

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

In the Matter of:

STUDENT,

Petitioner,

v.

SEQUOIA UNION HIGH SCHOOL  
DISTRICT,

Respondent.

OAH CASE No. 2006120087

DECISION

Administrative Law Judge (ALJ), Charles Marson, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 1, 2007, in Woodside, California.

Petitioner's mother (Mother) represented Petitioner (Student). David Nibbelin, Attorney at Law, and Marian Watson, Paralegal, represented Respondent Sequoia Union High School District (District).

Mother and Nikki Washington, the District's Chief Administrator of Special Education, were present throughout the hearing.

The request for due process hearing was filed on December 4, 2006. There was no continuance before the hearing. At the hearing, oral and documentary evidence were received. Student waived closing argument. At the District's request, the matter was continued and the record held open until February 8, 2007, when the District filed a closing brief and the matter was submitted.

ISSUES

1. Did the District deny Student a Free Appropriate Public Education (FAPE)

during the school years (SY) 2005-2006 and 2006-2007<sup>1</sup> by any of the following:

- a) Failing to provide Student individual tutoring in mathematics (math) and science;
- b) Failing to include a behavior intervention plan in Student's IEP offers;
- c) Failing to allow Student to retake tests on which she originally received a D or an F;
- d) Failing to allow Student to make up missed and late homework and assignments;
- e) Failing to include in IEP offers, to consider, and to respond to the concerns of Parents;
- f) Failing to include in IEP offers a transition plan for Student;
- g) Failing to state in IEP offers the beginning dates, frequency, and duration of services; and
- h) Failing to designate an IEP offer as the triennial IEP offer?

2. Is Student entitled, as relief, to the provision of:

- a) Individual tutoring in math and science;
- b) A review at District expense of a behavioral intervention plan by Dr. Frank Marone, and compliance with whatever revised plan Dr. Marone recommends;
- c) The opportunities to retake tests on which she originally received a D or an F, and to turn in late or missing homework and assignments;
- d) An opportunity to make up lost academic credits in summer school; and
- e) Placement in a private school at public expense if Student does not progress academically, or if the District fails to follow the revised behavior intervention plan, calls police about Student, or wrongly suspends or expels Student?

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<sup>1</sup>The request for due process hearing addresses the entire SY 2005-2006 and the SY 2006-2007 up to November 13, 2006.

## CONTENTIONS OF THE PARTIES

Student, who receives poor grades in most subjects, contends that those grades are caused by the District's failure to provide to her individual tutoring in math and science, and a behavior intervention plan. She also contends that the District committed procedural violations of the Individuals with Disabilities in Education Act (IDEA) by failing to offer her a transition plan; by failing to state in IEP offers the beginning dates, frequency, and duration of offered services; and by failing to designate an IEP offer as her triennial plan.

Student argues that the District's conduct denied her a FAPE and entitles her to various forms of relief, including individual tutoring in math and science, adoption of a specific behavior intervention plan to be revised by a named private behaviorist, opportunities to retake tests and resubmit late or missing homework and assignments, and, under certain circumstances, reimbursement for future expenses to be incurred in attending private school.

The District contends that Student's arguments are factually incorrect, and that it has offered and provided to her a FAPE. The District argues that Student's poor academic performance results not from any disability or flaw in her program, but from her inattention and misbehavior in class; that Student has had ample tutoring available but will not take advantage of it; that she does not require a behavior intervention plan; and that her parents (Parents) have frustrated its efforts to create a behavior support plan by refusing to allow Student to participate in its development. The District also contends that Student has been given many opportunities to retake tests and resubmit homework and assignments, but has rarely done so. Finally, the District argues that Parents have frustrated its efforts to improve Student's grades and behavior by refusing to agree to any IEP the District has offered.

## FACTUAL FINDINGS

### BACKGROUND

1. Student, a 15-year-old female, resides with Parents within the District, and is eligible for special education because of a speech and language impairment. She is in the 10th grade at the District's Woodside High School (Woodside).

### STUDENT'S UNIQUE NEEDS

2. A school district must adequately address all the unique needs of a student eligible for special education for any reason.

3. Student has impaired speech and language skills and organizational deficits that diminish her academic performance. She misbehaves in class to the detriment of her education. However, Student is generally quite capable, and in some ways outstanding. Her ability to understand and express herself verbally is high. She has no cognitive processing or specific learning disorder. Her academic and functional skills are at grade level. Her gross and fine motor development, and her social and emotional development, are age appropriate. Her academic skills range from average to high average. She plays the violin, composes music, is skilled at fencing, and is a gifted graphic artist.

### THE DISTRICT'S OFFERS OF PLACEMENT AND SERVICES

4. A school district must offer a student eligible for special education an IEP that is reasonably calculated to afford her some educational benefit.

The IEP from Hillview Middle School in Menlo Park

5. The last IEP to which Parents agreed was developed on March 5, 2004, while Student was in the seventh grade at Hillview Middle School (Hillview) in the Menlo Park City School District. That IEP placed her in a regular classroom and provided her 30 minutes a month of speech therapy consultation.<sup>2</sup>

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<sup>2</sup> Official notice is taken of two previous due process proceedings involving

6. When Student entered Woodside as a ninth grader in 2005, the parties could not agree on an IEP, and the District continued to use the March 5, 2004 Hillview IEP as Student's program. It is still the last agreed-upon and implemented IEP.

The January 26, 2006 IEP offer

7. In December 2005, and early January 2006, the District conducted its triennial assessments of Student, which are described in detail in *Sequoia Union High School District v. Student, supra*.

8. In preparation for the triennial IEP meeting scheduled for January 26, 2006, the District faxed to Mother<sup>3</sup> a draft IEP, soliciting suggestions for certain provisions. The parties did not reach agreement on January 26, and on February 22 Mother faxed to the District a letter dissenting from most of the District's recommendations. The IEP team held additional meetings on February 23 and March 2. The final product of those meetings, which was faxed to Mother on March 3, 2006, is referred to herein as the January 26, 2006 IEP offer.

9. In the January 26, 2006 IEP offer, the District proposed to continue the 30 minutes a month of speech therapy consultation Student was receiving, and to continue her placement in regular classes, except for one period a day in the Resource Specialist Program (RSP) for individual assistance in organizational skills and the completion of homework. The District also asked that Mother consent to a mental health assessment.

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Student. In *Student v. Menlo Park City School District*, OAH Case No. N2005090654, Administrative Law Judge (ALJ) Richard Clark ruled on April 4, 2006, that the respondent District provided a FAPE to Student during the school year 2004-2005. In *Sequoia Union High School District v. Student*, OAH Case No. 2006050687, ALJ Debra Huston ruled on July 30, 2006, that this District's triennial assessments of Student were appropriate. Some of the facts stated herein are drawn from those decisions.

<sup>3</sup> Student's father was not involved in the events described here.

Mother refused to sign the proposed IEP or consent to the assessment, and the March 5, 2004 IEP from Hillview continued in effect.

#### THE NOVEMBER 3, 2006 IEP OFFER

10. At an IEP meeting on November 3, 2006, the District offered Student a program that was substantially the same as the program offered her in January. Because of Student's increasing behavioral difficulties, the District requested that Mother consent to a mental health assessment and a functional analysis assessment (FAA). Again the parties could not agree, and on November 13, 2006, Mother faxed another letter of dissent to the District. Mother refused to sign the proposed IEP or consent to the mental health referral or the FAA. The March 5, 2004 IEP from Hillview continued in effect.

#### STUDENT'S GRADES

11. Student's grades in SY 2005-2006 were low. They improved slightly between December 2005, and June 2006, in English (D- to C-), Geometry (F to D-), physical education (C to B), and Advanced Integrated Science (C to C+). They remained the same in Fine Arts (D) and French (C). They worsened in World Studies (B to D).

12. As set forth below, Student's poor grades in the SY 2005-2006 did not result from any flaw in the District's IEP offers or in its delivery of curriculum to Student. They were caused by Student's failure to seek out available tutoring, her inattention and misbehavior in class, her failure to retake tests and to turn in homework and assignments, and by Mother's failure to agree to any IEP proposal.<sup>4</sup>

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<sup>4</sup> Student alleges that she did not make sufficient progress under a specific academic goal in the January 26, 2006 IEP offer. However, the District was under no obligation to measure Student's progress against that goal because it was part of an IEP offer that Mother rejected. Moreover, the goal was proposed on the assumption that Student would receive one period a day of tutoring from the RSP teacher in study skills and homework completion, which she did not.

## INDIVIDUAL TUTORING

13. Student does not use her low grades to criticize the Hillview IEP under which she received them. Instead, Student contends, but did not prove, that her grades demonstrated a need for the inclusion, in the IEP offers of January 26 and November 3, 2006, of individual tutoring in math and science.<sup>5</sup> However, Student offered no evidence that, in order to benefit educationally, she required such tutoring, or that her grades in math and science were related to any lack of tutoring.

14. Student's low grades in Geometry were primarily caused by her lack of sufficient background in algebra. As her geometry teacher Aaron Campbell testified, most ninth graders at Woodside take Algebra I, not Geometry. However, at Parents' insistence, Student was placed in Geometry in the ninth grade without having taken Algebra I. Campbell testified without contradiction that, as a result, Student simply lacked the foundation in algebra to understand geometry. Marian Welch, Student's speech and language therapist, testified that Student had taken, but not passed, pre-algebra work in eighth grade.

15. Student's science teacher Ernest Lo testified that the main reason Student did poorly in science was that she did not turn in her work. There was no contrary evidence.

16. Even if Student had required individual tutoring in math and science, she had ample opportunity to get it. At all relevant times, Woodside had an extensive program of tutoring for all its students. Any student who did not understand something was offered tutoring assistance, and any student who asked for tutoring assistance got it. Certificated teachers, some of them math and science teachers, offered tutoring in the school's library Mondays through Thursdays after class. Some of the tutoring in the library was individual; some was in small groups. There was no evidence that Student would not benefit from small group tutoring any less than from individual tutoring.

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<sup>5</sup> Student does not challenge the adequacy of her speech and language therapy.

17. All of Student's teachers offered their students individual tutoring after classroom hours. Student's science teacher Lo testified that the science and math departments gave tutoring assistance to any student who desired it, and that during the SY 2005-2006 he announced in class to all his students that he was available at lunch, during seventh period, and after school to give any of them individual assistance. He spoke separately to Student, offering to help her individually after school, but she only came in for that help approximately five times during the year. Lo also communicated his availability for science tutoring to Parents by email.

18. Student's geometry teacher Campbell testified that math tutoring was available to all students immediately after school in the library. Math teachers were present in the library at least twice a week. And on Tuesday and Thursday evenings, from 5:30 p.m. to 7:30 p.m, two math teachers were available for math tutoring in classrooms. A schedule for the evening tutoring sessions was posted in all classrooms. The schedule advised students to "[s]ee your own math teacher for individual help." The District attached this schedule to its January 26, 2006 IEP offer. The availability of math tutoring was communicated to Student in class and personally, and to Mother by email. Campbell testified that Student took advantage of these math tutoring opportunities only once or twice during SY 2005-2006.

19. Woodside's tutoring program was part of its regular, not special, education curriculum, and therefore was not a required element of an IEP offer. Nonetheless, the availability of that tutoring was communicated to Mother at IEP meetings, and was contained in the January 26, 2006 IEP offer.

20. There was no evidence that the availability of tutoring in the regular education program, instead of the special education program, made any difference in its usefulness to Student. Tutoring did not substantially aid Student in science and math because she did not take significant advantage of the tutoring opportunities she knew she had.

## BEHAVIORAL INTERVENTION PLAN

22. Student's low grades resulted in part from her inattention and misbehavior in class. She frequently sketched or read Japanese comic books when she should have been paying attention. During the SY 2005-2006, Student occasionally disrupted her English class. For example, on one occasion she broke a pen hard enough that pieces of it hit the teacher and another student. On another, during a silent reading period, she did homework, and when criticized for that, vocally challenged the teacher, saying (incorrectly) that she had a right to do homework then. Student used profanity at inappropriate moments, and sometimes had difficulty maintaining social relations with her peers.

23. Student's behavioral difficulties are not thoroughly documented, in part because the District honored Mother's request not to interview Student on the subject. There is a line on the January 26, 2006 IEP form asking: "Does student's behavior impede learning of self or others?" The question is not answered. Instead there is a notation that the question is "not answered per parent request."

24. The District did what it could to understand Student's behavioral difficulties. In the January 26, 2006 IEP offer, in a separate document sent to Mother on March 20, and as part of the November 3 IEP offer, the District requested that Mother permit a referral of Student to San Mateo County Mental Health Services for a mental health assessment. On each occasion Mother declined to consent. In the November 3 IEP offer, the District also requested that Mother consent to a functional analysis assessment (FAA), a common method of exploring behavioral difficulties. Again Mother declined.

25. It was the District's practice to develop a behavior support plan only in collaboration with the student, but Mother declined to allow Student to participate in that process. The District was therefore unable to develop a behavior support plan.

26. Although the District wanted to develop a behavioral support plan, Student did not prove that such a plan was required in order to provide her a FAPE, or that her behavior could not be adequately controlled in the absence of such a plan.

27. At all IEP meetings in 2006, Mother advocated the adoption of a proposal written by a private behaviorist, Dr. Frank Marone. That proposal was described at hearing as a behavioral intervention plan, but there is nothing in the record to show whether the proposal was preceded by an FAA or adopted or implemented by any school according to the procedures required by law. The parties agree that the proposal was outdated. Mother urged the District to adopt Dr. Marone's proposal subject to his review and alteration of it. The District declined. Student did not prove that Dr. Marone's proposal had any merit, or that the proposal, if revised and adopted, would have made any difference in her behavior.

28. Student did not prove that addressing her misbehavior required a behavior intervention plan. There was no evidence that she exhibited a serious behavior problem that significantly interfered with the implementation of the goals and objectives of her IEP, that was self-injurious or assaultive, that caused serious property damage, or that was pervasive and maladaptive and not effectively controlled by the instructional and behavioral approaches specified in her IEP or otherwise followed by the District.

#### RETAKING D AND F TESTS

29. Student did not prove that, in order to benefit educationally, she required the opportunity to retake tests on which she originally received a D or an F. However, the parties viewed that opportunity as appropriate for inclusion in Student's IEP. The January 26, 2006 and November 3, 2006 IEP offers both proposed that Student be given the opportunity to retake D and F tests until she received a C. Mother's letters dissenting from both offers purported to accept those portions of the offers.

30. At all relevant times, the District offered Student the opportunity to retake any test on which she received a D or an F, but Student rarely chose to do so. Karen McGee, a school psychologist who recently assessed Student, testified that all of Student's ninth grade teachers were asked to allow her to retake D and F tests, and all complied. Student's science teacher, Lo testified that he had been informed that Student should

have the opportunity to retake those tests, and he told her that she could, but she never attempted to do so. Student's geometry teacher, Campbell testified that it was the policy of the math department that any student could retake a D or F test. That policy was communicated to all geometry students in the course description. Campbell individually reminded Student of the policy, and communicated the policy to Mother by email. Student retook at least one geometry test, and arranged to retake at least one more, but did not show up for the test.

31. To the extent that Student's grades were low because she received Ds or Fs on some tests, those grades either reflected Student's choice not to retake most of the tests, or incorporated Student's low scores on the tests she retook.

#### MAKING UP LATE OR UNCOMPLETED HOMEWORK AND ASSIGNMENTS

32. Student did not prove that she required special accommodations in completing and turning in her homework and class assignments. Nonetheless, the parties assumed that she did, and the District's IEP offers included such accommodations.

33. During the SY 2005-2006, Student frequently failed to turn in homework and assignments on time, or at all. She had done the same at Hillview Middle School. Student's progress reports and IEP offers all record that she had consistent difficulties with the completion of homework in most of her classes, including science, math, history, biology, and social science. The January 26 and November 3, 2006 IEP offers proposed to place Student in one period a day of individual work with the RSP teacher to work on study skills, to give her additional time to complete homework and assignments, and to pursue related goals and objectives.

34. Student does not challenge the appropriateness of the goals and objectives concerning homework and assignments offered to her in the two proposed IEPs, nor does she question the potential value of the offered assistance from the RSP teacher. Mother's stated reason for rejecting that assistance was only that she wanted to communicate directly with Student's teachers, not indirectly through the RSP teacher. Why Mother

could not communicate directly with Student's teachers if Student spent one period with the RSP teacher was not explained.

35. The goals, objectives, and RSP assistance proposed by the District to help Student with homework and study skills were reasonably calculated to afford educational benefit to Student and were appropriate.

36. The undisputed evidence showed that, notwithstanding Mother's decision not to consent to any IEP offer, all of Student's teachers gave her the opportunity to make up late and missing homework and assignments. Student rarely attempted to do so.

37. To the extent that Student's poor grades were caused by late or missing homework and assignments, those grades either reflected Student's choice not to timely complete homework and assignments, or incorporated Student's low scores on the homework and assignments she did submit. They also reflected the absence of assistance from the RSP teacher.

#### ALLEGED PROCEDURAL VIOLATIONS

38. A school district must ensure that the parents of a child eligible for special education are allowed to participate fully in the decision-making process regarding their child's education, and must consider the parents' views, and information provided by them, in developing an IEP proposal.

#### Dissent letters

39. Student claims that the District significantly impeded Parents' opportunity to participate in the decisional process by refusing to include Parents' dissenting views in the IEP proposals and by refusing to respond to those views. The evidence showed otherwise.

40. On February 22, 2006, in response to the January 26 IEP meeting, Mother faxed to the District a letter dissenting from the District's proposal. The next day the second of three IEP meetings was held. The District's uncontradicted notes of that meeting stated that its purpose was "to review IEP documents and parents' written

dissent with the IEP' faxed this morning." Those notes showed that the IEP team adequately considered, and responded directly to, the matters raised in the dissent letter. For example, the letter demanded tutoring. The IEP notes stated that Parents would receive the math tutorial schedule. The letter demanded that Dr. Marone have access to the school. The IEP notes stated that Parents would sign a form for the release of information to Dr. Marone. The notes also stated that the IEP was revised, in unspecified ways, as a consequence of Parents' letter. The letter was not attached to the IEP, as Mother demanded, but was placed in Student's file.

41. After Mother and the District did not agree on an IEP on November 3, 2006, Mother sent to the District another letter of dissent, dated November 13. That letter primarily reiterated the views expressed in the February 22 letter. The IEP team, at its November 3 meeting, considered and discussed the content of the February 22 letter. To the extent that the November 13 dissent letter echoed the February 22 dissent letter, the issues it raised were considered on November 3 by the IEP team.

42. In her November 13, 2006 dissent letter, Mother raised some issues not raised in the February 22 letter. She demanded that the IEP offer specify exactly what services the RSP teacher would provide, and include a description of the exact length, setting, and amount of those services. However, mother had previously been adequately informed of the offered RSP services, which were described in the IEP offer as "time for homework completion and remediation of organizational skills." Given the nature of the RSP services, a more precise description of them was impracticable.

43. The November 13, 2006 dissent letter also demanded that the IEP offer explain why additional evaluations of Student were sought. However, the requests for consent to assessments, the IEP documents themselves, and the testimony of District witnesses all showed that the District sought additional evaluations because of Student's increasing behavior problems, and had adequately communicated that reason to Mother.

44. The November 13, 2006 dissent letter also demanded that the IEP confirm in writing "that the SUHS never received signed January 26th, 2006 IEP and Dissent letter

dated February 21st, 2006." The reason for this demand is obscure. The District had received the February dissent letter and discussed it with Mother at IEP meetings on February 23 and November 3. Mother knew that the District never received a signed January 26, 2006 IEP because she never signed one. There was no reason for the IEP to contain this confirmation.

45. There was nothing in the November 13, 2006 dissent letter that there was any reason to add to the November 3, 2006 IEP offer. Student did not prove that the District did not consider all of the letter's contents. The letter was placed in Student's file.

#### Beginning dates, frequency, and duration of services

46. An IEP must state the beginning dates, frequency, and duration of offered services.

47. Student's claim that the January 26 and November 3, 2006, IEP offers failed to state the beginning dates, frequency, and duration of offered services is baseless. Each IEP offer made those elements as clear as possible. The January 26 IEP, for example, offered Student 1475 minutes a week of general education teaching, 30 minutes a month consultation with a speech and language therapist, and 25 minutes a day with the RSP teacher. Only the proposal that Student retake D or F math tests is less than precise: in the column for frequency the offer states "as needed." Given the nature of the accommodation, the offer could not have been more specific. All the offered services were described as lasting for one year; the November 3 IEP offer was similarly precise. Documents accompanying the transmittal of both offers to Mother stated that the services would begin as soon as the District received consent for them. Since Mother had never agreed to an IEP offered by the District, that was a reasonable way of describing the beginning dates of services offered.

#### Lack of transition plans

48. Beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it

appropriate), an IEP must include a transition plan that contains appropriate postsecondary goals relating to training, education, employment, and, where appropriate, independent living skills.

49. Student was 13 years of age at the beginning of the SY 2005-2006. She was 15 on September 17, 2006, during which time the January 26, 2006 IEP offer would have been in effect if parents had consented to it. She will be 16 on September 17, 2007, during which time the November 3, 2006 IEP offer would be in effect if parents had consented to it.

50. Student's contention that the January 26 and November 3 IEP offers do not contain transition plans is groundless. The January 26 offer contained a separate page entitled "IEP 1A TRANSITION SERVICES" that set forth a transition plan for Student. It was modest in detail, since the parties assumed Student, a ninth grader, would go to college. The transition plan proposed that Student visit the Career Center to explore college career interests, and that she visit the guidance counselor. The November 3, 2006 IEP offer contained an almost identical transition plan. Student does not challenge the sufficiency of these plans; she simply denies, incorrectly, that they exist in the IEP offers.

#### Designation as triennial IEP

50. A school must reassess a special education student every three years unless the district and the parents agree in writing that the triennial reassessment is unnecessary.

51. Student's argument that the January 26, 2006 IEP is not designated as the triennial IEP is untenable. The draft and final versions each contained a line entitled "Purpose of Meeting." In each instance the box marked "Triennial" was checked.

#### IMPACT OF ALLEGED VIOLATIONS

52. Even if the District had violated procedural provisions of the IDEA, which it did not, the District's conduct did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.

## ENTITLEMENT TO RELIEF

53. Based on the foregoing Factual Findings, Student is not entitled to relief, so it is not necessary to examine her proposed resolutions.<sup>6</sup>

## CONCLUSIONS OF LAW

### ELEMENTS OF A FAPE

1. Under the IDEA and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363(a).)

2. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

3. In *Rowley*, the Supreme Court held that the IDEA does not require school

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<sup>6</sup> Although Student's proposed resolutions address the possibilities that the District might call the police about her, or wrongly suspend or expel her, Student did not pursue these issues at hearing.

districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.)

School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. Based on Factual Findings 1, 3, and 5-37, and Legal Conclusions 1-3, the District's January 26 and November 3, 2006 IEP offers adequately addressed all of Student's unique needs, to the extent that the District could obtain cooperation from parents. They were reasonably calculated to provide Student educational benefit. It is undisputed that the offers appropriately addressed Student's speech and language impairment. Assistance from the RSP teacher in study skills and homework completion would have allowed her to improve her academic performance. The January 26 and November 3, 2006 IEP offers constituted offers of a FAPE. The special education and services the District actually provided to Student from the beginning of SY 2005-2006 to November 13, 2006, under the terms of the March 5, 2004 IEP from Hillview Middle School, also constituted a FAPE. Student's low grades were not caused by any shortcoming in the District's delivery of curriculum to her.

#### BEHAVIORAL INTERVENTION PLAN

5. If a child's behavior impedes her learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i); Ed. Code, §§ 56341.1, subd. (b)(1), 56523.) One such intervention is with a behavioral support plan. Another involves a behavior intervention plan, a document that is developed when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of her IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem is behavior that is self-injurious or assaultive, causes serious property damage, or is pervasive and maladaptive and not effectively

controlled by the instructional and behavioral approaches specified in the student's IEP. (*Id.*, subd. 3001(aa).) The adoption of a behavior intervention plan must be preceded by a functional analysis assessment (FAA). The plan must, inter alia, summarize the relevant and determinative information gathered from the FAA. (*Id.*, subd. (f), § 3052.)

6. Based on Factual Findings 3, 9-10, 12, and 22-28, and Conclusion of Law 5, Student's misbehavior required the IEP team to consider the use of positive behavior interventions and supports, and other strategies, and the IEP team did so, to the extent that parental consent could be obtained. The District was unable to develop a behavior support plan because Mother refused to allow Student to be interviewed about her behavior or to participate in the development of such a plan. The District was unable to investigate the possibility of a behavior intervention plan because Mother would not consent to an FAA or a mental health assessment. In any event, there was no evidence that Student's behavior was sufficiently serious to require a behavior intervention plan, and the District was not required to adopt one.

## PROCEDURAL REQUIREMENTS

### Parental Participation in IEP Process

7. A parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c) (1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.343(c)(2)(iii), 300.346(a)(1)(i), (b), 300.533 (a)(1)(i); Ed. Code, § 56341.1, subd. (a)(1), (d)(3), (e).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (Appen. A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).)

8. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP.

(*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

9. Based on Factual Findings 39-53, and Legal Conclusions 7-8, Student's parents were not denied their right to participate in the decisional process regarding Student's educational program. Mother participated fully in every IEP meeting. She communicated her views to the rest of the IEP team, and those views were adequately considered and discussed at the IEP meetings on February 23 and November 3, 2006. It made no difference to the quality of Mother's participation in the process that the District placed her dissent letters in Student's file rather than attaching them to the IEP offers.

#### Required contents of an IEP

10. An IEP must contain a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the "extent ... to which" a child will not participate in a regular classroom with nondisabled children; a statement of the special education and related services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code, § 56345, subd. (a)(1), (2), (3).) A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

11. Federal and state law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code, § 56345.) Those statutes may not be construed to require that something be contained in an IEP beyond that expressly required by the statutes themselves. (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (i).) There is no requirement that an IEP contain any document offered by a parent.

12. Based on Factual Findings 39-46, and Legal Conclusions 10-11, there was no reason for the District to attach Mother's dissent letters to the IEP offers, and no requirement that it do so. The parties were well aware of the contents of the dissent

letters, which were considered and discussed. It made no difference that the letter was placed in Student's file rather than attached to the IEP offer.

#### Beginning dates, frequency, and duration of services

13. An IEP must contain a projected date for the beginning of services and modifications, and the anticipated frequency and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.347(a)(6); Ed. Code, § 56345, subd. (a)(7).)

14. A school district may not begin to deliver special education and related services until it obtains parental consent. (20 U.S.C. § 1414(a)(1)(D)(ii)(II); see, Ed. Code, § 56346.)

15. Based on Factual Finding 47, and Legal Conclusions 13-14, the January 26 and November 3, 2006 IEP offers adequately set forth the projected dates for the beginning of offered services and modifications. The District was unable to describe those beginning dates more accurately than it did without parental consent, which it reasonably believed would not be granted. The IEP offers described the anticipated frequency and duration of the offered services with precision, except where precision was not possible due to the nature of the service or accommodation described, such as retaking tests.

#### Transition plans

16. Beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must contain a transition plan that contains appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. The plan must also contain the transition services needed to assist the pupil in reaching those goals. (34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8)(A).)

17. Based on Factual Findings 48-52, and Legal Conclusion 16, the January 26 and November 3, 2006 IEP offers contained appropriate transition plans. Although the

content of those transition plans is limited, Student does not challenge their sufficiency. She only asserts that they do not exist in the IEP offers. They do.

#### Triennial IEP

18. A child with a disability must be reevaluated not more frequently than once a year, unless a school district and a student's parents agree otherwise, and shall be reevaluated at least once every three years, unless the district and the parents agree in writing that a triennial reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.536(b); Ed. Code, § 56381, subd. (a)(2).)

19. Based on Factual Finding 51, and Legal Conclusion 18, the District conducted an adequate triennial reevaluation of Student and properly labeled its triennial review and IEP offer as such. The draft and final versions of the January 26, 2006 IEP offer contained check marks in the boxes used for designating the meeting as triennial. Mother was aware that the January 26 meeting was the triennial IEP meeting, and was not misled or misinformed in any way.

#### Impact of alleged violations

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

21. Based on Factual Findings 39-53, and Legal Conclusion 20, the District's conduct did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. The District was fully aware of Mother's views, including those set

forth in the dissent letters, and adequately discussed them with her. The IEP offers of January 26 and November 3, 2006, described the beginning dates, anticipated frequency, and duration of offered services as well as practicable. Mother knew that the offers required her consent before the services could be implemented, and was not misled or misinformed in any way.

#### BURDEN OF PROOF

22. Student, as the petitioner, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49.)

23. Based on Factual Findings 1-54 and Legal Conclusions 1-22, Student did not discharge her burden of proving that she was denied a FAPE.

#### ORDER

For the foregoing reasons, Petitioner's requests are denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d) requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all 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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 23, 2007

A handwritten signature in black ink, reading "Charles Marson", is enclosed in a thin black rectangular border. The signature is written in a cursive style with a long horizontal flourish at the end.

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CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division