

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008120309

DECISION

Administrative Law Judge (ALJ) Susan Ruff, Office of Administrative Hearings (OAH), State of California, heard this matter in Murrieta, California, on February 18 and 19, 2009.

Ellen Dowd, Esq., represented Student and his parents. There was no appearance by Student or his parents during the hearing.¹

Jack Clarke, Jr., Esq., represented the Murrieta Valley Unified School District (District). Zhanna Preston, Director of Special Education for the District, also appeared on behalf of the District.

¹ Student's counsel explained during the hearing that Student's father had intended to appear at the hearing, but due to his work schedule he was unable to do so. Counsel represented that she had authority to proceed in the absence of her clients.

Student filed his request for a due process hearing on December 5, 2008. On January 22, 2009, OAH granted the parties' request for a continuance of the case. The case was taken under submission at the close of evidence on February 19, 2009.²

ISSUES

The issues for this hearing were those set forth in Student's due process hearing request, as clarified in Student's prehearing conference statement filed on February 5, 2009, and further clarified during the telephonic prehearing conference held on February 10, 2009:

1. Did the District fail to offer and provide a free appropriate public education (FAPE) for the 2006-2007 school year, beginning December 13, 2006, by violating Education Code section 56341, subdivision (a), by:
 - Circumventing the individualized education program (IEP) process and not allowing parent to meaningfully participate in the development of an IEP;
 - Placing Student after December 12, 2006, in a nonpublic agency (NPA) placement through a "settlement agreement" rather than an IEP, when no due process complaint had been filed, thereby failing to provide Notice of Procedural Safeguards, and without an IEP team meeting agreeing to this

² The parties requested and received leave to file written closing argument, and it was decided during the hearing that the due date for the written closing argument would not affect the due date for this Decision. For purposes of maintaining a clear record, Student's written closing argument has been marked for identification as Exhibit T and the District's written closing argument is marked for identification as Exhibit 14. The District's exhibit binder originally contained a different document that had been marked as Exhibit 14, but that document was withdrawn by the District during the hearing.

placement, without a meeting of a legally-formed IEP team, and without an IEP document reflecting this;

- Sending Petitioner to an NPA placement without written goals to inform tutors of their specific responsibilities?³

2. Did the District fail to provide a FAPE and/or violate the Individuals with Disabilities Education Act (IDEA) between August 3, 2007, and November 7, 2008, by failing to provide one-to-one educational therapy at Big Springs Murrieta, two 50-minute sessions per day, which would have been stay put had it been written in an individualized education program (IEP) rather than a “settlement agreement?”⁴

CONTENTIONS OF THE PARTIES

This is the second due process hearing request filed by Student against the District based on events that occurred between October 2006 and May 2007. In OAH case number N2007080147, Student contended that the District had violated a promise made in October 2006, to place Student in a nonpublic school known as Big Springs School after Big Springs determined he was ready for placement in May 2007. Student also contended that the District predetermined Student’s placement in the May 2007 IEP meeting.

³ Student’s due process hearing request and prehearing conference statement originally contained two additional sub-issues as part of Issue One, but Student withdrew those issues in Student’s written closing argument.

⁴ In its written closing argument, the District contended that Student’s issues had been further narrowed by discussion during the hearing, but the District is mistaken in that regard. The discussion during hearing was intended to help clarify the second of Student’s issues; it was not intended to foreclose Student’s remaining issues.

On October 19, 2007, ALJ Darrell Lepkowsky of OAH issued a decision in that case, finding in favor of the District on both issues (Lepkowsky Decision). Student appealed that decision to federal court. On October 24, 2008, United States District Court Judge A. Howard Matz, in case number SACV 07-1586 AHM (OPx) (Matz Decision), upheld the Lepkowsky Decision.

Student's current case is based on a settlement agreement signed by Student's parents on December 12, 2006. In that agreement, the parties agreed that the District would fund certain NPA educational services for Student at Big Springs until the summer of 2007.⁵ Student contends that the District entered into that settlement agreement in order to circumvent the IEP process and thereby denied Student and his parents various procedural protections contained in state and federal law. Student also contends that the Big Springs services in the settlement agreement should have been Student's "stay put" placement during the pendency of OAH case number N2007080147 and United States District Court case number SACV 07-1586 AHM (OPx), and that the District's failure to provide those services as "stay put" violated IDEA.

The District contends that the District's actions in entering into the settlement agreement separate from the IEP process were proper, that there was no denial of FAPE, and that the settlement agreement terms were never intended to become, and did not in fact become, Student's "stay put" placement.

FACTUAL FINDINGS

1. Student is a 12-year-old boy who is eligible for special education and related services under the category of speech and language impairment. Student's parents reside within the jurisdiction of the District.

⁵ Big Springs offers NPA educational services in addition to its nonpublic school.

2. On October 17, 2006, October 24, 2006, and November 2, 2006, Student's IEP team met to discuss Student's placement and services for the 2006-2007 school year. On November 2, 2006, the District made an offer of placement and services for Student. The parents did not agree to that offer. Factual Findings regarding the details of these IEP meetings and the November 2, 2006 offer were made in the Lepkowsky Decision in OAH case number N2007080147, and the Matz Decision in United States District Court case number SACV 07-1586 AHM (OPx). Official notice is taken of those findings. (See Gov. Code, §11515; Evid. Code, §§ 451, 452.) In particular, the Lepkowsky Decision found that at "the October 24, 2006 IEP team meeting, Student's parents initialed their acknowledgment that they had been advised of their rights and previously been given a copy of the Notice of Procedural Safeguards."

3. As determined by ALJ Lepkowsky and Judge Matz, the District's November 2, 2006 offer consisted of a special day class (SDC) at Rail Ranch Elementary School five days a week for a full class day, with one-to-one tutoring offered two times a week for one hour each session. The offer also included two 30-minute sessions a week of speech therapy in a small group setting, and one 30-minute session per week of collaborative speech therapy.⁶ The Lepkowsky Decision also found that, at the November 2, 2006 IEP meeting, "Student's parents agreed that the draft goals were appropriate for a District placement."

4. During the same time as these IEP meetings were occurring, the parties were also discussing a possible settlement because of the parties' disagreement about the full-day Rail Ranch SDC placement and disagreement about whether educational

⁶ At no time in this proceeding has Student contended that the placement and services in the District's November 2, 2006 proposal were insufficient to provide Student with a FAPE.

services from Big Springs were necessary for Student. In October 2006, Zhanna Preston, the District's Director of Special Education, had an informal conversation with Student's advocate Helen Robinson about the possibility of settlement. On October 25, 2006, Student's mother sent an email to Preston. In the email, she stated that, after speaking to Robinson, "we learned that Big Springs may not be offered to [Student]. Is this accurate? Will the district be offering a settlement agreement for Big Springs services or not."

5. Preston replied by email on the same day, stating:

We are interested in funding Big Springs Murrieta therapy sessions in a settlement agreement. However, we need to agree on terms. [Mother], I got your phone message with the same question. Please consider this email as a response to both.

Stephen and I are working on the Settlement Agreement and will be sending it to you shortly – probably after the IEP is completed.

Re: your question about the IEP offer of Big Springs: I do not know if the district IEP team members will agree or not agree to this placement. The IEP will make that determination. I will deal with the settlement portion of the discussion. In general: the program specialists and the school site IEP members make offers of FAPE through the IEP and I deal with the settlement agreements.

6. On December 12, 2006, after the District's November 2, 2006 offer of FAPE had been made by the District and rejected by the parents, Student's parents and their advocate signed a settlement agreement with the District. Preston and Guy Romero, the District's Assistant Superintendent of Educational Services, signed the agreement on behalf of the District on December 8, 2006, and December 11, 2006, respectively. No due process proceeding had been filed by either party at the time the settlement agreement was signed.

7. The settlement agreement recited that its purpose was "to compromise and resolve educational claims that exist between Parents and the District." The agreement went on to state that neither party admitted liability and that the agreement "is entered into solely as a compromise and to avoid costs typically associated with litigation."

8. The terms of the settlement agreement included, among other things, the following:

Big Springs educational therapy: District will fund the Student's attendance of Big Springs School two fifty minute sessions five days a week based on Murrieta Valley USD student calendar as soon as Student starts Big Springs school after this Agreement is signed until June 15 2007 (sic). District will fund the placement upon receipt of appropriate documentation such as proof of attendance and invoices.

Placement in SDC for partial day. Student will enroll and attend the SDC class at Rail Ranch Elementary School five days a week for part of the school day (time around therapy

sessions excluding travel time to & from Big Springs and RRES).

...

Extended School Year. District will fund Student to attend the Big Springs ESY program for 20 days per the district ESY calendar during the summer of 2007.

A meeting to discuss placement for 2007-08 school year.

An IEP meeting will be held prior to the end of May 2007 to discuss placement for 2007-08 school year beginning in August 2007.

9. The settlement agreement included a release of claims, a statement that the written document contained the sole and entire agreement of the parties, and a statement that the agreement "is entered pursuant to the laws of the State of California and shall be interpreted pursuant to those laws."

10. Student does not contend that the District failed to comply with the terms of this settlement agreement. There was no evidence presented at hearing indicating that the District failed to comply.

11. On December 12, 2006, the same day they signed the settlement agreement, Student's parents signed an addendum to the November 2, 2006 IEP, agreeing to the IEP terms except for the following: a) They did not agree to a full day placement in the Rail Ranch SDC. They believed that Student needed one-to-one therapy from Big Springs; b) They did not agree to the level or delivery of speech-language services proposed. They believed he needed additional one-to-one speech-language therapy; and c) They did not agree to the academic goals and believed that Big Springs should be involved in developing the goals "[s]ince Big Springs will now be

addressing the areas of reading, writing and math....” They also added a comment/clarification regarding the purpose of Student’s one-to-one after school tutoring.

12. The December 12, 2006 IEP was an addendum to the November 2, 2006 IEP which contained 14 goals covering the areas of:

- a) mathematical reasoning (choosing the correct operation in a mathematical word problem and solving the problem);
- b) written expression – sentence structure (sorting confusing/incorrect sentences into the correct word order);
- c) written expression – organization and focus (independently producing a graphic organizer or outline of ideas in the pre-writing process);
- d) written expression – spelling (90% accuracy in spelling list of words of certain types);
- e) reading decoding and word recognition (decoding list of multisyllabic real and nonsense words);
- f) reading comprehension (answering comprehension questions from second grade narrative text);
- g) reading comprehension (answering comprehension questions from third grade “expository reading passage”);
- h) reading vocabulary (using sentence context to determine the meaning of unknown words);
- i) mathematics – number sense (correctly stating place values of digits up to 10,000);
- j) math – number sense (solving three digit subtraction problems with regrouping);

- k) communication – receptive/expressive language (explaining and using common idiomatic expressions);
- l) auditory comprehension (following multi-step commands);
- m) communication – expressive language (using descriptors such as adjectives, adverbs, and prepositional phrases to describe objects or pictures); and
- n) communication – expressive language (answering inferential questions about sentence passages presented orally with visual supports).

13. Each of these 14 goals included a series of boxes to check listing the “person(s) responsible” for the goal. According to the boxes checked for goals number one through 10, the person(s) responsible included the general education teacher, special education teacher, and “Other: student/parent.” For goals 11 through 14, the person responsible was listed as the “Specialist: SLP” (the speech-language pathologist). Although the Big Springs staff was not mentioned among the “person(s) responsible” in these goals, a representative of Big Springs participated in one or more of the fall 2006 IEP meetings, and the District staff considered the Big Springs input when formulating these goals.

14. After the settlement agreement, Student began attending Big Springs as called for in the agreement. The staff at Big Springs drafted some proposed goals and objectives which were subsequently provided to Student’s IEP team.

15. Most fourth and fifth grade pupils who attend the Rail Ranch SDC are “mainstreamed” (taught in a general education classroom) for social studies and science. After the settlement agreement was signed and Student began attending the SDC class at Rail Ranch, a question arose as to whether Student would be mainstreamed for these two classes. Student’s mother had concerns about Student being mainstreamed for these classes.

16. On February 7, 2007, Stephen Diephouse, a program specialist for the District, sent an email to Student's mother proposing an IEP meeting to discuss goals and objectives proposed by Big Springs for Student, clarification of what activities Student could participate in during his time at Rail Ranch, and the level of service for speech therapy. The email noted that, because the parents had not agreed to the proposed speech and language services, the District was continuing to provide services in accordance with the May 2006 IEP.

17. The Diephouse email included a statement that an "IEP team meeting must be held to document this." During the hearing, Diephouse explained that he was referring to a meeting to document the three topics he proposed in his email. He did not propose an IEP meeting to document the terms of the settlement agreement.

18. The parties held an IEP meeting on April 25, 2007, to discuss the parents' concerns about spelling, social studies, science, and speech services. The IEP team adopted goals and objectives proposed by Big Springs. The District staff at the meeting believed the goals were appropriate because they could be implemented at Rail Ranch as well as Big Springs.

19. The 11 goals contained in the April 25, 2007 IEP included:

- a) improving phonological skills (deleting sounds within a word and blending sounds within word);
- b) decoding skills (encoding and decoding various syllable types in single-syllable words);
- c) understanding the value of money (counting coin combinations);
- d) comprehension skills (reading third grade text and identifying main idea of story, summarizing main points and answering comprehension questions);
- e) math calculation skills (subtracting three-digit numbers with regrouping and multiplying two-digit numbers by single digits);

- f) math application skills (identifying needed operation in a word problem and solving the problem);
- g) written language skills (constructing a basic paragraph with certain elements such as a topic sentence);
- h) categorization and general vocabulary skills (developing a "word web" for specific vocabulary terms, including the word's part of speech, salient feature, two synonyms, two antonyms, and a sentence containing the term);
- i) time and calendar skills (identifying future time up to one and one-half hours and future date up to two weeks within same calendar month);
- j) risk taking and challenges (identifying three acceptable ways to attempt a difficult task and determining Student's preferred strategy to use); and
- k) typing skills (typing 20 words per minute with 95 percent accuracy).

20. Of these 11 goals, the first 10 listed the person responsible as: "Other: Educational therapist." Goal 11 (the typing goal) listed the persons responsible as the educational therapist and the special education teacher.

21. Prior to the meeting, Meg Miller, the SDC teacher at Rail Ranch, drafted an agenda for the meeting and a document listing Student's daily schedule. The schedule included the time Student spent at Big Springs pursuant to the settlement agreement. Miller testified that the two documents were not intended to be part of the IEP document.

22. The IEP team met again on May 29, 2007. The discussions which occurred at and around that meeting were addressed in the Factual Findings made in the Lepkowsky Decision and the Matz Decision. Student's parents and the District were unable to agree upon a placement and services for the 2007-2008 school year.

23. On August 3, 2007, Student filed a due process hearing request against the District in OAH case number N2007080147.

24. The evidence does not establish what the District provided to Student as a “stay put” placement while OAH case number N2007080147 was pending. Neither party submitted any evidence regarding the actual educational placement and services Student received after the extended school year (ESY) in 2007. However, based on the testimony of Leslie Huscher, the Director of Big Springs, that she had not seen Student since May of 2007, the evidence supports a finding that no one-to-one services from Big Springs were provided to Student as “stay put” after ESY 2007.

25. On October 19, 2007, OAH issued the Lepkowsky Decision in case number N2007080147 finding in favor of the District and denying Student’s requests for relief. Student thereafter filed an action in the United States District Court to appeal the OAH decision.

26. On October 24, 2008, Judge Matz issued the Matz Decision finding in favor of the District and affirming the Lepkowsky Decision.

LEGAL CONCLUSIONS

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a 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 IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied

with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

4. The centerpiece of a child's special education program is the IEP. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592].) A district must have an IEP in effect for each special needs pupil at the beginning of each school year. (Ed. Code, § 56344, subd. (c); 34 C.F.R. § 300.323(a) (2006).) An IEP is a written document that includes statements regarding a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subds. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: 1) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); 2) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); 3) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and 4) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and districtwide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

5. There are numerous procedural requirements for development of an IEP, including requirements for certain District employees to be members of the team that

develops the IEP (Ed. Code, § 56341; 34 C.F.R. § 300.321 (2006)), a requirement for parental participation in the development of the IEP (Ed. Code, § 56341.5; 34 C.F.R. § 300.322 (2006)), and a requirement that the parents agree to the IEP before any services are provided to a pupil in accordance with that IEP. (Ed. Code, § 56346, subd. (c), (d); 34 C.F.R. § 300.300(b) (2006).) A parent must also receive written notice of IDEA procedural safeguards at least once a year. (Ed. Code, § 56301, subd. (d)(2); 34 C.F.R. § 300.504 (2006).)

6. In addition, the law provides that a parent may choose to accept only a portion of the proposed IEP. In that event, only the portions of the IEP to which the parent agreed become effective for the pupil. (Ed. Code, § 56346, subd. (e).) In those circumstances, if there was a prior IEP in effect, the remaining goals, placement and services would stay the same as they were in the prior IEP. If a district believes that the portions of the IEP to which the parent did not consent are required to provide the child with a FAPE, "a due process hearing shall be initiated" in accordance with federal law. (Ed. Code, § 56346, subd. (f).)

DID THE DISTRICT FAIL TO OFFER AND PROVIDE A FAPE FOR THE 2006-2007 SCHOOL YEAR, BEGINNING DECEMBER 13, 2006, BY VIOLATING EDUCATION CODE SECTION 56341 BY CIRCUMVENTING THE IEP PROCESS AND NOT ALLOWING PARENT TO MEANINGFULLY PARTICIPATE IN THE DEVELOPMENT OF AN IEP?

7. Education Code section 56341 provides, in part: "(a) Each meeting to develop, review, or revise the individualized education program of an individual with exceptional needs shall be conducted by an individualized education program team." The section goes on to describe the individuals who must be included as part of the team.

8. Student believes the District violated IDEA by using a settlement agreement as a vehicle to provide the Big Springs educational services to Student when

no due process complaint had been filed instead of offering those services through the IEP process. Student contends that the District did this to circumvent the IEP process, and that the failure to offer those services through the IEP process prevented the parents from meaningfully participating in the development of an IEP.

9. In order to consider Student's contentions, it is necessary to review the laws and policies underlying settlement agreements in IDEA cases.

10. There are strong public policies favoring settlements in special education cases. The IEP process is intended to be nonadversarial. (Ed. Code, § 56341.1, subd. (h).) When disputes about a child's educational program arise, both federal and state law contain numerous mechanisms designed to assist parents and districts to settle their differences without need for an administrative hearing. When a due process hearing request is filed by a pupil's parents, the law calls for an informal resolution session to assist the parties with settling their differences. (20 U.S.C. § 1415(f)(1)(B); Ed. Code, § 56501.5.) If the parties are unable to resolve the matter in resolution, there is a mediation process prior to the hearing. (20 U.S.C. § 1415(e); Ed. Code, §§ 56501, subd. (b)(2); 56503). Even after a due process hearing has begun, the parties are permitted to stop the proceeding to engage in mediation. (Ed. Code, § 56501, subd. (b)(2).)

11. California law also provides for mediation *before* a due process hearing request is filed. (Ed. Code, § 56500.3.) This type of mediation is intended to be an informal procedure, conducted without attorneys being present to negotiate the terms. (Ed. Code, § 56500.3, subd. (a).) Parties are also permitted to settle their differences even before this mediation session is held. (Ed. Code, § 56500.3, subd. (j)(1).)

12. California law encourages informal settlements prior to the filing of administrative proceedings. For example, California Government Code section 11415.60, permits California public agencies to settle cases "before or after issuance of an agency

pleading” except in the case of an agency action to discipline a professional or occupational license. (Gov. Code, § 11415.60, subd. (b).)

13. Student has cited to no law that prevents a district from pursuing settlement concurrently with, but separately from the IEP process. In fact, given the federal and state emphasis on resolution of differences between parents and districts, it would seem that the law would *favor* such an informal resolution when the parents and the district are aware that they hold major differences of opinion as to the proper program for a child.

14. In the instant case, as discussed in Factual Findings 1 – 11, in the fall of 2006, Student’s parents and the District disagreed about the District’s offer of a full-day SDC placement in a District school; the parents preferred Big Springs NPA services. Although the IEP process was continuing, both sides were looking to a possible settlement agreement to resolve their differences in a way that would prevent the need for a formal hearing. The evidence at hearing indicated that Student’s parents actively sought a settlement when the District presented that as a possibility. For example, as noted above in Factual Finding 4, on October 25, 2006, Student’s mother sent an email to Preston asking, “Will the District be offering a settlement agreement for Big Springs services or not.” The educational advocate representing Student’s parents had a conversation with Preston about settlement.

15. If the evidence showed that no IEP meetings were held at all, Student’s position that the IEP process was “circumvented” might have more merit. (See, e.g., *San Miguel Joint Union School District v. Parents on Behalf of Student* (2008) OAH case numbers 2008010224 and 2008030743 (*San Miguel Case*), in which a settlement was signed, but no IEP was held for over a year.) However, that was not what happened here. There was an ongoing IEP process, and an offer of FAPE made on November 2, 2006. Student’s parents and their advocate participated in the IEP process. Prior to entering

the settlement agreement in December, Student's parents had a full opportunity to challenge that November 2, 2006 offer through a due process proceeding, but did not do so. Instead, as discussed above in Factual Findings 4 – 11, they compromised with the District by signing a settlement which provided some of the NPA services they sought in exchange for waiving their right to file for due process based on the November IEP offer. They agreed to portions of the District's proposed IEP, but still objected to the full-day SDC, the goals, and the speech-language services.

16. The evidence does not support a finding that the District used a settlement to circumvent the IEP process. Instead, the evidence shows that the settlement process was used for precisely what the law envisioned – to compromise and resolve a disputed claim in a way that made it unnecessary for either party to seek a due process hearing. The parents meaningfully participated in both the IEP process and the settlement process. There was no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BY PLACING STUDENT AFTER DECEMBER 12, 2006, IN AN NPA PLACEMENT THROUGH A "SETTLEMENT AGREEMENT" RATHER THAN AN IEP, WHEN NO DUE PROCESS COMPLAINT HAD BEEN FILED, THEREBY FAILING TO PROVIDE NOTICE OF PROCEDURAL SAFEGUARDS, AND WITHOUT AN IEP TEAM MEETING AGREEING TO THIS PLACEMENT, WITHOUT A MEETING OF A LEGALLY-FORMED IEP TEAM, AND WITHOUT AN IEP DOCUMENT REFLECTING THIS?

17. As stated above in Legal Conclusions 2 – 16, there was no violation by the District because the District offered the Big Springs services through a settlement agreement rather than an IEP. Student has cited no authority which requires a district to use the IEP process instead of a settlement to offer NPA services or that requires a district to file for due process before settling a disagreement. Likewise, there is no authority requiring a full IEP team to negotiate a settlement or requiring that the parents receive a copy of the Notice of Procedural Safeguards before signing a settlement. Those requirements are part of the IEP process, not the settlement process.

Education Code section 56301, subdivision (d)(2), requires the Notice of Procedural Safeguards to be given at least once a year and upon the filing of a due process case or compliance complaint, not prior to settlement talks. As discussed in Factual Finding 2 above, the parents were given a copy of the Notice of Procedural Safeguards in October 2006 as part of the IEP process.

18. However, Student raises another point which merits attention – even if there was nothing wrong with entering into the settlement agreement, was the District required to follow up that settlement agreement by incorporating its terms into Student’s IEP? Student contends that the District changed Student’s placement through the settlement agreement so the placement listed in Student’s IEP was no longer accurate. Student argues that anyone looking at the IEP would not know where Student was during the day, because Student’s educational services at Big Springs were never mentioned in the IEP.

19. The District, however, maintains that there is nothing in IDEA or the corresponding California law which requires a school district to memorialize a settlement agreement in an IEP. To the contrary, the United States Department of Education (DOE), in its commentary to the 2006 amendments to the federal regulations, indicated there was no such requirement.

20. When discussing the proposed amendments to 34 Code of Federal Regulations part 300.510, the DOE stated:

Comment. One commenter asked whether decisions agreed to in resolution meetings supersede previous IEP decisions and whether the IEP Team must reconvene to sanction the decisions made in a resolution meeting. One commenter recommended that if the resolution agreement includes IEP-related matters, the agreement must state that the LEA will

convene an IEP Team meeting within a specific number of days to revise the IEP accordingly or develop an IEP addendum, as appropriate.

Discussion: Unless the agreement specifically requires that the IEP Team reconvene, there is nothing in the Act or these regulations that requires the IEP Team to reconvene following a resolution agreement that includes IEP-related matters. We do not believe that it is necessary or appropriate to anticipate the elements of a particular settlement agreement, which may supersede an existing IEP. The contents of settlement agreements are left to the parties who execute a settlement agreement.

(71 Fed.Reg. 46703 (August 14, 2006).)

21. Although that discussion involved settlements that resulted from resolution sessions, the same reasoning would apply to all settlement agreements that change the terms of an IEP. Student cites to no statute or regulation that specifically requires a settlement agreement to be memorialized in an IEP.

22. In Student's written closing argument, Student relies upon the *San Miguel Case* which found a procedural violation of FAPE when a school district based an educational program on a settlement agreement instead of an IEP. The ALJ determined that the district should have scheduled an IEP meeting to incorporate the settlement agreement because the agreement "could not stand in the place of an IEP." (*San Miguel Case, supra*, at p. 8.) However, the *San Miguel Case* is factually distinguishable from the instant case. In the *San Miguel Case*, there was no IEP process. The settlement agreement "developed a new program for [s]tudent's re-entry into the [d]istrict, but did

not contain all of the required components of an IEP.” There were no present levels of performance, no goals and objectives, and no statement as to how the child’s progress toward those goals would be measured. (*Ibid.*) The district did not hold an IEP at all for the pupil from the time the settlement was signed until approximately a year and a half later.

23. In the instant case, by contrast, Student had already been operating under an IEP at the time of the fall 2006 IEP team meetings.⁷ As discussed in Factual Findings 2 –21, Student’s IEP team met three times in October and November 2006 to determine present levels of performance, develop goals and objectives, and decide upon an appropriate placement for Student. The District made an offer of FAPE during the November 2, 2006 IEP meeting. The parents disagreed with part of that offer and the parties settled. There was a full IEP process with procedural protections for the parents. When questions arose later as to parts of Student’s program, an IEP meeting was held in April 2007.

24. In Student’s written closing argument, Student contends that District Program Specialist Stephen Diephouse believed that an IEP meeting was necessary to “document the placement made in the Settlement Agreement.” However, that interpretation of Diephouse’s testimony is mistaken. As set forth in Factual Findings 16 – 17 above, although Mr. Diephouse’s February 7, 2007 email proposed an IEP meeting, Diephouse clarified during his testimony that he thought a meeting was necessary to discuss three things: the parents’ concerns regarding speech and language, the Big Springs goals, and whether Student would be mainstreamed for part of his time in the

⁷ Although the IEP in effect prior to December 12, 2006, was not placed into evidence during the hearing, reference to a May 2006 IEP was made in the email correspondence of the parties, as noted in Factual Finding 16.

Rail Ranch SDC. Diephouse never proposed an IEP meeting to document the settlement agreement.

25. In light of the commentary by the DOE discussed in Legal Conclusion 20 above, there is no basis for finding a FAPE violation by the District. The District was permitted to enter into a settlement without filing for due process, and was not required to memorialize that settlement in an IEP. There was no procedural violation by the District, whether or not Student's special education program changed as a result of the settlement agreement. Likewise, there was no FAPE violation by the District in changing Student's program through the settlement process, even though the District did not provide the parents with a Notice of Procedural Safeguards as part of the settlement process and even though no IEP meeting was held as part of the settlement process.⁸

DID THE DISTRICT DENY STUDENT A FAPE BY SENDING STUDENT TO AN NPA PLACEMENT WITHOUT WRITTEN GOALS TO INFORM THE TUTORS OF THEIR SPECIFIC RESPONSIBILITIES?

26. As stated above in Factual Findings 11 – 13, the December 12, 2006 IEP addendum signed by the parents contained 14 goals incorporated from the District's November 2, 2006 offer of FAPE. Student does not contend that these goals failed to address Student's areas of need. As set forth in Factual Findings 3 and 11, at the November 2006 IEP meeting Student's parents had agreed that the goals were appropriate for a District placement. Their subsequent concern with the goals involved the lack of Big Springs' involvement in drafting the goals. Student contends that the goals were defective because they failed to mention Big Springs' staff in the "person(s) responsible box" for each goal.

⁸ The more difficult question regarding the effect of that settlement agreement on the District's obligation to provide "stay put" is dealt with below.

27. As stated above in Legal Conclusion 4, an IEP must contain a “statement of measurable annual goals, including academic and functional goals” designed to:

(A) meet needs of the individual that result from the disability of the individual to enable the pupil to be involved in and make progress in the general education curriculum.

(B) Meet each of the other educational needs of the pupil that result from the disability of the individual.

(Ed. Code, § 56345, subd. (a)(2); 34 C.F.R. § 300.320(a) (2006).)

28. An IEP must also contain a description “of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided.” (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006).)

29. The 14 goals in the December 12 IEP addendum to the November 2, 2006 IEP were clearly stated and easy to follow. They could have been implemented in either a classroom or a one-to-one tutoring session. Each goal listed the area of academic need the goal was designed to address. It should have been obvious to any individual working with Student – whether teacher or one-to-one tutor – which goal(s) applied to a given academic area. Indeed, as can be determined by comparing the list of goals in Factual Finding 12 with those in Factual Finding 19, many of the goals proposed by Big Springs and incorporated into the April 2007 IEP were similar to the goals from the November 2006 IEP. The failure to amend the December 2006 IEP to add the words “educational therapist” to each box under “person(s) responsible” for a goal should not have presented any confusion to the Big Springs tutors working with Student. To find otherwise would exalt form over substance. There was no procedural violation.

30. However, even if there was a procedural violation related to the goals, that procedural violation was not sufficient to constitute a denial of FAPE.

31. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

32. There is no indication that Student lost educational benefit or was denied a FAPE due to any problem with these goals. Leslie Huscher, during her testimony, described the educational progress Student made while receiving the Big Springs educational services. Likewise, there is no indication of lack of parental participation. The parents participated in all the IEP meetings that discussed goals. There was no denial of FAPE.

DID THE DISTRICT FAIL TO PROVIDE A FAPE AND/OR VIOLATE THE IDEA BETWEEN AUGUST 3, 2007, AND NOVEMBER 7, 2008, BY FAILING TO PROVIDE ONE-TO-ONE EDUCATIONAL THERAPY AT BIG SPRINGS MURRIETA, TWO 50-MINUTE SESSIONS PER DAY, WHICH WOULD HAVE BEEN STAY PUT HAD IT BEEN WRITTEN IN AN IEP RATHER THAN A "SETTLEMENT AGREEMENT?"

33. Student's final issue involves whether the District denied Student a FAPE by failing to provide Student with the Big Springs services called for in the settlement agreement as "stay put" while OAH case number N2007080147 and United States District Court case number SACV 07-1586 AHM (OPx) were pending.

34. The concept of "stay put" arises under both federal and state law. According to IDEA: "during the pendency of any proceedings conducted pursuant to

this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.” (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006).)

35. California law has a corresponding provision:

Pursuant to Section 300.518(a) of Title 34 of the Code of Federal Regulations, during the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement, except as provided in Section 300.533 of Title 34 of the Code of Federal Regulations, unless the public agency and the parent or guardian agree otherwise.

(Ed. Code, § 56505, subd. (d).)

36. Stay put is not discretionary for a school district; it is a requirement. Absent an exception created by law, a court order, or an agreement with a parent, the child must remain in the child’s present placement. (See, e.g., *Honig v. Doe* (1988) 484 U.S. 305, 323 [108 S.Ct. 592] (stay put language “unequivocal”).)

37. The purpose of the stay put provision is to prevent a district from unilaterally changing a pupil’s educational placement without the parents’ consent. (*Honig v. Doe, supra*, 484 U.S. at p. 323.) Court’s have compared it to an automatic statutory injunction, similar to the automatic stay in a bankruptcy case. (*Casey K. v. St. Anne Community High School District No. 302* (7th Cir. 2005) 400 F.3d 508, 511 (*Casey K.*)) Stay put is designed to maintain the status quo while a case is pending. (*Thomas v.*

Cincinnati Board of Education (6th Cir. 1990) 918 F.2d 618, 625 (*Thomas*); *Van Scoy v. San Luis Coastal Unified School District* (C.D. Cal. 2005), 353 F.Supp.2d 1083, 1086.)

38. The difficulty in a stay put case is often determining what the “then-current” or present placement of the child is. (See, e.g., *Van Scoy v. San Luis Coastal Unified School District*, *supra*, 353 F.Supp.2d 1083; *Termine v. William S. Hart Union High School District* (C.D.Cal. 2002) 219 F.Supp.2d 1049, 1056.) Typically, the then-current placement for stay put purposes is the last agreed-upon and implemented IEP placement. (*Ibid.*) However, the stay put law does not use the term “IEP” placement, just the term “then-current” placement. Therefore, the appropriate stay put placement is not always the same as that contained in an IEP. Under certain circumstances, a different stay put placement may be necessary to maintain the status quo. For example, in *Thomas*, neither the pupil’s original IEP nor its revision had actually been implemented, so the court looked to the services the pupil actually had been receiving to determine what the stay put would be. (*Thomas, supra*, 918 F.2d at pp. 625-626.)

39. In the instant case, as discussed in Factual Findings 8 –14, there is no dispute that the settlement agreement altered where Student was physically located during his school day from the date the settlement was signed until June 15, 2007. Instead of the full-day SDC placement at Rail Ranch called for in the IEP, Student received one-to-one tutoring services from an “educational therapist” at Big Springs for part of his school day. After June 15, 2007, when the one-to-one services ended, Student received extended school year services from Big Springs.

40. While the physical effect of that settlement agreement is unquestioned, the issue for this Decision is what the *legal* effect of that settlement agreement was for purposes of determining Student’s stay put placement.

41. One possibility is that the settlement agreement became stay put as a matter of law no matter what the terms of the agreement or the intent of the parties

might be. It could be argued that a settlement agreement which changes a pupil's IEP services and the location of those services might be a de facto amendment to an IEP. As a de facto amendment to the IEP, those services might become the status quo and the pupil's stay put as a matter of law. However, a review of the law does not support this line of reasoning. Instead, the law indicates that the stay put effect of a settlement depends on the terms of the settlement and agreement of the parties.

42. As discussed in Legal Conclusions 17 – 25, above, the law does not require the parties to hold an IEP meeting to incorporate or memorialize the terms of a settlement. Absent unusual circumstances (such as the failure to engage in the IEP process at all), it is up to the parties to decide as part of the settlement whether a follow-up IEP meeting is required to incorporate the settlement into the IEP. This strongly implies that the terms of the settlement agreement govern the effect of that agreement, including any stay put effect.

43. Neither party has cited any statutory or case authority holding that a settlement agreement becomes stay put as a matter of law. In the *Casey K.* decision, relied upon by Student, the majority opinion found it unnecessary to address that question, because the school district assumed "that the settlement agreement created a valid placement" at the private school. (*Casey K.*, *supra*, 400 F.3d at p. 512.) Instead, the legal issue addressed by the court in *Casey K.* involved whether a private placement decision made by an elementary school district through a settlement would be binding as stay put when the child transferred to the high school district.

44. Likewise, in the *San Miguel Case*, also relied upon by Student, the ALJ did not find that a settlement automatically became stay put as a matter of law. Instead, the ALJ found that:

Depending on the circumstances and the terms of the settlement agreement, a student's placement set forth in a

settlement agreement reached by the parties may constitute the student's current educational placement and be found to be the student's stay put placement in a subsequent dispute.

(*San Miguel Case, supra*, at p. 45.)

45. Even the language of the federal and state law seems to indicate that the parties' agreement should take precedence. Title 20 United States Code section 1415(j) provides that the district and parents can agree to a different placement as stay put besides the "then-current educational placement." California law contains similar language. (Ed. Code, § 56505, subd. (d).)

46. This determination that the stay put effect of a settlement depends on the terms of the settlement agreement also makes sense in light of practice. Special education settlement agreements often contain a term stating whether and to what extent the proposed services will constitute stay put. For example, Student's written closing argument noted that "stay put can be waived in a settlement agreement." Similarly, in the *San Miguel Case*, the parties agreed that certain provisions of the settlement "will be subject to 'stay-put'...." (*San Miguel Case, supra*, at p. 37.)

47. So it appears that, rather than automatically making the settlement terms stay put, the law looks instead to the terms of the settlement itself and what the parties intended to be stay put when they entered into the settlement. Therefore, to determine what Student's "then-current" placement was for purposes of stay put in the instant case, the next question is whether the parties intended that the settlement agreement, and in particular the one-to-one educational services at Big Springs, would become Student's stay put.⁹

⁹ There was a question raised at hearing about OAH's jurisdiction to interpret the provisions of a settlement agreement. Although OAH has limited jurisdiction in

48. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898.) In California, contracts are interpreted based on principles set forth in the Civil Code. (Civ. Code, § 1635.) Those statutory principles require a contract to be “interpreted...to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code, § 1636.) If the contractual language is clear and explicit, that language governs its interpretation. (Civ. Code, § 1638.) When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. (Civ. Code, § 1639.)

49. When examining whether a placement made in a settlement agreement becomes stay put, one of the factors the courts have considered is whether the parties intended the placement to be temporary or permanent. (See *Verhoeven v. Brunswick School Committee* (1st Cir. 1999) 207 F.3d 1.) In *Verhoeven*, for example, the court found that the settlement agreement agreed to “temporarily place P.J. at SMLC ‘only through the end of the 1997-1998 school year in June 1998.’” When the student filed a due process request in July 1998, the current educational placement was not “the recently ended SMLC placement.” (*Id.* at p. 9.) The court refused to find that SMLC placement was the pupil’s stay put placement.

50. In the instant case, the language of the settlement agreement indicates that it was intended to be a temporary placement and not stay put. The settlement agreement language provided a specific end date for the Big Springs’ services. The

enforcement of settlement agreements (see *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026), because the issue of stay put is within OAH’s jurisdiction, the determination of what the parties intended in their agreement with respect to stay put is also within OAH’s jurisdiction.

agreement did not call for an IEP meeting to adopt the settlement terms or provide that the terms of the agreement would be stay put. The agreement stated the District would “fund the placement” upon receipt of documentation such as proof of attendance and invoices. The language that the District would “fund” the placement indicates that it was a financial matter, not intended as a permanent educational placement for Student. (See *Zvi D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 908, in which the court noted that “[p]ayment and placement are two different matters.”) ¹⁰

51. Student has not met his burden of proving that the parties intended the terms of the settlement agreement to be a permanent placement or to be Student’s stay put placement in the event of a later dispute. The District did not violate the stay put protections of federal and state law, and so there was no denial of FAPE. Because there was no denial of FAPE, there is no need to address any of the remedies sought by Student in this case.

ORDER

Student’s requests for relief are denied.

¹⁰ Even if one were to go beyond the settlement language to the circumstances surrounding the signing of the settlement, there is no evidence that the one-to-one Big Springs’ services were intended to be Student’s permanent placement. As discussed in Factual Findings 3 and 9 in the Lepkowsky Decision, Big Springs recommended the one-to-one NPA services as a temporary measure to prepare Student for a full time placement at Big Springs School. Later, at the May 29, 2007 IEP, Huscher “indicated that Student was now ready for placement at Big Springs.” (Lepkowsky Decision at page 7, Factual Finding 19.)

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: The District prevailed on all issues in this case.

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 in accordance with Education Code section 56505, subdivision (k).

Dated: March 13, 2009

/s/
SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings