS UNIQUE NEEDS?

11. An important aspect of the parents' right to participate in the IEP process is the LEA's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal, written offer creates a clear record that helps eliminate troublesome factual disputes years later, and alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at p. 1526).)

12. The second part of the legal analysis for IDEA claims requires analysis of whether the LEA's proposed program was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) In addition, the educational program must be in the LRE.¹³ (See *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207; 20

¹³ Whether the District's proposed placement was in the LRE was not specifically at issue in the present case.

U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).)

13. The IDEA does not require school districts to provide special education pupils with the best education available or to provide instruction or services that maximize a pupil's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child and provides 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. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley's* "some educational benefit" standard as "meaningful educational benefit." (*N.B v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) It has also referred to the standard simply as "educational benefit" (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645.)

14. To determine whether the District offered Student 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.) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, 458 U.S. at p. 208.) As the First Circuit Court of Appeal noted, the legal standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 (citing *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 993).)

15. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. (Ed. Code, § 56341.1.)

16. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon, supra*, 195 F.3d at p. 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

17. In some instances, it is reasonable to discount the weight of expert testimony because of an expert's lack of personal observation. (See *M.P. v. Santa Monica-Malibu Unified School Dist.*, (C.D.Cal. July 16, 2008, No. CV 07-03393 DDP) 2008 WL 2783194.) In the case of *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 944-45, the Ninth Circuit held that, due to a factual dispute about whether the pupil could maintain satisfactory relationships with teachers, it was appropriate to defer to the teachers who had actually witnessed the interactions at issue, rather than to an expert who was extrapolating from his clinical interviews without any on-site investigation. In contrast, in a case where the pupil's needs were well-documented and the underlying facts were not contested, an expert's lack of on-site investigation was not significant. (*M.P., supra* at p. 11.) As the court in *M.P.* explained:

In other words, school personnel provided substantial descriptive evidence about M.P.'s behavior in the classroom. These facts are undisputed. Now, we must move past the question of "what happened" to "why did it happen." At such a point, clinical expert testimony is entirely appropriate.

(*Id.* at p. 11.)

18. Based on Factual Findings 30 to 37 and Legal Conclusion 11, the District's placement offer for reading and English/language arts included both an English SDC and the Read 180 class. Based on Factual Findings 37 to 53 and Legal Conclusions 12 to 17, the combination of the English SDC and Read 180 class constituted an appropriate offer that was designed to meet Student's needs related to reading and language arts for the 2008-2009 school year. Because the District offered an appropriate program, this decision need not determine whether Parents' preferred methodology of an MSL program such as Lindamood Bell would also appropriate for Student.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE SPEECH-LANGUAGE THERAPY FOR 25 MINUTES PER SESSION TWICE A WEEK, AND OT CONSULTATION, PURSUANT TO HIS IEP FOLLOWING PARENTS' CONSENT TO THOSE SERVICES ON SEPTEMBER 12, 2008?

19. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the pupil's IEP. "A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 481 F.3d 770, 773.)

20. Based on Factual Findings 5, 6, 12, and 54 to 57, and Legal Conclusions 12 and 19, the District provided Student's OT consultation in conformity with the IEP. Therefore, no denial of FAPE occurred on this basis.

21. Based on Factual Findings 5, 6, 12, 54, and 58 to 63, and Legal Conclusions 12 and 19, for the period from September 16, 2008 to March 5, 2009, the District failed to provide 450 minutes of speech-language therapy pursuant to the IEP. To that extent, the District denied Student a FAPE.

22. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is appropriate in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See, e.g. *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Id.* at p. 1497.) An award of compensatory education does not require the automatic provision of day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (citing *Student W. v. Puyallup Sch. Dist.*, *supra*, 31 F.3d at 1496).)

23. Based on Factual Findings 5, 6, 12, 54, and 58 to 63 and Legal Conclusions 12, 19, and 22, the District shall provide compensatory education to Student in the form of 450 minutes of speech-language services, in addition to the ongoing speech-language services provided pursuant to his IEP.

BEGINNING ON OCTOBER 23, 2008, DID THE DISTRICT DENY STUDENT A FAPE BY UNILATERALLY ALTERING HIS CLASS SCHEDULE WITHOUT PRIOR WRITTEN NOTICE, REFUSING TO REINSTITUTE HIS PRIOR SCHEDULE, AND THREATENING TRUANCY CHARGES?

24. Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) This is commonly referred to as stay put. The placement identified in the last agreed upon

and implemented IEP is generally the then-current educational placement for purposes of stay put. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) Absent written agreement between the parties, a parent's unilateral placement does not constitute an agreed-upon placement for purposes of stay put. (See, e.g., *Student v. San Mateo-Foster City Unified School Dist.*, OAH Case No. 2008090320.)

25. Stay put operates automatically upon the filing of a request for a due process hearing. (See *Casey K. v. St. Anne Community High School District No. 302* (7th Cir. 1998) 400 F.3d 508, 511.) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904, 906.)

26. In *Ms. S. ex rel. G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1133-35, the Ninth Circuit Court of Appeals addressed the question of the new district's obligation to provide stay put when a student transfers from another school district and his or her parent files a due process complaint challenging the services offered by the new school district. The *Vashon* opinion ruled that when a dispute arises under the IDEA involving a transfer student, "if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible." (*Id.* at 1134.)

27. Interpreting the Ninth Circuit's decision in *Vashon Island, supra*, a federal district court in California explained that stay put "entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances." (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

28. Following issuance of the *Vashon* decision, a law went into effect regarding stay put for pupils with an IEP who transfer to a new school district within the

same state within the same academic year. The law now specifies that, under those circumstances, the LEA shall provide a FAPE “including services comparable to those described in the previously held IEP.” (Ed. Code § 56325, subd. (a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e)(2006).) In the present case, because Student transferred to the District between academic years, instead of within the same academic year, it is not clear whether that law is technically applicable here. However, the “services comparable” standard is very similar to the applicable standard under *Vashon Island, supra*, and any distinction between the two standards makes no difference in the present case.

29. California law provides that a special education program cannot be implemented until the student’s parent consents in writing to all or part of the IEP. (Ed. Code, § 56346, subd. (a).) If the parent does not consent to all the components of the IEP, then those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the pupil. (Ed. Code, § 56346, subd. (e).) In those circumstances, if there was a prior IEP in effect, the remaining goals, placement and services would stay the same as they were in the student’s prior IEP. (See, e.g., *Student v. Murrieta Valley Unified School Dist.*, OAH Case No. 2008120309.)

30. California’s compulsory education requirements provide in part that each person subject to compulsory full-time education “shall attend the public full-time day school...for the full time designated as the length of the schoolday by the governing board of the school district...” (Ed. Code, § 48200.) Children who are being instructed in a private full-time day school by persons capable of teaching shall be exempted. (Ed. Code, § 48222.) Children not attending a private, full-time day school and who are being instructed in study and recitation for at least three hours a day for 175 days each

calendar year by a private tutor shall be exempted, but the tutor or other person must hold a valid state credential for the grade taught. (Ed. Code, § 48224.)

31. Section 3053 of title 5 of the California Code of Regulations provides in pertinent part:

(b) The following standards for special classes shall be met: [¶ ... ¶]

(2) Pupils in a special class shall be provided with an educational program in accordance with their individualized education programs for at least the same length of time as the regular school day for that chronological peer group:

[¶ ... ¶]

(B) When the individualized education program team determines that an individual cannot function for the period of time of a regular school day, and when it is so specified in the individualized education program, an individual may be permitted to attend a special class for less time than the regular school day for that chronological peer group.

32. Neither federal nor state law indicates that a public education agency may invoke the stay put provision. No court has construed stay put to be a remedy available to school districts. In *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 373 [105 S.Ct. 1996] the Court expressed doubt that the stay put provision “would authorize a court to order parents to leave their child in a particular placement.” The Court held that parental violation of the stay put provision does not operate to preclude reimbursement for a unilateral placement by the parents if the school district’s proffered placement is ultimately found to be inappropriate. (*Id.* at 370, 372.)

33. A school district is required to provide written notice to the parents of the child whenever the LEA proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §1415(b)(3); 34 C.F.R. § 300.503(a) (2006).)

34. Based on Factual Findings 3 to 17 and 64 to 83, and Legal Conclusions 4 to 5 and 24 to 33, the five-period school day that Student had been attending was not his last agreed-upon and implemented placement for purposes of stay put. The District never agreed upon a five-period school day for Student, and neither the May 2008 IEP nor the November 2006 IEP, which was Student's last agreed-upon IEP from Spreckels, provided for a shortened school day. Parents' arrangement for Student's shortened school day was akin to a unilateral placement by Parents. Pursuant to the November 2006 IEP, Student's stay put placement was a full school day that included a special education English class, in addition to the portions of the May 2008 IEP that Parents agreed upon. Thus, the District's efforts to require Student to attend a full school day were not a violation of his right to stay put, because the shortened school day was not his stay put placement. The District's efforts to require Student to attend a full school day were not a proposal to initiate or change, or refusal to initiate or change, his educational placement or provision of FAPE, and thus did not trigger the District's obligation to provide prior written notice. There was therefore no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BY SIGNIFICANTLY IMPEDING PARENT PARTICIPATION IN THE DECISION-MAKING PROCESS WHEN IT FAILED TO ALLOW DR. WOLK TO OBSERVE THE PROPOSED SDC CLASS ON JANUARY 15, 2009?

35. Parents' right to participate in the IEP process includes the right to have the parents' independent expert observe the proposed placement. (*Benjamin G. v. Special Education Hearing Office*, (2005) 131 Cal.App.4th 875, 881 [32 Cal.Rptr.3d 366]; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900.) Education Code section 56329, subdivision (c), specifies that "If a public education agency observed the pupil in conducting its assessment... an equivalent opportunity shall apply to...observation of an educational placement and setting, if any, proposed by the public

education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.”

36. Based on Factual Findings 84 to 92, Legal Conclusions 4 to 6, and Legal Conclusion 35, the difficulties regarding scheduling Dr. Wolk’s observation for January 15, 2009 did not violate Parents’ right to have Dr. Wolk observe the proposed placement. Because no procedural violation occurred, the scheduling of Dr. Wolk’s observation did not significantly impede Parent’s participation in the IEP decision-making process, and therefore did not constitute a denial of FAPE.

IN THE MAY 2008 IEP, DID THE DISTRICT OFFER STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR?

37. Based on Factual Findings 4 to 53 and Legal Conclusions 4 to 18, the District offered Student a FAPE for the 2008-2009 school year.

ORDER

1. The District shall provide Student with 450 minutes of speech-language services from an SLP as compensatory education. The District shall complete its delivery of these compensatory services to Student no later than one year from the date of this order.

2. The District’s May 2008 IEP constituted an offer of FAPE for the 2008-2009 school year.

3. All other claims for relief are 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. The following findings are made in accordance with this statute: Student prevailed in part on Issue 3. The District prevailed on all other issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 11, 2009

/s/
SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings