

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

In the Matter of:	
STUDENT,	OAH CASE NO. N2006010306
Petitioner,	
v.	
PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT,	
Respondent;	
PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT,	OAH CASE NO. N2006020527
Petitioner,	
v.	
STUDENT,	
Respondent	

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter from June 19 to 23 and June 26 to 28, 2006, in Placentia, California.

Attorneys David Larsen and Karen Van Dijk represented Placentia-Yorba Linda Unified School District (District). Trisha Brady, coordinator of special education for District, was present during the hearing.

Attorneys Timothy Adams and Brent Caldwell represented Student. Student's mother was present during the hearing. Student's father was present on June 19, 2006.

Student filed his request for a due process hearing on January 10, 2006, and the District filed its request on February 16, 2006. The matters were consolidated for hearing on March 3, 2006.

Oral and documentary evidence were received during the hearing and that portion of the hearing was closed on June 28, 2006. The record remained open for the submission of written closing arguments by July 21, 2006. Thereafter, the record was closed and the matter was submitted for decision.

STUDENT ISSUES

1. During the 2004-2005 school year and extended school year (ESY), did the district deny Student a free appropriate public education (FAPE) by:

(A) failing to consider the results of parent initiated assessments from Catherine Bowman dated April 30, 2004, and Dr. Chris Davidson, dated April 17, 2004, and April 16 and September 29, 2005;

(B) failing to revise Student's 2004-2005 IEP, through IEP meetings held on March 22 and 29, 2004; April 26, 2004; May 3 and 10, 2004; June 6, 2004; and September 13, 2004; to address lack of expected progress in general curriculum after Student's parents provided information to the District from Lindamood Bell (LMB) which included issues with: oral and written comprehension; receptive and expressive oral vocabulary; oral language and written comprehension and expression; language based critical thinking and problem solving skills; word attack (ability to decode nonsense words); word recognition ability; spelling; reading rate and accuracy; phonemic awareness; concept and symbol imagery; and sensory cognitive processing skills;

(C) failing to implement agreed upon portions of Student's March 2004-2005 IEP, signed on September 13, 2004, including failure to provide LMB software disk; failure to implement adaptive physical education (APE) in summer 2005; failure to implement social skills program and to provide supervision of the social skills program in September 2005;

(D) failing to provide LMB instruction to Student to meet his annual goals?

2. Are parents entitled to receive educational reimbursement for out of pocket expenses associated with placing Student in the LMB program and is Student entitled to prospective placement at LMB because of the District's failure to provide appropriate placement during the 2004-2005 school year and ESY such that Student could make progress towards annual goals and in the general curriculum?

3. During the 2005-2006 school year, did the District deny Student a FAPE in the least restrictive environment (LRE) by offering Student a placement in a special day class (SDC) and not full inclusion and failing to offer the LMB program?

DISTRICT ISSUE

4. Did the District offer Student a FAPE for the 2005-2006 school year in the LRE based upon available information when it made the following offer during a series of IEP meetings held on March 14, April 19 and 25, June 1 and 8, 2005: placement at Fairmont Elementary in an SDC/general education full inclusion blended program; designated instructional services with tri-weekly speech and language (SL), weekly APE, weekly occupational therapy (OT), 12 hours per week after school social skills instruction and program supervision; team meetings, transportation and shadow aide?

FACTUAL FINDINGS

1. Student is eleven years old and attends Fairmont Elementary School (Fairmont) located within the District. Student is eligible for special education services

under the category of autism. Student has delays in the area of expressive and receptive language, social pragmatics, fine and gross motor skills, task initiation and completion, adaptive behaviors, and social skills. During the 2005-2006 school year, Student completed the fourth grade in a general education (GE) classroom with support services from special education (SE). Student will be attending the fifth grade for the 2006-2007 school year. Student also attended extended school year (ESY) in 2005 and 2006.

2. The Individualized Education Plan (IEP) meetings held for both the 2004-2005 and 2005-2006 school years were attended by a wide array of experts with knowledge of Student and his individual needs. Most of the District personnel working with Student have known Student since he began receiving services through the District at age three and were very familiar with his unique needs, strengths and weaknesses. The IEP discussions were comprehensive, detailed, and designed to address the unique needs of Student. The IEP meetings had full participation of the parents and their experts.

3. During the 2004-2005 and 2005-2006 school years, Student attended school at Fairmont on Monday through Friday, from 7:50 a.m. until 2:10 p.m., and attended a social skills program at Fairmont on Tuesday through Friday, from 2:10 p.m. until 5:10 p.m. In addition, Student received one hour per week of private writing tutor at home, respite care at home for four hours per week on the weekend, totaling 16 hours per month, and one hour per week of social skills training at home. There were very few children in the District with this same level of designated instructional services (DIS).

4. Student's annual IEP meeting for the 2004-2005 school year was held on March 22, 2004, but an agreement was not reached. The District has a policy of allotting only two hours per IEP meeting. Additional IEP meetings were held as part of the annual IEP meeting on March 29, 2004; April 26, 2004; May 3 and 10, 2004; June 7, 2004; and September 13, 2004. On September 13, 2004, Student's mother agreed to the IEP with the exception of the social skills group program and program supervision. She approved goals

in communication, social-emotional, reading comprehension, writing, oral and written comprehension, math, attention, OT, psycho-motor, SL, and APE.

BOWMAN'S APRIL 30, 2004 LETTER

5. At the May 3, 2004 IEP meeting, the IEP Team was presented with a letter dated April 30, 2004, from Katherine Bowman, Student's private speech and language pathologist (SLP). The team agreed to review and discuss the letter at the May 10, 2004 IEP meeting.

6. At the May 10, 2004 IEP meeting, the IEP team discussed the April 30, 2004, letter from Ms. Bowman, which listed non-medical alternatives for focus, attention and processing, such as the Tomatis Method and the Interactive Metronome, offered by her business. The letter from Ms. Bowman was not an assessment since there was no standardized testing of Student, no specific information related to Student's progress in his SL therapy with her, and no recommendations for services. The letter was a recitation of possible attention strategies that Ms. Bowman could provide to Student through her private business. The IEP team agreed to further consider Ms. Bowman strategy recommendations after an attention evaluation.

7. As stated in Legal Conclusion 10, the District is required to consider privately initiated assessments provided by the parents. Here, the District properly considered the April 30, 2004 letter from Ms. Bowman at an IEP meeting even though it was not an assessment.

EVALUATIONS BY DR. DAVIDSON

8. Student's parents hired Dr. Christine Davidson, a private licensed educational psychologist, to conduct a comprehensive evaluation of Student's intellectual, academic and social functioning levels. Dr. Davidson has extensive experience as an educational

psychologist and has evaluated students with a wide array of disabilities. Dr. Davidson evaluated Student in April 2004, April 2005, and September 2005.

DR. DAVIDSON'S APRIL 17, 2004 EVALUATION

9. Dr. Davidson's first evaluation report (April 17, 2004) reflects testing conducted on April 4 and 17, 2004, and an in-school observation on June 2, 2004.

10. At the April 26, 2004 IEP meeting, Student's mother notified the District that she had an assessment conducted by a private psychologist but did not have a copy of the report to provide. At the May 10, 2004 IEP meeting, the IEP Team discussed Dr. Davidson's concerns regarding attention issues and "proposed an assessment plan to evaluate in this area." Student's mother never received a copy of an assessment plan for attention issues. Student's mother sent a letter to the District dated May 11, 2004, requesting an IEP meeting to discuss Dr. Davidson's evaluation of Student even though a copy of the report still had not been provided to the District. At the June 7, 2004 IEP meeting, the IEP Team agreed to meet on September 13, 2004, to further discuss Student's IEP for 2004-2005. Dr. Davidson had not yet provided a copy of her report to the District, and Student did not establish the date that the report was provided to the District.

11. At the September 13, 2004 IEP meeting, Dr. Davidson discussed her April 17, 2004 evaluation and stated that Student has higher nonverbal than verbal IQ scores which was consistent with testing by the District. District OT goals and strategies were consistent with those of Dr. Davidson's report. Dr. Davidson administered the Conners' Rating Scale Revised Long Form and the Burks' Behavior Rating Scales to Student regarding Attention Deficit Disorder (ADD) and found that there was a difference between what the parents observed at home and how Student preformed in school; Dr. Davidson related that Student had difficulty paying close attention and finishing what he started. A number of goals recommended by Dr. Davidson were incorporated into Student's IEP, but discussion

of the recommended social skills goals was postponed due to the absence of an IEP member.

12. On October 13, 2004, the IEP team, including Dr. Davidson, discussed the need for further information through the Vineland Adaptive Behavior Scales, which provides standard scores of a pupil's functioning in the areas of communication and daily living skills, but the team agreed that further assessments were not needed.

13. Dr. Davidson's April 17, 2004 evaluation reflected extensive testing, but did not present information that was unknown or different than what was included in Student's IEP. Dr. Davidson's analysis appeared to favor LMB and was structured in such a way to encourage the District to find that Student could only make progress in reading comprehension with LMB. The District's program, however, was reflective of Student's differing and unique needs and provided a collaborative approach that inter-connected all areas of deficit in a comprehensive program. The District staff was highly trained and knowledgeable in a variety of reading strategies that helped Student make progress academically and socially under the District's recommendations and level of services.

14. As stated in Legal Conclusion 10, the District is required to consider private assessments provided by the parents. The District did consider Dr. Davidson's April 17, 2004 evaluation.

DR. DAVIDSON'S APRIL 16, 2005 EVALUATION

15. Dr. Davidson's second evaluation report (April 16, 2005) reflects an evaluation of Student conducted on April 16, 2005, but no in-school observation. The report itself is not dated. The report was provided to Student's IEP team at the April 19, 2005 IEP meeting, but discussion was postponed to the next IEP meeting so that the IEP team could review the report.

16. On April 25, 2005, the IEP Team considered Dr. Davidson's April 16, 2005 report. The IEP notes reflect extensive discussion about the report and the recommendations contained therein.

DR. DAVIDSON'S SEPTEMBER 29, 2005 EVALUATION

17. Dr. Davidson's third evaluation report (September 29, 2005) reflects testing of Student conducted on September 3, 2005, with an in-school observation of Student on September 29, 2005. The report itself is not dated. The District received a copy of this report on November 22, 2005.

18. The District attempted to review Dr. Davidson's report at the November 28, 2005 IEP meeting, and included review of the report as an agenda item, but the parents did not want to review the report at the IEP meeting. Student's parents sent a letter to the District dated November 29, 2005, expressing their concern that the November 28 IEP meeting was only to review Student's progress but that the District had added discussion of Dr. Davidson's report to the agenda. Dr. Davidson's report was not discussed at the November 28 IEP meeting. Student's parents did not request an additional IEP meeting to discuss the report.

19. As stated in Legal Conclusion 10, the District is required to consider privately initiated assessments provided by the parents. The District attempted to review Dr. Davidson's report at the November 28, 2005 IEP meeting and listed it as a discussion item on the agenda for that meeting, but the parents refused to discuss the report. The parents did not request another IEP meeting or suggest a date when the report could be discussed. Therefore, the ALJ finds that the District fulfilled its obligation to discuss the September 29, 2005 report.

LACK OF EXPECTED PROGRESS, LMB REPORT AUGUST 30, 2004

20. At the September 13, 2004 IEP meeting, Dr. Davidson presented a report from LMB that reflected testing results of Student at LMB on August 30, 2004. Discussion of the report was postponed until the IEP Team evaluated the report.

21. At the October 13, 2004 IEP meeting, the IEP Team discussed the August 30, 2004 LMB evaluation which recommended Student receive 300 hours in the LMB program. The District members of the IEP team expressed concern that Student's language levels were too low to benefit from LMB services, which the District considered too abstract for Student. Student was making progress towards his IEP goals, which were appropriate given his present levels of performance. The IEP Team was also concerned with "splintering" Student with too many strategies, which would confuse Student and be detrimental to his progress. The District members of Student's IEP team felt that adding the resource specialist program (RSP), which incorporated LMB strategies, would support Student's reading comprehension goals. Dr. Hooper agreed to incorporate Visualizing and Verbalizing (VV) concepts into Student's SL program and modify the strategy to Student's level. The IEP Team indicated that VV was not uniquely a LMB strategy but was just a "good teaching" strategy. The District also agreed to provide Student's mother specialized VV software to support reading comprehension instruction at home. An addendum to Student's 2004-2005 IEP was signed, adding RSP for 45 minutes per day, four days per week.¹

¹ RSP was provided by Karen McCoy and Jeanne Wisniowski during the 2004-2005 school year pursuant to the October 13, 2004 addendum to Student's IEP. During the 2005-2006 school year, Ms. Wisniowski taught Student for three days per week, but on the fourth day, Student's APE interfered with her schedule. Ms. Wisniowski assumed that Student received one session of RSP from Ms. McCoy, but Ms. McCoy testified that she did not

22. The August 30, 2004 LMB report recited testing that reflected deficits in oral and written comprehension; receptive and expressive oral vocabulary; oral language and written comprehension and expression; language based critical thinking and problem solving skills; word attack (ability to decode nonsense words); word recognition ability; spelling; reading rate and accuracy; phonemic awareness; concept and symbol imagery; and sensory cognitive processing skills. These deficits were known by the District and specific goals were included in the IEP to assist Student in making educational progress in those areas. There was no persuasive testimony that the LMB testing identified any areas of deficit unknown to the District or demonstrated that Student required LMB to make academic progress towards the goals and objectives outlined in his IEP.

23. The District properly considered the August 30, 2004 LMB evaluation. The District's IEP goals and services were designed to address Student's unique needs and provide educational benefit to him without LMB. Furthermore, the LMB report did not demonstrate that Student would not make academic progress in his general curriculum.

IMPLEMENTATION OF THE VISUALIZING AND VERBALIZING SOFTWARE

24. At the October 13, 2004 IEP meeting, the District agreed to provide Student's mother specialized VV software to support reading comprehension instruction at home.

teach Student during the 2005-2006 school year. There was no additional evidence or testimony offered by the District regarding Student's 2005-2006 RSP instruction. Student's attorney urges a finding of a FAPE denial based upon this testimony. However, the ALJ does not rule upon this factual information since this issue was not raised as an issue for hearing. Due process requires that the District and Student have the opportunity to fully litigate any issue before the ALJ issues a ruling. Student may choose to bring the issue to the attention of California Department of Education through a compliance complaint or file a separate request for a due process hearing.

25. On December 16, 2004, the District was notified that the VV software provided to Student's mother was not compatible with the mother's computer. Efforts were made by the District to assist the mother with computer compatibility. After learning that the VV CD-ROM (CD) was not compatible, the District ordered a newer version of the CD that was not received until January 2005. On December 17, 2004, Dr. Hooper met with Student's mother to discuss VV techniques and provided materials to use at home to assist Student with reading comprehension. Student's mother attempted to use the software but found that it required Student have had prior LMB instruction. During the time that the CD was not available for the supplemental home instruction, Student received regular services under his IEP and was not denied any educational benefit. The ALJ finds that there was no procedural violation of the IDEA regarding receipt of the CD.

SOCIAL SKILLS PROGRAM, SEPTEMBER 2005

26. Student's mother testified that Student was released from his social skills training at least 20-25 minutes early on three occasions during September 2005, but she did not know the specific dates and was unsure how she learned the information. The testimony was not compelling and did not establish that the District failed to provide social skills training and supervision during September 2005.

27. During ESY 2005, Student attended LMB and received social skills training through the District. The social skills program worked on humor as a social tool. The LMB program did not offer social skills training and Student had limited interaction with other individuals participating in the LMB program during summer 2005. When the 2005-2006 school year began, Student was not speaking very much, but by the end of the year, he was much more verbal.

ADAPTIVE PHYSICAL EDUCATION, 2005 ESY

28. In September 2004, Student's mother notified the District that Student missed a total of four APE sessions in summer 2004 (totaling two hours). The District "made-up" the missed hours during the Fall 2004 even though typically those hours would not be made up. Student's mother was in regular contact with the District and was actively involved in Student's program. Student's mother also claimed that Student missed APE sessions during 2005 ESY, but there was insufficient evidence to establish that contention. The District did not have any record of missed APE during the summer 2005 and the District had no record of the mother reporting missed sessions. The names of Student's aides that the mother testified might have told her the sessions were missed did not correspond to the names of the individuals involved in Student's 2005 ESY program or APE. However, the names the mother recalled were similar to the names of the individuals who provided the 2004 ESY and APE. There was no persuasive testimony that APE was missed during 2005 ESY.

DISTRICT'S OFFER FOR 2005-2006 SCHOOL YEAR

29. At an IEP meeting held on March 14, 2005, the District made the following offer for the 2005-2006 school year to be implemented at Fairmont: RSP from March 14, 2005, to June 16, 2005, for four times per week, 45 minutes each session. From September 6, 2005, to March 14, 2006, an SDC (mild to moderate) blended program for language arts for 450 minutes per week with an SDC teacher or special education staff and GE with special education support for 1,180 minutes per week in the GE class room. From March 14, 2005, to March 14, 2006, SL by a speech therapist, with individual sessions three times per week, and group sessions one time per week, both for 30 minutes; OT by an occupational therapist, one time per week for 50 minutes, and a total of six OT consultations for the year, 30 minutes each; individual and small group instruction (shadow aide), five days per week for 6.75 hours per day by special education; social skills, individual and small group

instruction, four times per week, three hours each session; individual counseling, program supervision, nine months, six hour per month; and individual counseling, team meetings, four times per year, one hour each. From March 14, 2005, to November 14, 2005, APE, one time per week for 30 minutes by an APE teacher during GE physical education. The offer also included District provided door-to-door transportation. Additional IEP meetings were scheduled for April 19, April 25, and June 1, 2005, with an additional IEP meeting to be scheduled after Student's parents and Dr. Davidson visited the SDC.

SDC BLENDED CLASS

30. The District's proposed blended program combined teaching LA using both a SDC and RSP, and Student would receive LA instruction in either or both for the allotted time under the IEP. The students currently in the blended program all had IEPs that addressed mild to moderate disabilities. The blended program allowed the LA instruction to come directly from a teacher with the assistance of an aide, rather than have an aide instruct Student with the supervision of the teacher. Student would be in SDC/RSP for a total of 90 minutes per day, but otherwise with his typical peers in GE for all other subjects including math, social studies, physical education, and breaks. Dr. Davidson and Student's mother had observed the SDC placement but felt that there were behavior problems in the SDC classroom, that the SDC class contained students of too wide an age range and ability level, and that the curriculum would be too easy for Student.

31. The SDC proposed by the District was taught by Nirmala Nagenthiram, who was well trained and qualified to teach an SDC class. Ms. Nagenthiram used the District's Houghton-Mifflin curriculum in her SDC for reading instruction and used other strategies as necessary. She was trained in LMB and other strategies, but did not use VV because it was a one-to-one clinical strategy. Jeanne Wisniowski, the RSP teacher, has extensive knowledge and experience teaching reading to students, including students with autism. The District personnel were trained to teach reading using varying strategies, including LMB strategies

such as VV, Seeing Stars and LIPS. Other strategies used included the District reading program Houghton-Mifflin, SRA, TEACCH, Links to Language and Read Naturally. The strategies were designed to increase reading competency and assist with comprehension skills such as decoding words. The teachers used a variety of strategies to assist students make reading progress and changed strategies when necessary to maximize the educational benefit to Student.

32. On May 26, 2005, Student's parents sent a letter to the District requesting that the District fund the LMB program for 2005 ESY. The letter indicated that Student's private SL therapist recommended the program, as did Dr. Davidson. At the June 1, 2005 IEP meeting, Student's parents provided the IEP team a report from LMB reflecting pre-testing done on Student on May 25, 2005. The District's IEP Team had different opinions regarding Student's ability levels and the likelihood that he would benefit from an intensive LMB program. LMB operates independently of Student's IEP, which is not considered by LMB. The LMB report recommended 300 hours of instruction after testing in August 2004, but only 240 hours after testing in May 2005. Student had made progress during the school year even though he had not yet enrolled in LMB. The District provided prior written notice to Student on June 28, 2005, that the District would not fund LMB for the 2005 ESY. Student's parents paid for Student to enroll and attend LMB during the summer 2005.

33. LMB tested Student on August 30, 2004, and again on May 25, 2005, prior to Student's parents enrolling him in LMB. LMB testing included the Gray Oral Reading Test and the Gray Oral Reading Test-4 (GORT-4) in August 2004 and in May 2005. Student had improved significantly on both tests even though he had not received any LMB services. His scores on other tests had not changed to any appreciable degree. Post-testing by LMB in September 2005 revealed that while Student's reading scores increased significantly, Student's math scores declined significantly because LMB focused exclusively on reading comprehension. The testing reflected that Student made progress under the District's program and that LMB focused on one area to the detriment of another.

34. Michelle Garcia-Winner is a SLP who testified as a District expert in the area of social cognitive processing and has extensive knowledge of LMB. She is an expert in an emerging area that merges psychology and SLP. Ms. Garcia-Winner testified persuasively and established that LMB VV is too high a level for Student. LMB requires solid language and good observation skills to conceptualize what is being read, such as motive, mood or setting, but results in no functional change, which is adapting the learned behavior to a new area, such as interacting with peers or at play. There might be an increase in test scores, but the increase cannot translate into the real world. Ms. Garcia-Winner was critical of Dr. Davidson's reports because they were all geared towards recommending VV and LMB. Student has a developmental problem with communication, social development and play. In a social context, Student gives scripted responses but cannot shift away from the script to engage in further conversation or understand the nuance of the moment. IQ scores are not a good indicator of functioning for children with autism because they do not measure social cognition. Dr. Davidson's social goals came from an older book written by Ms. Garcia- Winner, but the goals were not appropriate for Student. Dr. Davidson's comments about Student differed from the observations of those who have observed and worked more closely with Student, and did not acknowledge that a collaborative approach usually works best with autistic children.

35. To the extent that there is a conflict in the observations and opinions of Dr. Davidson and Ms. Garcia-Winner, the ALJ finds that Ms. Garcia-Winner's testimony was more compelling and persuasive. Ms. Garcia-Winner works closely with autistic children, which provides her understanding and insight into autism that Dr. Davidson did not have. Her testimony was very credible and corroborated by other evidence and testimony received in the hearing.

SPEECH AND LANGUAGE

36. Dr. Hooper provided SL services to Student for the past four years. She is well qualified for her position and was informed about Student's unique needs in the area of SL. Dr. Hooper prepared regular updates on Student's progress for IEP meetings and wrote the SL goals and objectives for his 2005-2006 IEP. She based the goals upon standardized testing and her working with Student. The goals were designed to address Student's unique needs so that he could better access his education. Dr. Hooper included strategies requested by Dr. Davidson and Student's mother in her services to Student. Dr. Hooper did not suspect that Student had attention deficit disorder, but believed any attention issues were related to Student's autism. Student was making good progress on his SL goals under Dr. Hooper's instruction.

ACADEMIC GOALS

37. Connie Polivka is the full inclusion case manager for District assigned to Student's case. She monitors Student's program and placement, hires and trains the aides assigned to Student, and modifies Student's curriculum to meet his needs in consultation with the classroom teacher. Ms. Polivka has extensive experience working with autistic children and has known Student since he was three years old and a Student in her classroom for pre-kindergarten and kindergarten. Ms. Polivka drafted the March 2004-2005 and 2005- 2006 IEP academic goals in consultation with Student's GE teacher and aides. Student's goals covered reading fluency, reading comprehension, math computation, written expression and writing skills, math word problems, independence from aide, and social skills. The goals were written for Student's unique needs and designed to provide him educational benefit. Student made very good progress on his 2004 goals though did not achieve them all.

SHADOW AIDE

38. The aides assigned to Student were well qualified and well trained by Ms. Polivka to provide the required services to Student that helped him access his education. Student's aides were trained to incorporate VV strategies, which were not only LMB strategies, but simply "good teaching."

OCCUPATIONAL THERAPY

39. Student's OT goals and objectives were thoroughly discussed at the April 19, 2005 IEP meeting. The goals were appropriate and reasonably calculated to provide educational benefit to Student.

ADAPTIVE PHYSICAL EDUCATION

40. Student's APE goals and objectives were thoroughly discussed at the April 25, 2005 IEP meeting. The goals were appropriate and reasonably calculated to provide educational benefit to Student.

SOCIAL SKILLS

41. Student's social skills goals and objectives were thoroughly discussed at the April 25, 2005 IEP meeting. Christine Bowers-Hatch, an autism and behavior specialist and an SDC teacher for the District, supervised Student's social skills program. She worked closely with Student, and interacted daily with Student and his aide. Julie Stonich, who supervised the program during the 2004-2005 school year, consulted regularly with Ms. Bowers-Hatch and discussed and collaborated upon the social skills goals presented for the 2005-2006 school year. Input was received from Student's parents and from Dr. Davidson, and their recommendations were incorporated into the IEP goals where appropriate. The IEP team discussed that Student was making progress in the social skills program and was learning to generalize from a personal setting to a group setting. The team noted that

Student still had significant difficulty with language and perspective taking, but the goals were designed to address those deficit areas. The goals were appropriate and would assist Student to take the next logical step in his social development.

TRANSPORTATION

42. The District agreed to provide door-to-door transportation for Student from his home to Fairmont.

LEAST RESTRICTIVE ENVIRONMENT

43. As discussed in Legal Conclusions 6 and 7, a substantively appropriate IEP must be provided in the LRE, i.e., Student must be educated with his nondisabled, typically developing peers to the maximum extent appropriate. The IEP states that Student would be educated with his nondisabled peers for sixty seven percent of each day in all subjects except language arts.

44. The placement offer of an SDC blended program was the LRE because it allowed Student to be with his typical peers the majority of the day, but allowed Student the necessary intensity to address a significant area of deficit in reading comprehension.

45. The District's offer represented a comprehensive and collaborative approach to address the unique needs of Student. The services, goals and objectives were reasonably calculated to provide educational benefit to Student and were to be provided by well trained, competent individuals. The District offered Student a FAPE in the LRE for 2005-2006.

APPLICABLE LAW

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special

education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8) (IDEA 1997); 20 U.S.C. § 1402(9) (IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that DIS, California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at pp. 201.)

4. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).)

5. 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 School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Id.*)

6. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Board of Education* (5th Cir.1989) 874 F.2d

1036, 1044-45; *Sacramento City Unified School Dist. v. Rachel H.*, (9th Cir. 1994) 14 F.3d 1398.)

7. In determining the placement of a child with a disability, each public agency shall ensure that the placement decision is made in conformity with LRE provisions, that the child's placement is based on the child's IEP, and that the placement is as close as possible to the child's home. (34 C.F.R. § 300.552.) The public agency shall also ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. (34 C.F.R. § 300.552(c).)

8. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks, of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

9. The Ninth Circuit Court of Appeal 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* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

10. The District must consider privately initiated assessments conducted at parent's expense. (34 C.F.R. § 300.502; Ed. Code § 56329, subd. (c).)

11. When a district has failed to provide a FAPE, the parents may be entitled to reimbursement for the costs of private placement and services if they are proper under the IDEA and replaced services that the school district failed to provide. (*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The private services and placement do not have to be an exact replacement under the IDEA in order for the parents to receive reimbursement, as long the placement and services met the student's unique needs and provided educational benefit. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir. 1986) 79 F.2d 1153, 1161.)

12. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. [126 S.Ct. 528, 163 L.Ed 2d 387].)

LEGAL CONCLUSIONS

THE DISTRICT DID NOT DENY STUDENT A FAPE DURING THE 2004-2005 SCHOOL YEAR, AS LISTED IN ISSUE ONE.

1. As stated in factual findings 5 through 14, and legal conclusions 3 through 5 and 8 through 10, the District reviewed and considered all assessments conducted at parent's expense. The District considered and implemented those portions appropriate to provide some educational benefit to Student.

2. As stated in factual findings 20 through 23, and legal conclusions 3, 5, 8, 9, 11 and 12, the District was not required to revise Student's IEP based upon testing from LMB. Student had an extensive, collaborative IEP that involved many facets working together directly for Student's benefit. The District was not required to provide LMB as the level of services and instruction provided by the District were designed to provide educational benefit to Student. The District's program had properly incorporated and considered the deficits identified by LMB, and the IEP was designed to address those areas of Student's

need. Further, Student did not meet his burden to show that there were areas of lack of expected progress.

3. As stated in factual findings 24 through 28, and legal conclusions 3 through 5 and 12, the District properly implemented the agreed upon portions of Student's IEP. To the extent that there were minor procedural violations, if any, the error was be harmless.

PARENTS ARE NOT ENTITLED TO REIMBURSEMENT FOR OUT OF POCKET EXPENSES RELATED TO THEIR UNILATERAL IMPLEMENTATION OF THE LMB PROGRAM, AND STUDENT IS NOT ENTITLED TO PROSPECTIVE PLACEMENT IN LMB, AS LISTED IN ISSUE TWO.

4. As stated in factual findings 3, 20 through 23 and 32 through 35, and legal conclusions 3 through 5, 8, 9, 11, and 12, the District offered Student an appropriate placement during the 2004-2005 school year. Therefore, the District was not required to implement LMB for Student. Further, the ALJ is not persuaded that LMB is an appropriate program that would provide educational benefit to Student given his deficit areas. Student needs a comprehensive, collaborative program that coordinates all areas of service for Student's need. The District's program was designed to do that.

THE DISTRICT OFFERED STUDENT A FAPE IN THE LRE DURING THE 2005-2006 SCHOOL YEAR, AS LISTED IN ISSUES THREE AND FOUR.

5. As stated in factual findings 29 through 45, and legal conclusions 3 through 9 and 12, the District's offer for the 2005-2006 school year was designed to provide Student educational benefit in the LRE. The offer for the 2005-2006 school year was not significantly different than the placement Student had during the 2004-2005 school year, with the exception of an SDC for 90 minutes per day for language arts. The District offered Student a comprehensive program that would address his unique needs and provide him significant educational benefit. The District's 2005-2006 school year offer was a FAPE in the LRE.

ORDER

1. Student's request for relief is denied.
2. The District's request that its placement offer for the 2005-2006 school year be found to be a FAPE in the LRE is granted.

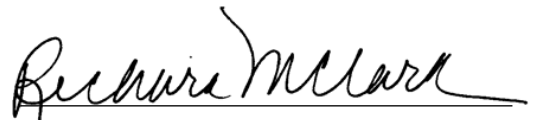
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and considered.

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: August 22, 2006

A handwritten signature in black ink, appearing to read "Richard M. Clark", is written over a horizontal line.

RICHARD M. CLARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings