

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

In the Matters of:

STUDENT,

Petitioner,

v.

ORANGE UNIFIED SCHOOL DISTRICT,

Respondent,

OAH CASE NO. N2006080125

STUDENT,

Petitioner,

v.

ORANGE UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2007030628

DECISION

Jacqueline Jones, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on March 20-22, April 2-4, April 17 and May 29-30, 2007, in Orange, California.

Attorneys Jennifer J. Kropke, Drew Massey, Paul Roberts and Timothy A. Adams, of Roberts & Adams, represented Student. Mother was present on all days of the hearing except two. Father and Grandfather were present at times during the hearing.

Attorney Nancy Finch-Heuerman, of Parker & Covert, LLP, represented Orange Unified School District (District). Also present as the District's designated representative was Dr. William Gee, Superintendent of Special Education and SELPA Director for Orange

Unified School District.

On August 2, 2006, Student filed her request for a due process hearing against the District and Corona-Norco Unified School District. Student filed her request for a continuance of the due process hearing on August 8, 2006. This is Case Number N2006080125. On March 19, 2007, Student filed a further request for due process which is Case Number N2007030628. On the first day of hearing, the parties agreed to consolidate the two cases and Student dismissed Corona-Norco Unified School District.

Oral and documentary evidence were received, the record was left open for receipt of the written closing arguments. The record was closed on June 20, 2007.

ISSUES¹

1. Did the Orange Unified School District (OUSD) fail to assess in all areas of suspected disability and fail to conduct appropriate assessments during the 2005-2006 school year?
2. Did the Orange Unified School District (OUSD) deny Student a free appropriate public education (FAPE) during the 2005-2006 school year by:
 - A. Failing to "offer" a comparable interim placement;
 - B. Failing to either adopt or create a new program within 30 days;
 - C. Failing to develop appropriate, objective and measurable goals in all areas of suspected disability;
 - D. Failing to formulate an individualized education program (IEP) that shows a direct relationship between Student's present levels of academic achievement and functional performance, the goals and objectives, and the specific educational services to be provided to Student;

¹ The issues raised by Student have been restated for purposes of addressing the merits of her claim.

- E. Failing to “offer” or “provide” Student with an appropriate placement services, and supports in the Least Restrictive Environment (LRE); and
- F. Failing to make a clear, written IEP offer;

CONTENTIONS OF THE PARTIES

This case concerns events that occurred from June 15, 2005, when Student’s family moved from the Corona-Norco Unified School District (CNUSD) to the District, and November 16, 2005, when her Parents placed Student in a non-public school.

Student contends that the District failed to provide a comparable special education program after she transferred from CNUSD to the District. Student contends that the District failed to adopt or create a new special education program within 30 days after she transferred from CNUSD to the District. Student contends that, in developing a placement offer, the District failed to assess her in all areas of suspected disability. Student contends that, in the August 17, 2005 IEP, the District failed to include annual goals, failed to include appropriate measurable goals designed to address all areas of suspected disability, and failed to show a direct relationship between Student’s present levels of performance, goals and objectives and the specific educational services to be provided. Student also contends that the August 17, 2005 IEP does not contain a clear offer of placement. Student further contends that, in the August 17, 2005 and November 29, 2005 IEPs, the District failed to offer an appropriate placement, services, or supports in the least restrictive environment. For relief, Student seeks compensatory education, specifically prospective placement at Prentice (a non-public school) and reimbursement for a private tutor. The District contests each allegation.

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Student is a nine-year-old girl who lives with her Parents and resides within the geographical boundaries of the District.

FACTUAL BACKGROUND

2. In January 2005, CNUSD determined that Student was eligible for special education and related services under the disability category of specific learning disability (SLD).²

3. Student attended Corona-Norco Unified School District during her first grade year, 2004-2005. After completing her first grade year, Student's family moved to a residence which is located within the boundaries of the District. CNUSD is not located within the same special education local plan area (SELPA) as the District. On or about June 15, 2005, Student's Mother enrolled her at Imperial Elementary School which is a District school.

4. On July 25, 2005, the 2005-2006 school year began at Imperial Elementary School. On the same day, Student started attending Imperial Elementary in the second grade class of Ms. Laurel Parke. Student attended Imperial for 57 days and was absent five days for a total enrollment period of 62 days or approximately 12 weeks. Student was disenrolled by her Parents from Imperial on November 10, 2005. On November 16, 2005, the District was informed that Student had been enrolled by her Parents at Prentice, a non-public school.

5. Student is currently in the third grade and continues to attend Prentice.

ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

6. In performing initial assessments and reassessments of a student with exceptional needs, a school district must assess in all areas of the student's suspected

² A child with SLD is entitled to special instruction and services or both if there is a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, and a severe discrepancy between intellectual ability and achievement.

disability. In developing and revising an IEP, the district shall consider the results of the initial or most recent assessment of the student. Whether or not the district should have conducted an assessment turns on what the district knew at the time.

7. Student contends that, before making the placement offers in the June 15, 2005 interim IEP and the August 17, 2005 and November 29, 2005 IEPs, the District failed to assess Student in all areas of suspected disability. Specifically, Student contends that the District failed to assess Student in the areas of Dyslexia and behavior. The District contends that Student failed to establish that additional assessments were required or that new areas of disability were suspected.

Assessments Conducted at CNUSD

8. In September 2004, while she was attending CNUSD, Dr. Eugene Wong, a Psychological Assistant, and Dr. Dudley Weist, a Licensed Psychologist, conducted an independent psychoeducational assessment of Student and prepared a report. The report was the basis for the determination that Student was eligible for special education. The report was completed 10 months prior to Student's enrollment at Imperial. According to the report, Parents referred Student for assessment because of poor school performance that was accompanied by significant difficulty in concentration, staying focused and completing school work. Mother reported concerns regarding Student's reading, writing and phonic skills. The assessors assessed Student using the Wechsler Abbreviated Scale of Intelligence (WASI). Student's full scale intelligence quotient (IQ) was 83, which placed her at the 13th percentile for individuals her age. This is equivalent to the low average range for intelligence scores. The assessors used the Cognitive Assessment System (CAS) as a measure of cognitive abilities. Student scored in the low average range in most of the domains of the test. The assessors tested academic achievement via the Weschler Individual Achievement Test-II (WIAT-II). Overall, performance on the individual subtests fell within the extremely low to average range. The assessors tested fundamental reading related skills (phonological awareness and memory, and rapid naming) through the

Comprehensive Test of Phonological Processing (CTOPP). Student's phonological awareness performance was at the high end of the low average range. Phonological memory was within the average range. Rapid naming abilities were below average. The assessors measured memory skills through the Wide Range Assessment of Memory and Learning (WRAML). Student's memory screening index score was at the 19th percentile which indicates the high end of the low average range. The assessors tested Visual-Motor abilities with the Wide Range Assessment of Visual Motor Abilities (WRAVMA). Student's performance was below average and suggests the likelihood of some difficulty with writing/printing.

9. To Drs. Wong and Weist, Student's Parents reported primary concerns with Student's attention and concentration. Additionally, the Parents noted concerns with temper tantrums, anxiety, and worry. Drs. Wong and Wiest diagnosed Student with attention deficit/hyperactivity disorder (ADHD), inattentive type, and a reading disorder. There were no recommendations in the report related to anxiety/depression symptoms. Drs. Wong and Wiest identified Student as eligible for consideration of special education services as a student with a specific learning disability or Other Health Impairment. There was a recommendation for Student to receive a medical consultation to address the inattentive/hyperactive symptoms. There was a recommendation for a combined program of medication and behaviorally-based interventions to be used at home. There was a recommendation for classroom based strategies to address attention related concerns.

10. On January 13, 2005, CNUSD conducted another psychoeducational evaluation of Student. Student's Mother requested this assessment based upon her concerns with Student's academic achievement and to determine eligibility for special education instructional services. Bill Smithson, a school psychologist, performed the psychoeducational assessment. After observation, review of Student's personal history and development, adaptive behavior, classroom performance, academic achievement and other evaluative instruments designed to identify strengths and weaknesses in specific skill

areas, Mr. Smithson concluded that Student was functioning in the average range of cognitive functioning. In the Auditory Processing/Language Functioning area, Student performed on the Receptive One-Word Picture Vocabulary Test (ROWPVT) at a standard score of 98. On the Expressive One-Word Picture Vocabulary Test (EOWPVT), the Student's score was a standard score of 92. Her performance on Test of Auditory-Perceptual Skills-Revised revealed an auditory perceptual quotient of 79. In the area of Visual Processing on the Test of Visual-Perceptual Skills (TVPS), Student scored a visual perceptual quotient of 84. Mr. Smithson opined that weakness in this area can be seen in the classroom as difficulty in discriminating between similar letters or words, difficulty following visual directions, difficulty noticing details in a picture or words within words, reversal of letters and numbers, difficulty attending to task, difficulty in spelling and regrouping in mathematics. Student's performance on the Developmental Test of Visual Motor Integration revealed a standard score of 68, an age equivalency of four years and six months which is below the range expected of a student of six years of age. Student's social emotional functioning indicated that Student got along well with peers and adults and was able to function adequately in most social situations. Student was given portions of the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) and portions of the Brigance Educational Inventory to measure her academic skills. Student performed on the reading portion at an ending kindergarten to beginning first grade level. On the KETA-II she was able to recognize words at an ending kindergarten (K-10) level. On the Brigance, she was able to recognize 38 of the 108 sight words presented. Student's overall mathematics skills were at an ending kindergarten to beginning first grade level, her mathematical information and reasoning skills were at the first grade level and calculation skills were at a kindergarten (k-10) grade level. Student could count and write her numbers to 29 without difficulty. She was able to do some simple addition and subtraction problems using her fingers to count and subtract. Student's overall written language skills were at an ending kindergarten to beginning first grade level. Student was

unable to write the alphabet from memory, but was able to write the alphabet from dictation in both upper and lower case. Reversal of "b" and "d" were observed. Student was able to spell her first and last name, reversed the first "d" in the last name but not the second "d." Student was able to spell a few sight words on the KETA-II. Mr. Smithson found that there was a significant discrepancy between academic achievement and intellectual functioning. A comparative analysis of assessed cognitive and academic standard scores revealed the necessary 1.5 deviation discrepancy which met the criteria for special education consideration. Mr. Smithson found that the discrepancy was due to a disorder in or one or more of the basic psychological processes and found the Student eligible for special education services as a student with a specific learning disability.

11. On January 26, 2006, Jill Cleveland prepared a speech and language assessment report. Ms. Cleveland is a speech and language pathologist at CNUUSD. Student's parents requested this speech and language assessment. The assessment consisted of observations of behavior, oral-peripheral screening, evaluation of fluency and voice and evaluation of fluency and voice. Student was easily distracted throughout the assessment. Student needed cueing to return to the task at hand. Student performed well on the assessment although difficulty was noted in the areas of vocabulary, antonyms, stating differences, providing multiple meanings for words, and giving attributes. Ms. Cleveland found that Student's language strengths were in the areas of associations, categorization, similarities, paragraph comprehension and pragmatic judgment. Ms. Cleveland concluded that Student qualified for special education in the area of language/speech and that a significant delay/disorder existed in the areas of semantics (word meaning) and morphology/syntax (grammar usage and sentence structure). Ms. Cleveland recommended that the CNUUSD IEP team consider the need for language intervention.

12. The Student's expert at hearing was educational psychologist Dr. Perry Passaro. He conducted a psychoeducational re-evaluation of the Student on April 26,

2006, May 6, 2006 and May 13, 2006. Dr. Passaro's report is dated June 5, 2006. Student had disenrolled from OUSD November 16, 2005. In his report, Dr. Passaro concluded that Student had ADHD-combined type, oppositional defiance disorder, generalized anxiety disorder, a reading disorder, a phonological disorder, and a developmental motor coordination disorder. Dr. Passaro further concluded that Student's reading disorder stemmed from dyslexia. Dr. Passaro's assessment began five months after the Student was removed from the District by her Parents. Dr. Passaro never observed the Student while she was attending OUSD. Dr. Passaro indicated that Drs. Wong and Wiest's September 12, 2004 report identified a weakness in math, not a disability or disorder. Dr. Passaro agreed during testimony that in September 2004, Student scored a 68 in reading comprehension on the WIAT II (as administered by Drs. Wong and Wiest). When Student left OUSD in November 2005, she scored a standard score of 85 in reading comprehension on the WIAT (as administered by Prentice school). Dr. Passaro admitted during testimony that Student's gain of 18 points in this area of need was "statistically significant."

13. Neither the Parents, nor the teachers at Imperial requested a reassessment. There were no apparent changes in circumstances to warrant a reassessment. As the District was not requested to prepare an assessment at this time, it was not required to do so. The District did not fail to sufficiently or appropriately assess, or fail to assess Student in all areas of suspected disability

Student's Behavior at Imperial Elementary

14. Student's Parents contend that the District should have assessed Student in

the area of behavior based upon her poor behaviors at home and in school. Ms. Ewing³ testified credibly that Student did not exhibit bad behavior during speech therapy and got along with other children. Ms. Scheiber⁴ indicated that Student never cried or seemed upset in her RSP class. Ms. Scheiber testified that Parent commented that Student did not want to do homework with her Grandfather and that the Parent complained about the level of homework. Ms. Parke⁵ testified credibly that the Mother never mentioned concerns regarding Student crying, throwing tantrums, or refusing to attend school. Ms. Parke testified that Student never lost her temper, argued with adults, or was irritable, and Student seemed happy at school. Ms. Parke described Student's behavior in class as quiet at times, unfocused, never argued and behavior was never a concern. Ms. Parke indicated

³ Ms. Ewing received her B.A. in Communicative Disorders from California State University at Fullerton and her master's in Speech Language Pathology from Loma Linda University. She has obtained a certificate of clinical competence from the American Speech and Hearing Association (ASHA). Ms. Ewing is a licensed Speech Pathologist. She has worked as a Speech and Language Pathologist for the past six years. She has worked at Imperial Elementary since 2005.

⁴ Ms. Scheiber received a B.A. in Criminal Justice from California State University at San Bernardino and a master's degree in Special Education from National University. Ms. Scheiber has a level two Education Specialist credential from California State University at Long Beach which allows her to teach students with mild moderate disabilities. Ms. Scheiber has worked as the Resource Specialist at Imperial Elementary since 2000.

⁵ Ms. Parke received a B.A. in Liberal Studies from the University of San Diego and a master's degree in Administration from California State University at Fullerton. Ms. Parke has multiple subject credentials to teach kindergarten through sixth grade and supplemental authorization in English to teach students from kindergarten through ninth grade. She has worked as a teacher for eleven years. Ten of those years she has taught at Imperial Elementary.

that she spoke with Mother on a weekly basis regarding Student's academic progress. Mother testified that beginning in kindergarten and continuing through her attendance at District, Student was acting out behaviorally, upset easily and did not like attending school. Student's work and study habits grade while at Imperial was satisfactory. Student's citizenship and social habits grade while at Imperial was outstanding. It is entirely believable that Student was on her best behavior at school and presented differently at home. It was not until April and May 2006, five to six months after Student left Imperial School, that Dr. Passaro.⁶ assessed and identified the additional diagnosis of oppositional defiant disorder, generalized anxiety disorder (including overanxious disorder of childhood). At no time, while Student was attending Imperial, did Parents request an assessment for behavior or for any other concern. District did not fail to assess in the area of behavior. The District properly identified Student's unique, educational, behavioral and social-emotional needs by reviewing the assessments conducted by Drs. Wong and Wiest and CNUSD. District had input from Ms. Park, Ms. Ewing and Ms. Scheiber.

Dyslexia

15. Dyslexia is a learning disability that hinders the development of reading skills. Individuals with dyslexia have difficulty with accurate and/or fluent word recognition, spelling and word decoding abilities. Dyslexia may affect an individual's reading comprehension abilities. Dr. Passaro indicated that a disorder of reading was diagnosed in the September 12, 2004 report of Drs. Wong and Wiest. At least four other professionals assessed Student prior to Dr. Passaro. Drs. Wong and Wiest did not make a diagnosis of dyslexia. School psychologist, Bill Smithson did not make a diagnosis of dyslexia. CNUSD speech and language pathologist concluded that Student had a significant delay/disorder in the areas of semantics (word meaning) and morphology/syntax (grammar usage and sentence structure). Ms. Ewing informally

⁶ Both parties stipulated to Dr. Passaro's credentials as an Educational Psychologist.

assessed Student and did not reach a conclusion of dyslexia. Ms. Ewing testified that Student was making progress on speech and language between July 25, 2005 and August 17, 2005. As a result, there was no failure to assess Student in the area of dyslexia.

16. The District properly used the CNUSD assessments in the June 2005 interim IEP and as support for the placement offers in the August 17, 2005 and November 29, 2005 IEPs for Student. The CNUSD assessments assessed Student in all areas of suspected disability, including for her reading disorder. The Student behaved well while she attended Imperial Elementary School, such that the District had no reason to suspect that it needed to assess Student in the area of behavioral concerns.

17. A school district's offer of FAPE to a student with exceptional needs is appropriate if the offer satisfies a four part test: (1) the placement must be designed to meet the unique needs of the student, (2) the placement must be reasonably calculated to provide some educational benefit, (3) the services provided must comport with the student's IEP, and (4) the placement must be in the least restrictive environment. Student contends that the District's placement offer in the August 17, 2005 IEP failed to meet elements one and two in the foregoing test.

THE OFFER OF COMPARABLE SERVICES

18. When a student who has an IEP developed by one school district transfers within the same academic year from the district that developed the IEP to another school district that is not part of the same SELPA, then the new district must offer the student for 30 days a special education program that is comparable to the services described in the IEP developed by the former district.

19. Student contends that when she transferred from CNUSD to the District, the District did not offer services that were comparable to the IEP developed by CNUSD.

20. On January 26, 2005, CNUSD offered, and Parent consented, to the following special education and related services in an IEP:

- resource specialist program (RSP) services 40 minutes, four days a week:

- speech and language services 25 minutes once a week in small group; and
- 10 minutes of reading and writing consultation once a week.

21. On June 15, 2005, the District held an Interim IEP meeting and offered Student the following special education and related services as an interim placement for 30 days:

- resource specialist program (RSP) services 30 minutes daily;
- speech and language services 25 minutes once a week in small group; and
- 100 minutes of physical education weekly.

The District adopted the goals of the prior IEP. The IEP identified Student's annual IEP and triennial review dates as January 25, 2006 and January 25, 2008. The District provided Student's Mother with a copy of the Interim IEP.

22. The interim placement offered by District to Student was comparable with the special education program set forth in the CNUSD IEP dated January 26, 2005. According to the testimony of Ms. Scheiber (Student's special education teacher) and Ms. Parke (Student's regular education teacher), Student's RSP time was shortened by 10 minutes because of Student's scheduled lunch period and because Student had to participate in the ExCel⁷ reading program in her general education classroom. Ms. Scheiber and Ms. Parke both credibly testified that, although not noted on the IEP, reading and writing consultation with the classroom teacher continued to be provided for a minimum of 10 minutes on a weekly basis. Student's Mother signed her consent to this IEP on June 15, 2005.

CONFIRMING IEP

23. When a student with exceptional needs transfers between school districts that are not part of the same SELPA, the new district must adopt the IEP developed by the

⁷ The ExCel reading program is an intensive reading program which the District provided to the Student for 60 minutes per day, according to the testimony of Ms. Parke.

previous district or develop, adopt and implement a new IEP within 30 days of the transfer. Student contends that, after she transferred to OUSD from CNUSD, the District failed to hold a timely IEP meeting to develop, adopt and implement an IEP.

24. On July 25, 2005, Student started on Track S at Imperial Elementary School (Imperial). Imperial is on a single track, year round calendar identified as "S" Track. The first quarter of school ended on September 23, 2005.

25. On August 17, 2005, the IEP team met. The IEP team consisted of Linda Salata (the District representative), Michelle Scheiber (Student's special education teacher), Laurie Parke (Student's regular education teacher), Michelle Ewing (Student's speech and language pathologist), Mother, Father and Grandfather. The team reviewed parental rights and the District offered Student the following placement:

- resource specialist program (RSP) services 30 minutes daily;
- speech and language services 30 minutes 2 week in a small group; and
- 100 minutes of physical education weekly.

The District IEP team continued 2 of the goals identified by CNUSD and wrote 3 new goals in the areas of semantic skills, using blends, diagraphs and letter patterns to create words, and using capital letters and endmark punctuation. The IEP team discussed and identified modifications and adaptations to be used in all classroom settings which addressed Student's Attention Deficit/Hyperactivity Disorder inattentive type (ADHD).

26. The 30 day period started at the beginning of the Student's academic year, July 25, 2005. The IEP team meeting was, therefore, due on or before August 24, 2005. The District met in a timely manner for the August 17, 2005 IEP meeting to develop, adopt and implement an IEP for Student.

PRIVATE PLACEMENT OF STUDENT

27. On November 16, 2005, the attorney for the Student notified the District that the Parents had removed Student from Imperial Elementary School and privately placed her at Parent's expense in Prentice. Parents believed the program offered by the District

was not appropriate. Parents contend that the effects of the program offered by the District were manifest through Student's behavior. Mother testified that Student would tantrum when going to school, that Student spent hours at home trying to complete her homework and would cry over her failure to complete homework within a reasonable time.

NOVEMBER 29, 2005 IEP

28. On November 29, 2005, the IEP met to review the placement offered to Student and in response to Student's parentally made private school placement. The IEP team consisted of Gillian Pons (Elementary Special Education Program Coordinator), Cindy Olson (Student's long term substitute teacher), Linda Salata (District representative and Principal), William Gee (SELPA Director), Laurie Parke (Student's second grade teacher), Michelle Scheiber (Student's special education teacher), Michelle Ewing (Student's speech pathologist), Christy Gwaltney (second grade Excel reading intervention teacher) and Mother. The District reviewed parental rights and offered Student the following placement:

- resource specialist program (RSP) services 90 minutes daily;
- speech and language services 30 minutes two times a week in a small group;
- 100 minutes of physical education weekly.

All of the goals from the prior IEP were continued. The District proposed two math reasoning goals. An additional goal was created to address oral reading fluency and accuracy. The District identified modifications and accommodations to be used in the classroom settings which addressed Student's ADHD. Mother did not consent to this IEP.

FAPE

29. Student contends that the District's placement offer in the August 17, 2005 IEP was inappropriate and that she had inadequate support. Within this primary contention, Student makes several arguments concerning the August 17, 2005 IEP. Student contends that the goals in this IEP were not appropriate. Student contends that

this IEP failed to make a clear offer of placement. Student also contends that this IEP failed to show a direct relationship between Student's present levels of performance, the goals for Student and the specific educational services to be provided.

30. The adequacy of a special education program offered by a school district to a student with exception needs is measured, in part, by whether the placement is designed to meet the unique needs of the student. Thereafter, the district must develop an IEP that contains a statement of measurable annual goals that meet the student's unique needs resulting from his or her disability.

Unique Needs

31. The September 2004 psychoeducational assessment of Student performed by Drs. Wong and Wiest established that Student had unique needs in the area of reading. The assessment dated January 13, 2005, conducted by CNUSD psychologist Bill Smithson established that Student had unique needs in the areas of reading and written language. CNUSD speech pathologist Jill Cleveland's speech and language assessment report dated January 26, 2005, established that Student had unique needs in the areas of semantics (word meaning) and morphology/syntax (grammar usage and sentence structure).

Goals in the June 15, 2005 Interim IEP

32. The goals from CNUSD (IEP dated January 26, 2005) were attached to the District's June 15, 2005 interim IEP. Ms. Scheiber explained to Parent that the District was going to continue with the goals from the CNUSD IEP.

33. There were four goals from the CNUSD IEP dated January 26, 2005. The goals are annual goals and were to be completed as of January 26, 2006, the date of the annual IEP meeting. Student contends that the goals failed to meet Student's unique needs and that they were ambiguous and immeasurable. The goals were as follows:

- a) Goal 1 involves written language: when given a verbal or visual cue, Student will

Speak/write three to four complete sentences in 3 out of 4 trials.

- b) Goal 2 involves reading: when given a list of 100 priority sight words, Student will read these target words aloud with automaticity in two out of three trials with 80 percent accuracy.
- c) Goal 3 involves language skills: when given a word Student will describe it using at least five attributes with 90 percent accuracy across three trial days without cueing.
- d) Goal 4 involves language skills: Student will demonstrate understanding of 20 multiple meaning words with 90 percent accuracy without cueing provided.

All of the above goals were designed to meet Student's unique needs in the areas of reading and speech and language. The goals are clearly written and provide a standard by which to evaluate Student's performance. There is no evidence that Mother was unable to participate in discussion of the goals at the IEP team meeting. These are appropriate statements of measurable annual goals designed to meet the unique needs of Student.

Goals in the August 17, 2005 IEP

34. In the IEP dated August 17, 2005, the District continued two of the goals from the CNUSD January 26, 2005 IEP and wrote three new goals. Student contends that the goals failed to meet Student's unique needs and that the goals were ambiguous and immeasurable. The goals in this IEP were as follows:

- a) Goal 1 involves reading skills: Student will read a list of 100 sight words with automaticity as measured by teacher made test using a criteria of 95 percent.
- b) Goal 2 involves written language skills: Student will write in complete sentences when given a verbal or visual cue as measured by work samples using criteria of four out of five sentences.
- c) Goal 3 involves written language: Student will correctly use simple capital letters (beginning of sentence, names, I) and endmark punctuation when given sentences to write as measured by work samples using a criteria of four out of

five sentences.

- d) Goal 4 involves written language: Student will create recognizable words when given letter combinations with consonant blends, digraphs and letter patterns containing long and short vowel patterns as measured by work samples using criteria of eight out of 10 words.
- e) Goal 5 involves language skills: Student will make gains in expressive semantic skills as measured by progress toward benchmark goals using criteria of 70 percent. The corresponding benchmarks are: (1) that Student will identify three attributes for words provided, identify how two pictures/words are the same and different, and identify antonyms and synonyms for provided words as measured by observation record using criteria of 60 percent, and (2) Student will identify three plus items that fit into given category groups, identify two meanings of multiple meaning words, and provide word to complete given analogies as measured by observation record using criteria of 60 percent.

All of the above goals were designed to meet Student's unique needs in reading and speech and language. The goals are clearly written. There is no evidence that Parents were unable to participate in discussion of this goal. These are appropriate statements of measurable annual goals designed to meet the unique needs of Student.

Goals in the November 29, 2005 IEP

35. In the November 29, 2005 IEP, the District added three new goals based upon information provided by the IEP team members. Two of the goals pertained to math reasoning and one addressed reading fluency. Student contends that the goals were vague, subjective and immeasurable. The new goals were as follows:

- a) Student, when given a word problem orally, will determine the approach and operation needed (addition or subtraction) to successfully complete the problem with criteria of 80 percent accuracy as measured by work samples.
- b) Student will correctly compute mixed problems (addition and subtraction) with

80 percent accuracy.

- c) Student will read 25 words per minute with fluency and accuracy with appropriate intonation and spacing that sounds like natural speech at a second grade level.

The above goals are designed to address Student's unique need in the areas of math reasoning and reading based on information provided by the IEP team at the meeting. There is no evidence that Mother was unable to participate in the discussion of this goal. These are appropriate statements of measurable annual goals designed to meet the unique needs of the Student.

36. The goals were appropriate, understandable and designed to meet the unique needs of Student.

Present Levels of Performance

37. Student contends that the August 17, 2005 IEP failed to contain a direct relationship between the Student's present levels of performance, goals and objectives and the special education services that the District offered to provide Student.

38. In developing an IEP for a student with exceptional needs, a school district must set forth in the IEP a statement of the student's present levels of performance, a statement of measurable annual goals and a statement of the special education and related services that the district will provide to the student. The IEP must show a direct relationship between the present levels of performance, the goals and the specific educational services to be provided.

39. Dr. Gee conceded in his testimony that the only written present levels of performance in the August 17, 2005 IEP pertained to Communication skills. The IEP did not contain any other specific information about Student's present levels.

40. The absence of details on the Student's present level of performance constituted a technical violation of the statutes. Student's expert, Dr. Passaro testified that without the present levels of performance, it would be difficult to measure progress.

Progress could still be measured by reviewing progress reports and report cards of Student. Ms. Schrieber testified that she verbally reviewed the Student's present levels of performance (PLOP) at the August 17, 2005 IEP. There was insufficient evidence regarding how the lack of this information in the IEP caused Student to lose educational opportunity or significantly interfered with the Parent's right to participate in the IEP process.

41. At the November 29, 2005 IEP meeting, Student's present levels of performance were presented both verbally and in writing according to the testimony of Ms. Scheiber. Ms. Parke testified that Student was now exhibiting difficulty with math skills, writing and reading fluency. In response, two math application goals were developed, based upon Student's present levels of performance. An additional fluency goal for reading at the second grade level was also developed in response to the present levels of performance.

The Appropriateness of the District's Placement

42. A school district's offer of FAPE to a student with exceptional needs is appropriate if the offer satisfies a four part test: (1) the placement must be designed to meet the unique needs of the student, (2) the placement must be reasonably calculated to provide some educational benefit, (3) the services provided must comport with the student's IEP, and (4) the placement must be in the least restrictive environment. Student contends that the District's placement offer in the August 17, 2005, failed to meet elements one and two in the foregoing test.

Placement

43. Ms. Ewing testified that to address Student's needs in language arts and speech and language she recommended and the IEP team agreed to continue the CNUSD goals and created additional goals and objectives in the areas of semantic skills, using consonant blends, digraphs, short and long vowel letter patterns, and using simple capital

letters and endmark punctuation in written sentences. Additionally, Ms. Ewing recommended increasing Student's speech therapy to 30 minutes, twice a week. The IEP agreed to the increase in speech therapy. According to Ms. Scheiber, the entire IEP team discussed and identified modifications and adaptations to be used in all classroom settings which addressed the ADHD diagnosis and characteristics. Ms. Scheiber indicated that Student was doing grade level math work in the classroom. In September, Ms. Parke modified the quantity of homework, after being told by the Parent that Student was having difficulty completing it. Ms. Parke also allowed Student to turn in her homework late without penalty. The IEP team agreed to provide Student with 30 minutes of daily RSP assistance which provided Student with assistance in reading and language. Student also participated in the Excel program which provided intensive reading for 60 minutes per day in the general education classroom.

44. Student was receiving speech and language therapy twice a week for 30 minutes. According to the testimony of Ms. Ewing, Student was making progress on her Communication skills and Student participated successfully in her speech and language class. Ms. Parke indicated in testimony that she informally assessed all of her students in the areas of language arts, reading and spelling weekly.

Least Restrictive Environment

45. A school district, to the maximum extent possible, must educate a student with exceptional needs in the least restrictive environment (LRE). In determining whether a placement is in the LRE, the following four factors must be weighed and balanced: (1) the educational benefits available to the special education student in a regular classroom; (2) the nonacademic benefits of interaction with children who are not disabled; (3) the effect of the student's presence on the teacher and the other pupils in the regular education classroom; and (4) the cost of mainstreaming the student in a regular education classroom.

46 Student contends that the District failed to place Student in the LRE, in that,

District failed to identify Student's dyslexia, oppositional defiance disorder, generalized anxiety disorder and developmental motor coordination disorder.

47. Student's placement in the District was at her local school consisting of 87 percent of the time in general education and 13 percent of the time in special education as agreed to by the August 17, 2005 IEP team. There was no discussion by any IEP team member of a more restricted environment. According to the testimony of Ms. Parke, Ms. Scheiber and Ms. Ewing, Student got along well with other pupils and the teachers. District's placement of Student at Imperial allowed the Student to interact with her typically developing peers which benefit her academically. Interacting with typically developing peers also benefits the Student socially. The September 12, 2004 report of Drs. Wong and Wiest did not mention or recommend placement in a nonpublic school. There was no testimony regarding the distance from Student's home to Prentice. There was no evidence to suggest that Student's inclusion with non-disabled peers would distract students or teachers.

48. The District offered a program and services that were designed to meet Student's unique needs, in the LRE.

Clear Written Offer of Placement

49. In developing an IEP for a student with exceptional needs, a school district must set forth in the IEP a statement of the special education and related services and supplementary aids and services that the district will provide to the student.

50. Student contends that the August 17, 2005 IEP did not constitute a formal written offer that creates a clear record. Specifically, Student contends that this IEP failed to specify methodologies and therapies, failed to define the nature of speech and language services in a small group, failed to specify the amount of "extra time" Student would have on tests, and used vague terms such as "RSP."

51. The August 17, 2005 IEP offered Student a placement in RSP for 30 minutes daily, speech and language services for 30 minutes twice per week in a small group, and

100 minutes of physical education each week. Student's Mother was present for this IEP and consented to the IEP document generated from this meeting. Ms. Parke testified that Mother was in weekly contact with her regarding Student's academic progress. Ms. Parke indicated that Mother frequently asked questions about Student. There was no testimony from either Mother or Father indicating that they had questions that went unanswered about the August 17, 2005 IEP.

52. The August 17, 2005 IEP contained an appropriate and understandable statement of the special education and related services that the District offered Student as a child with exceptional needs.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Petitioner has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA-procedural and substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 20 [102 S.Ct. 3032] (*Rowley*)). Second, the court must assess whether the program developed through those procedures was designed to meet the child's unique needs, reasonably calculated to

enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* at pp. 206-207.)

4. The intent of the IDEA is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Rowley, supra*, 458 U.S. at p. 192.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp.197, 200; *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F. 2d 1307, 1314 (*Gregory K.*)). A school district is required to provide an education that confers some educational benefit upon the child. (*Rowley, supra*, 458 U.S. at p. 200.)

5. When a pupil moves during a school year into a new school district that is not part of the same Special Education Local Plan Area (SELPA), the new school district must provide the student with FAPE, including services which are comparable to those in his previous district's IEP for the first 30 days of attendance in the new district. During those first 30 days, the new district must either adopt the old IEP or develop, adopt, and implement a new IEP that consistent with federal and state special education law. (Ed. Code, § 56325, subd. (a)(1).)

6. Federal law allows an IEP team to rely on the results of the initial or most recent evaluation of the child when developing and IEP. (34 C.F.R. § 300.346 (a)(1)(ii) (2003).)

7. An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414 (d)(1)(A)(i).) An annual IEP must also contain a statement of measurable annual goals designed to : (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the

pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414 (d)(1)(A)(iii).) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*W.G.*)). The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

8. The Ninth Circuit Court of Appeals 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. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

9. To determine whether the District offered student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's proposed program. (*Gregory K., supra*, 811 F.2d at p.1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if her parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

10. 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 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)(ii); see *W.G.*, *supra*, 960 F.2d at p. 1484.)

11. A disabled child's IEP must be tailored to the unique education needs of that particular child who, by reason of disability, needs special education and related services. (*Heatherv. State of Wisconsin* (1997) 125 F.3d 1045.)

12. A pupil must be assessed in all areas related to his or her suspected disability. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e), (f).)

13. School districts are required to provide each special education student with a program in the least restrictive environment, 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 aides and services could not be achieved satisfactorily. To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550 (b) 2003); Ed. Code, § 56031.) In *Sacramento City Unified School District v. Rachel H.* (9th Cir.1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class, (2) the nonacademic benefits to the child of such placement, (3) the effect the disabled child will have on the teacher and children in the regular class, and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child the district's proposed setting.

14. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced

services that the district failed to provide. (20 U.S.C. § 1412 (a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit.

DETERMINATION OF ISSUES

ISSUE 1): DID ORANGE UNIFIED SCHOOL DISTRICT (OUSD) FAIL TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY AND FAIL TO CONDUCT APPROPRIATE ASSESSMENTS DURING THE 2005-2006 SCHOOL YEAR?

15. Based upon Factual Findings 1-17, and Legal Conclusions 1, 2, 3, 4, 5, 6 and 12, the Student did not establish that the District denied her a FAPE on this basis.

ISSUE 2(A): DID OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO "OFFER" A COMPARABLE INTERIM PLACEMENT?

16. Based on Factual Findings 1-5, and 18-22 and Legal Conclusions 1, 2, 3, 4 and 5, the Student did not establish that the District denied her a FAPE on this basis.

ISSUE 2(B): DID OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO EITHER ADOPT OR CREATE A NEW PROGRAM WITHIN 30 DAYS?

17. Based on Factual Findings 1-5, 23-26 and Legal Conclusions 1, 2, 3, 4, 5 and 6, the Student did not establish that District denied her a FAPE on this basis.

ISSUE 2(C): DID OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO DEVELOP APPROPRIATE, OBJECTIVE AND MEASURABLE GOALS IN ALL AREAS OF SUSPECTED DISABILITY?

18. Based on Factual Findings 1-17 and 31-41 and Legal Conclusions 1, 2, 3, 4, 6, 7, 8, 12 and 13, the Student did not establish that the District denied her a FAPE on this

basis.

ISSUE 2(D): DID OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO FORMULATE AN INDIVIDUALIZED EDUCATION PROGRAM (IEP) THAT SHOWS A DIRECT RELATIONSHIP BETWEEN STUDENT'S PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE, THE GOALS AND OBJECTIVES, AND THE SPECIFIC EDUCATIONAL SERVICES TO BE PROVIDED TO STUDENT?

19. Based on Factual Findings 1-5, and 18-44 and Legal Conclusions 1, 2, 3, 4, 6, 7, 8, 9, and 11, the Student did not establish that the District denied her a FAPE on this basis.

ISSUE 2(E): DID THE OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO "OFFER" OR "PROVIDE" STUDENT WITH AN APPROPRIATE PLACEMENT, SERVICES, AND SUPPORTS IN THE LEAST RESTRICTIVE ENVIRONMENT (LRE)?

20. Based on Factual Findings 1-5 and 45-48 and Legal Conclusions 1, 2, 3, 4, and 13, the Student did not establish that that the District denied her a FAPE on this basis.

ISSUE 1(G): DID OUSD DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2005-2006 SCHOOL YEAR BY FAILING TO MAKE A CLEAR, WRITTEN IEP OFFER?

21. Based on Factual Findings 1-5 and 49-52, and Legal Conclusions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, the Student did not establish that the District denied her a FAPE on this basis.

ORDER

All of Student's claims for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the

extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues heard.

RIGHT TO APPEAL 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 the receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 26, 2007

A handwritten signature in cursive script that reads "Jacqueline Jones".

JACQUELINE JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division