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

In the Matters of: STUDENT, Petitioner, v. POWAY UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2007040130
POWAY UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N 2007040694

AMENDED DECISION

Administrative Law Judge (ALJ) Darrell L. Lepkowsky, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 24, 25, 31, and June 1, 2007, at the offices of the Poway Unified School District.

Attorney Michael S. Cochrane represented Student. Student's mother was present throughout the hearing. Student testified briefly on two of the hearing days but was otherwise not present during the proceedings.

Attorney Sundee M. Johnson, Atkinson, Andelson, Loya, Ruud & Romo, appeared on behalf of the Poway Unified School District (District). Emily Shieh, Assistant Director of Special Education for the District, attended the hearing on behalf of the District for some of the hearing days. When Ms. Shieh could not be present either Teresa Kurtz, the District's

Director of Special Education, or Christy Bateman, a program specialist for the District, appeared as its representative.

Student filed a request for a due process hearing (complaint) on April 3, 2007, naming the District as respondent. The District filed a request for a due process hearing (complaint) on April 23, 2007, naming Student as respondent. On May 22, 2007, upon agreement of the parties, OAH consolidated Student and District's complaints.

At the due process hearing, the ALJ received sworn oral testimony and documentary evidence. At the conclusion of the hearing, the parties agreed that the record would remain open in order for the parties to submit post-hearing closing briefs. Both parties timely filed their briefs on June 8, 2007. The ALJ closed the record and deemed the matter submitted as of that date.[1] Student declined to waive time for a decision in these consolidated matters. Therefore, based upon the filing date of Student's complaint, the decision in this matter is due no later than June 18, 2007.

ISSUES PRESENTED[2]

Student raised the following issues for decision by the ALJ:

1. Did the District fail to implement Student's individualized education program (IEP), and therefore deny Student a free appropriate public education (FAPE) from the start of the 2005-2006 school year until Student was moved to a private school in January 2006, through the failure to provide Student with (1) an AlphaSmart, (2) a "study buddy," (3) copies of class notes, (4) a daily check of his assignment calendar, (5) with the required amount of time in his resource specialist program class during approximately the first month of school, and (6) a small, well-structured class setting?

2. Did the District fail to implement Student's IEP by failing to give Student's teachers a copy of his IEP and failing to provide quarterly reports of Student's progress on his goals and objectives?[3]

3. Did the District deny Student a FAPE by failing to revise Student's annual IEP by no later than his annual due date of October 10, 2006, and /or failing to hold Student's triennial IEP meeting by its due date of October 1, 2006?

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[1] For ease of identification, Student was designated as petitioner in these consolidated cases and the District was designated as respondent. Student's brief was marked and admitted as petitioner's exhibt 33. The District's brief was marked and admitted as respondent's exhibit 38.

[2] The issues have been reframed and reorganized for this Decision.

[3] Student did not present any evidence at the hearing regarding the alleged failure to provide quarterly progress reports. The issue therefore will not be addressed in this Decision.

4. Did the District's offer of placement and services contained in Student's IEP dated February 14, 2007, fail to constitute a FAPE for the 2006-2007 school year because:

A. The District failed to have a general education teacher in attendance for the duration of the September 13, October 12, November 28, 2006, and January 11, 2007 IEP meetings?

B. The IEP offer failed to include a statement of specialized instruction/special education that was based upon peer reviewed research to the extent practicable that would be provided in Student's resource specialist program (RSP) Learning Strategies course?

C. The individual transition plan (ITP) included in the IEP offer was not based upon age-appropriate transition assessments, did not include measurable post secondary goals related to training, education, employment and independent living skills, and did not provide transition services to meet Student's post secondary transition needs?

The District raised the following issues:

4. Did the District's offer of placement and services contained in Student's IEP dated February 14, 2007, constitute a FAPE for Student, for the 2006-2007 school year?

5. Did the District conduct appropriate psychological and medical assessments using qualified personnel during the 2006 triennial assessment? Was the standardized Test of Written Language, Third Edition (TOWL-III) administered appropriately?[4]

PROPOSED RESOLUTIONS

Student proposes the following resolutions should he prevail:

1. Reimbursement to his parents for educational expenses at Fusion Learning Center from January through August 2006, and at Cathedral High School during the 2006-2007 school year, including tuition, transportation, and books at both locations;

2. Reimbursement for private tutoring during the 2005-2006 school year and for driver's education funded by his parents;

3. Compensatory education as follows: 100 hours for individualized transition plan (ITP) consultation, collaboration, and coordination of services; 180 hours for transition services; 50 hours of reading and writing skills instruction using peer reviewed, research based methodologies; and other relief as deemed appropriate by the ALJ.

[4] The parties did not put any other assessments or academic testing at issue.

CONTENTIONS OF THE PARTIES

Student contends that he left the District for a private placement in approximately January of 2006 because the District failed materially to implement portions of his IEP, causing him to be unable to access his education and fail his classes. Student further alleges that the IEP offered to him by the District in an IEP document dated February 14, 2007, was procedurally and substantively deficient and therefore failed to offer him a FAPE. Student alleges that he is therefore entitled to reimbursement for private tutoring and two separate private school placements, as well as entitled to compensatory education.

The District contends that it did not fail to implement Student's IEP in the fall of 2005. It further contends that Student was appropriately assessed in all areas of suspected disability and that the placement and services offered by the District for the 2006-2007 school year, in the IEP dated February 14, 2007, were appropriate and provided Student a FAPE in the least restrictive environment. The District therefore maintains that Student is not entitled to any compensatory education or reimbursement of expenses.

PROCEDURAL MATTERS

Pending at the start of the hearing on May 24, 2007, was the District's motion to dismiss Student's issue 1, sub-issue 8, regarding the alleged lack of provision of an AlphaSmart to Student, and issue 1, sub-issue 12, regarding the alleged unilateral change in the provision of the RSP Learning Strategies class to Student during the beginning of the 2005-2006 school year. The District argued that the issues had been litigated in previous due process hearings involving the District and Student and that the Student was, in effect, collaterally estopped from raising the issues again. Student opposed the motion. The ALJ reviewed the parties' briefs and the two prior decisions. Agreeing that the parties had not previously litigated the issues, the ALJ denied the motion to dismiss the two sub-issues in question.

FACTUAL FINDINGS

Background Information

1. Student is a young man born on May 6, 1990. At the time of the hearing, Student had just turned 17 years old and was attending Cathedral High School, a parochial school, where his parents had privately placed him in approximately September 2006.[5] The

[5] As discussed below, in approximately January of 2006, Student's parents withdrew him from the District high school and placed Student at a private school called Fusions. Fusions is also known as the Grauer School, and is identified as Grauer in Student's transcripts.

District does not dispute that Student and his parents reside within the boundaries of the District.

2. In 2003, when Student was in eighth grade, he was found eligible to receive special education services under the category of other health impaired (OHI) due to Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD or ADHD). In finding Student eligible for special education services, the IEP teams determined that his ADD negatively influenced Student's progress in school by affecting his strength, vitality, and alertness. Student's ADD was determined to be of the "inattentive" form of the disorder; Student does not suffer from hyperactivity. The parties do not dispute that Student is eligible for special education services.

3. The IEP team completed an initial IEP for Student on October 1, 2003. Student's mother agreed to the goals and objectives, and placement and services offered. Additional meetings were held during the course of the 2003-2004 school year. On June 2, 2004, the IEP team held another meeting to address Student's transition from middle school to high school. The District's IEP team added additional goals and objectives, but Student's mother did not sign her agreement to them. The full IEP team added additional program modifications or special factors to assist Student when he began high school. Student's mother did sign her agreement to the placement and services determined appropriate at this meeting.

4. Student began high school at the District's Westview High School (Westview) in the fall of 2004. Although he struggled academically the first semester of his freshman year, Student's grades improved the second semester, and he finished his freshman year with just above a C average.

5. The District's IEP team made an offer of placement and services to Student for the 2004-2005 school year on January 12, 2005. Student's parents did not accept the offer. The District and Student both filed due process complaints, which, *inter alia*, addressed whether the IEP dated January 12, 2005, offered a FAPE to Student. An ALJ heard the matter in September and October of 2005. The ALJ issued his decision on January 17, 2006, finding that the IEP offered Student a FAPE in the least restrictive environment.[6]

6. Student began his sophomore year of high school in August of 2005. His special education placement and services were based upon the IEP his IEP team had developed for him in middle school. His program consisted of placement in general education classes for 75 percent of the time, placement in a RSP/Learning Strategies class (LS) for 25 percent of the time, and various program modifications to assist Student in benefiting from his education.

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[6] The cases were consolidated as *Poway Unified School District v. Student* and *Student v. Poway Unified School District* (OAH, January 17, 2006), OAH NOS. N2005090003 and N2005090004. It does not appear that either party appealed these cases.

7. Student's IEP team held his next annual IEP meetings on September 15 and October 10, 2005. Student's parents did not agree to the IEP. Student filed for a due process hearing concerning this IEP, but ultimately withdrew his complaint. The District filed its own request for due process, requesting a determination that its offer constituted a FAPE for Student. OAH held a due process hearing before an ALJ on February 14 and 15, 2006.[7] The ALJ issued her decision on May 3, 2006, finding that the IEP offer constituted a FAPE.[8]

8. Student began failing most of his classes early in the fall semester of 2005. In response, Student's parents paid for private tutoring to supplement his education during that semester. When Student's grades did not significantly improve, his parents gave notice to the District in or about January of 2006 that they were going to withdraw him from Westview and place him at a private school. Student's parents subsequently privately placed him at the Fusions Learning Center (Fusions), where he completed his sophomore year. Student's grades were all a B+ or higher at Fusions. However, Student did not like the one-on-one teaching environment there. Therefore, Student's parents withdrew him from Fusions and privately placed Student at Cathedral High School (Cathedral), a parochial school, at the beginning of the fall semester of 2006. There is no evidence that Student's parents gave notice to the District of their intent to change Student's private placement from Fusions to Cathedral. Student was still enrolled at Cathedral at the time of this hearing, where he is maintaining a B average.

Failure to Implement Student's IEP During the 2005-2006 School Year

9. As described in Legal Conclusions 2 through 4, a student with exceptional needs is legally entitled to a free appropriate public education that conforms to the student's individual needs. Under state and federal law and federal precedent, one of the factors used in determining whether a school district provided a FAPE to a student is whether the services provided to the student conformed to his or her IEP as it was written. A failure to implement any provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material; a material failure to implement an IEP occurs when the services provided to the student fall significantly short of the services required by his or her IEP.

10. Student's IEP of October 1, 2003 IEP, as amended by the IEP team on June 2, 2004, details his last agreed upon special education placement, services, and program modifications. Student's placement continued to consist of 75 percent of his educational time to be spent in general education and 25 percent of his time to be spent in the Learning Strategies class. The accommodations listed in that IEP consist of the provision of an AlphaSmart,[9] the provision of a "study buddy," copies of class lecture notes, and daily

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[7] *Poway Unified School District v. Student* (May 3, 2006) OAH No. N2005120568.

[8] Student has appealed the ALJ's decision. [*Student], et al. v. Poway Unified School District, et al.* (S.D.Cal. 2006) 06cv1563 DMS (RBB).

[9] An AlphaSmart is a type of portable word processing device, similar in size to a laptop computer.

checking of Student's assignment calendar to assure that he was writing down all assignments.

11. Student contends that the District materially failed to implement his IEP in the fall semester of the 2005-2006 school year by enrolling him in the Learning Strategies class for only two class periods a week rather than daily (25 percent of Student's school day) as required by his IEP. The District contends that the failure to do so was a clerical error that Student did not bring to its attention at the beginning of the school year. Had Student done so, the District would have corrected the error. The District also contends that the Student did not want to attend the class. As a result of Student's lack of desire to attend the class, and issues concerning what constituted stayput, the parties stipulated at the beginning of the previous due process hearing begun September 21, 2005, that Student's placement would be amended so that he would only attend Learning Strategies once every two weeks.

12. The failure to provide Student with the Learning Strategies class for 25 percent of his school day only lasted approximately four weeks, from the time the 2005-2006 school year began approximately August 25, 2005, until the stipulation to change Student's attendance at the class was served on the parties. A one-month failure to place Student in a class for more time than he then stipulated would constitute his placement, does not amount to a material failure to implement Student's IEP.

13. Student also contends that the District failed to implement his IEP by failing to provide him with all the program modifications listed in the October 1, 2003 IEP, as amended June 2, 2004. First, Student contends the District did not provide him with an AlphaSmart, the word processing device that would have assisted him in taking notes during his classes. The District contends that it did have an AlphaSmart available for Student, but he chose not to use it.

14. The evidence does not support the District's contention that it made an AlphaSmart available to Student for the fall semester of 2005. Although Student may not have wanted to use the AlphaSmart during the prior school year, the evidence concerning the 2005-2006 school year supports Student's contention that he did not have access to one during the fall semester of 2005. Student's teachers and his case manager testified that they did not specifically provide an AlphaSmart or other word processor to Student, nor was an AlphaSmart or other type of word processor available for Student to use in his classes. Further, none of the teachers or the case manager saw Student bring an AlphaSmart or other type of word processor to class from an outside source.

15. Student's IEP specifically identifies assistive technology as a means for Student to access his education, due to his inattentiveness and inability to focus in class. The IEP team recognized Student's need for a word processing device such as an AlphaSmart in each of the IEPs offered to Student from June 2, 2004, to the present. The evidence supports Student's contention that the District did not make an AlphaSmart or other word processor available to him in his classes and that the failure to do was a material failure to implement his IEP.

16. Student further contends that the District failed to implement his IEP in the 2005-2006 school year when it failed to provide him with a "study buddy" and copies of class lecture notes, and failed to check his assignment calendar on a daily basis. The District contends that the IEP team replaced these program modifications from Student's IEP at the June 2, 2004 IEP meeting by the recommendation for the provision of the AlphaSmart. The District contends that Student's mother agreed to the revision.

17. The evidence is contrary to the District's contention. The original program modifications for Student were listed on the "Special Factors" page of his October 1, 2003 IEP. At the June 2, 2004 transition IEP meeting, the IEP team reviewed and added goals for Student, and added an accommodation for use of the AlphaSmart. There is no indication on the IEP that the IEP team meant to replace rather than supplement the additional "Special Factors" page. Since the new goals added at the June 2, 2004 meeting were meant to supplement the previously developed goals, the assumption by Student's mother that the recommendation for the AlphaSmart on a new "Special Factors" page was in addition to the previously recommended program modifications, was reasonable.

18. Most significantly, evidence of communications between Michael Murray, Student's case manager, and Student's parents, contradicts the District's contention that the "Special Factors" page developed at the June 2, 2004 IEP meeting was meant to replace rather than supplement the initial "Special Factors" page. In email correspondence dated April 4, 2005, Student's parents asked Mr. Murray to clarify Student's accommodations at school. Mr. Murray replied in an email dated April 6, 2004. He stated that while Student did not have any accommodations for California State/District wide assessments, Student "has the following program modifications . . . study buddy, Raider reminder[10] checked daily, copy of notes."

19. Student also contends that the District did not provide a copy of his IEP to each of his general education teachers. The District contends that it provided summaries of the pertinent parts to each teacher. There is no requirement that each general education teacher receive a copy of Student's entire IEP. However, in order for the IEP to be properly implemented, each teacher must receive that part of the IEP that he or she is supposed to implement in his or her classroom. A review of the IEP summary indicates that the summary failed to include all pertinent information regarding program modifications for Student. Since the information was missing, the general education teachers were not on notice that Student was supposed to receive copies of class notes, be provided with a study buddy, and have his assignment calendar checked on a daily basis. The failure to inform the general education teachers of the program modifications contributed to the District's failure to implement fully Student's IEP.[11]

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[10] "Raider reminder" was what Student's assignment calendar was called in eighth grade and, therefore, how the assignment calendar was designated on the IEP he brought with him from middle school.

[11] There is no evidence that Student was supposed to be placed in anything but a general education classroom for his academic subjects, nor does Student allege that he required a more restrictive environment for such instruction. The IEP reference to a small, well-structured environment was meant to be implemented in the

20. Other than assignment to the Learning Strategies Resource Program Class, which the parties significantly limited by their stipulation to change Student's attendance in that class in September of 2005, the access to an AlphaSmart and the program modifications at issue here formed the core of Student's special education program and services. Therefore, the failure to provide Student's teachers with a description of his program modifications, the failure to provide Student with a "study buddy," class notes, and a daily check of his assignment calendar and the failure to provide him with an AlphaSmart, was a material failure to implement his IEP.

Reimbursement for Tutoring Expenses and Tuition at the Fusions School

21. As discussed in Legal Conclusions 17 through 22, the IDEA permits reimbursement of expenses incurred by a student's parents when they unilaterally place their child in a private school or pay for related services themselves if a district has denied a FAPE to the child. Compensatory education is also a permissible remedy where the child has been denied a FAPE and proves that he or she needs additional education or services to make up for education and related services the child was denied. These are equitable remedies to ensure that a child is appropriately educated within the meaning of the IDEA. Remedies may be limited if a parent's actions are found to be unreasonable or where a weighing of the evidence does not support awarding of a particular remedy.

22. Student's parents have requested reimbursement for costs they incurred in obtaining private tutoring for Student during the fall semester of the 2005-2006 school year while he attended Westview. The evidence does not support this request. The first bill submitted is for the Tutoring Club, for $350, for tutoring services given to Student in September of 2005. The tutoring was given to Student during the first month of classes in the fall semester. Student's parents therefore did not base their decision to pay for extracurricular tutoring for Student based upon the District's failure to implement Student's IEP. Nor did they base their decision on Student's failing grades for this school year since grades had not yet been issued. Rather, it appears tutoring was a prophylactic measure to help Student raise his grades rather than a response to any deficiencies in Student's educational program. Student's parents are therefore not entitled to reimbursement for the Tutoring Club expenses.

23. Student's parents also request reimbursement for private tutoring from Melinda Kuti during the fall school semester of 2005, in the sum of $750 It is unclear from the evidence when these services began. However, Student's grades for the fall semester, given in January of 2006, were an F in English, an F in Science, and a D in Ceramics.[12]

Learning Strategies classroom, where the number of students in the class is smaller than in a general education classroom and where the ratio of adult instructors to students is greater.

[12] Student's Ceramics teacher explained at the hearing that her Ceramics class was more than just an art classes as she graded the students on written work, including a research paper. The artistic ability of a student was not a determinative factor in the student's final grade.

Therefore, the tutoring was not effective for Student and did not result in any benefit to him. Weighing the equities, the District is not responsible for reimbursing Student's parents for the tutoring given by Ms. Kuti.

24. Finally, Student's parents request reimbursement for the enrollment and tuition costs at Fusions, the private school in which they enrolled Student in January or early February of 2006, after the District failed to implement his IEP and Student was failing in school. As stated in Factual Finding 21, a student's parents may be entitled to reimbursement of private school expenses where a district has denied a FAPE to a student. Here, the ALJ has determined that Student was denied a FAPE by the District's material failure to implement his IEP.

25. There is no dispute that Student's parents gave appropriate notice of their intent privately to place Student when he failed almost all his classes the first semester of his sophomore year at Westview. Fusions, the private school at which Student's parents placed him initially, offers a program where the student works individually with a teacher and then goes to a study hall to complete homework. The student does not leave school until the student has completed the homework and has submitted it to the teacher. The program also includes ADD coaching, study skills training, organizational assistance, homework supervision, time management techniques, goal setting, and behavior modification. Although the one-on-one approach to teaching is much more restrictive than the educational environment the IEP team determined appropriate for Student, and much more restrictive than the parties maintain is presently appropriate for Student, the supports provided by Fusions mirror the supports that Student's IEP stated he was to get, but did not. Therefore, Fusions was an appropriate placement for Student at the time his parents enrolled him there for the spring semester of the 2005-2006 school year. Weighing the equities, based upon the District's material failure to implement Student's IEP, and the appropriateness of the placement, Student's parents are entitled to reimbursement of the tuition and enrollment fees at Fusions.[13]

The IEP Dated February 14, 2007

26. As discussed in Legal Conclusion 10, a school district must comply both procedurally and substantively with the IDEA. While not every procedural flaw constitutes a denial of FAPE, procedural flaws that inhibit a student's right to receive a FAPE, significantly prevent a parent's opportunity to participate in the IEP process, or cause a deprivation of educational benefit to a student, will constitute a substantive denial of FAPE.

[13] The invoice from Fusions also includes fees for Student's enrollment in two semesters of physical education. Student was not enrolled in physical education at Westview, and there is no evidence that it was a required class during his sophomore year. Therefore, the charges for the physical education classes at Fusions are disallowed. Furthermore, the invoice from Fusions only shows a credit of $6,000. Student's parents have not submitted any other evidence of payment to Fusions. Therefore, reimbursement will be ordered for only $6,000.

27. Student contends that the District committed several procedural violations while formulating its IEP offer dated February 14, 2007, which substantively denied him a FAPE. The District contends that it procedurally and substantively offered a FAPE to Student.

Procedural Violations During the Formulation of the IEP

Failure to Revise Student's IEP by His Annual Date

28. As discussed in Legal Conclusion 14, a school district is required to review a student's IEP at least annually, and to revise it, as appropriate, to address lack of progress on goals, the results of reassessment, information about the student, and the student's anticipated needs. However, there is no requirement that the IEP process be completed, and a full offer of placement and services made, prior to the student's annual date.

29. Student contends that the District violated his rights under the IDEA because the District did not make an offer of placement and services to him until five months after his annual IEP was due on or about October 1, 2006. The District maintains that it began the IEP process before Student's annual due date, and that the failure to complete the process before the date does not violate the IDEA. Additionally, the District contends Student's prior IEP, still in effect at the time, offered Student a FAPE while the parties went through the process to develop a new IEP for him.

30. In anticipation of Student's annual IEP review, and in order to reassess Student for his triennial review, the District mailed an assessment plan to Student's parents on or about August 29, 2006. Student's mother signed her consent to the plan and mailed it back to the District on or about September 15, 2006. The signed plan did not reach its intended recipients and Student's mother had to send a scanned copy to the District, which they received in early October 2006.

31. District staff conducted numerous assessments of Student during October and November of 2006.

32. An IEP team meeting to address Student's annual review was first held on September 13, 2006. The team held further meetings on October 12, 2006, November 28 and 29, 2006, January 11, 2007, and February 14, 2007. The District did not make an offer of placement and services to Student until the last meeting held on February 14, 2007.

33. Early on in the IEP process, Student's mother requested that the District hold either longer IEP meetings or hold meetings closer together in time. The District did not respond to her request. There is no evidence that addresses why the District scheduled the IEP team meetings so far apart.

34. By the start of the 2006-2007 school year, the IEPs for Student's prior school years had been upheld by ALJs in two due process proceedings. Had Student returned to his

District school placement at the start of this school year, he would have been given a placement and services according to his previous IEPS, and would have received those services during the time his next annual IEP was being reviewed and revised.

35. The District's only requirement with regard to the review and revision of a child's IEP is that this be done annually. There is no requirement that the process be completed by the annual date. Therefore, the District did not violate the IDEA when it began the process to consider revisions to Student's IEP before his annual date but failed to complete the process by that date.[14]

Failure to Complete Triennial Assessments Before Student's Triennial Date

36 As discussed in Legal Conclusion 16, an IEP required because of an assessment plan must be developed within 60 calendar days from the date a district receives a parent's signed consent to the assessment. Although an initial IEP must be developed within 30 days of the initial determination that child needs special education and related services, there are no such requirement that subsequent IEPS meet a specific time frame. Additionally, although a child with a disability must be reassessed at a minimum of every three years, there are no specific requirements that the reassessment occur exactly within the three-year time. Neither is there any precedent for finding a violation of a student's right to a FAPE if the assessments, and corresponding IEP meeting, are not held within the three-year period.

37 As stated above, the District began the IEP process for Student's October 1, 2006 annual IEP/triennial IEP by forwarding an assessment plan to Student's mother and initiating the IEP team meeting process. The assessments were completed within 60 days of receipt by the District of the signed assessment plan. An IEP team meeting was held within the 60 days as well.

38 The failure of the District to assess Student prior to the annual or triennial due dates in October of 2006, and the District's failure to hold and/or complete the triennial IEP by October 1, 2006, did not violate the IDEA.

Failure of the General Education Teachers to Attend the Entire IEP Meetings

39. As discussed in Legal Conclusion 13, a general education teacher must participate in the formation of the student's IEP if (add requirement that child is, or may be, placed in general ed environment). A harmless error analysis is applied to the failure to secure his or her attendance at the IEP meeting. If the court finds the error was not harmless,

[14] The ALJ requested that Student provide case citations in his closing brief that specifically addressed whether the failure to make an offer of placement and services by a student's annual IEP due date and failure to complete the triennial assessments exactly by their due date, constitute a denial of FAPE. Student's closing brief does not cite any case that specifically makes such a finding, nor has the ALJ located a case that so finds.

the failure of the general education teacher to participate in the IEP process will result in a finding that the district substantively denied a FAPE to the student.

40. Current law permits a parent to waive the participation at the IEP meeting of any of the participants who are normally required to be present, including the general education teacher. In this case, Student's parents never agreed to waive the presence at any time of Student's general education teacher or teachers. Student contends that the failure of the general education teachers to remain during the entire IEP meeting was a procedural violation that denied him a FAPE. The District disagrees.

41. A general education teacher was present for at least part of each IEP meeting, which culminated in the District's offer of placement and services on February 14, 2007. Hayley Shields, Student's former ceramics teacher, attended the IEP meetings on September 13, 2006, and January 11, 2007. Jim Krentz, Student's former geometry teacher, attended the IEP meeting held on October 12, 2006. Mr. Krentz also attended the November 28, 2006 IEP meeting. General education teacher Malinda Dixon, Student's former biology teacher, attended the November 29, 2006 IEP meeting as well as the February 14, 2007 meeting.

42. It is not disputed that the there were some meetings where the general education teacher in attendance either arrived late or left before the meeting concluded. However, the IDEA and its supporting regulations do not state that the teacher must be present for the entire meeting. Rather, the regulations state that the general education teacher, to the extent appropriate, must participate in the development of the student's IEP. There is no evidence that the general education teachers in this case failed to do so. Rather, the meeting notes from each of the IEP meeting sessions indicate that the general education teacher present at the meeting gave input as to his or experiences with Student and gave his or her opinion concerning issues of importance to Student's education. The teachers answered questions and agreed to provide documentation to Student's mother when she requested it. The evidence thus supports the District's contention that the general education teacher present at each meeting assisted in the review of Student's progress and present levels of performance, reviewed and discussed the goals and objectives the team was developing for Student, and participated in the determination of supports and program modifications that might be appropriate for him.

43. Additionally, there is no evidence that the failure of any of the general education teachers to remain during the entire IEP meeting, impeded the ability of Student's parents to participate in the IEP process, inhibited Student's right to receive a FAPE, or cause a deprivation of educational benefit to Student. The evidence adduced at the hearing indicated that the teachers each gave input regarding Student and were available for questions by Student's parents if questions arose. Therefore, the District did not deny Student a FAPE by the failure of his general education teachers to remain for the entirety of each IEP meeting.

Failure to Include a Statement of Peer-Reviewed, Research-Based Special Education

44. As stated in Legal Conclusion 15, an IEP must contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to a student who qualifies for special education.

45. Student contends that the IEP offer of February 14, 2007, failed to meet this standard because there is no description of any type of education services to be provided to Student that were based upon peer-reviewed research. The District contends that the Learning Strategies class placement was the specialized instruction that the District offered to Student, as were the program modifications that were part of the IEP.

46. Student is correct that no specific peer-reviewed, researched based program of education was specified in his IEP. However, the program offered to Student in the IEP addressed all of his unique needs and offered support services that would permit Student to access his education and progress in the curriculum. Student offered no evidence that the program developed by the District's IEP team would not meet those goals. Nor did Student offer evidence of a peer-reviewed, researched-based educational program that would better meet his needs and which the IEP team should considered. Student has not shown that there exists a peer-reviewed, research-based methodology needed to teach students, such as him, who suffer from inattentive ADD, and that he would benefit from it if it existed. The statute states that a statement of education and related services, based upon peer-reviewed research, is to be included in an IEP *to the extent practicable*. If no such methodology exists to address a particular deficit of a child, or if the child would not benefit from it, it is not *practicable* to include a statement that a student's educational program will be based upon peer-reviewed research.

47. Therefore, the District was not required to include a statement of special education and related services based upon peer-reviewed research in Student's IEP and its failure to do so did not deny Student a FAPE.

Inappropriate Individualized Transition Program

48. As stated in Legal Conclusion 9, beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must include a statement of transition services to be provided to the student. The statement must contain appropriate postsecondary goals that are based upon age appropriate transition assessments. The goals should relate to training, education, employment, and, where appropriate, independent living skills for a student after high school. The statement of transition services assumes greater importance as a student nears graduation and post-secondary life. The failure to include an adequate statement of transition services for a student is a procedural violation subject to a harmless error analysis.

49. Student contends that the District did not provide a transition assessment to him to determine his transition needs, that the Individual Transition Plan (ITP) the District developed does not contain measurable goals or appropriate transition services, and that the District's IEP team did not consider his individual needs in the development of the ITP. The District contends that the ITP developed as part of Student's IEP met all legal standards.

50. The District did not complete a transition assessment for Student as part of the development of his ITP. The only basis for the ITP was an interview between Student and his case manager and discussion of community-based services such as Social Security, the Department of Rehabilitation and a community program called Workability, at the IEP meeting held February 14, 2007. The failure to complete a transition assessment for Student was not harmless error. The failure prevented the IEP team from having a complete picture of Student's abilities, preferences, and transition needs, resulting in a loss of educational benefit and corresponding denial of FAPE to Student.[15]

51. The ITP indicates that Student was on track to receive a high school diploma, that Student's goal was to attend a four-year university and live at a dormitory if going away to school, and that he was interested in recreation activities such as running, swimming, computers and water polo. The ITP also indicates that Student has a Social Security card and intends to obtain a driver's license. Support services, such as through a regional center, are checked off as not being needed by Student. A separate page details Student's goals of high school graduation, college attendance, and earning money from employment to help pay for college expenses.

52. There was no evidence presented at hearing that supports Student's contention that the ITP is deficient because it does not address his daily living skills. Student did not prove that he has deficits in this area. Student testified at the hearing on two days, but never discussed any living skills areas in which he felt he was deficient and which, therefore, the IEP team needed to address in an ITP. The only evidence offered with regard to Student's need for transitional living skills was the testimony of Student's mother that Student *might* have difficulties in the future with independent living skills such as paying bills and balancing a checkbook. The testimony of Student's mother regarding this issue is speculative and not entitled to much weight.

53. However, the ITP does not address any completed career preparation activities or describe any assistance the District will give to Student to achieve his goal of attending college. Although Student is a student with average intelligence, on course to graduate high school and attend some type of post-secondary college, he still needs assistance in achieving those goals. The ITP does not describe any type of assistance the District would give to Student to research colleges or explore career choices and gives him no guidance as to where

[15] The District administered a transition assessment to Student subsequent to the filing of his due process request and prior to the start of the hearing in this case. The parties did not present much evidence regarding the details of the assessment.

he could find the information necessary regarding either colleges or career choices. The deficiencies are significant given the nature of Student's disability. He has inattentive ADD. His deficits are in organizational skills, note taking, and focus. He specifically needs direction and assistance in achieving his educational and career goals. His disability, and past history of inability to focus and organize, should have been indicators to the District that Student needed specific guidance in how to locate information, how to determine what he would need in order to qualify for admission to specific schools, and how to complete the application processes.

54. Additionally, Student needed specific guidance on where to find information about accommodations available to student's with disabilities at institutions of higher learning. Student also needed guidance on which offices to contact at colleges if he felt he would need accommodations. Finally, given Student's ADD, he needs techniques to help him overcome his organizational problems if he is going to be successful at college where the special education supports he receives through an IEP at high school may not be available.

55. The February 14, 2007 IEP covers Student's junior year of high school as well as the beginning of his senior year. While the ITP included in his previous IEP was adequate because Student was still a sophomore and not close to graduation, the instant ITP has to prepare Student for graduation and college, all of which generally take place during a student's junior and senior year of high school. The deficiencies noted above support Student's contention that the ITP contained in the February 14, 2007 IEP was not adequate to meet his unique needs during his junior and senior years of high school. The deficiencies in the ITP therefore are not harmless error as the District's failure to properly develop the ITP prevented Student from benefiting from his education, resulting in a denial of FAPE.

The February 14, 2007 IEP

56. As stated in Legal Conclusions 2 through 7, in order to offer a student a substantive FAPE, a school district must design a program that addresses the student's unique educational needs and one that is reasonably calculated to provide some educational benefit to the student. The program offered also must be designed to provide the student with the foregoing in the least restrictive environment (LRE) and the program must comport with the student's IEP.

57. The District contends that the February 14, 2007 IEP offered Student a FAPE because it met all legal requirements of the IDEA. Student argues that the IEP does not offer FAPE and, specifically, contends that it does not offer FAPE because the Learning Strategies resource class is too restrictive an environment for him.

Student's Unique Needs

58. During the IEP meetings held by Student's IEP team on September 13, 2006, October 12, 2006, November 28 and 29, 2006, January 11, 2007, and February 14, 2007, the

IEP team determined that Student had unique needs requiring specific program modifications to assist Student in accessing his education. The team reviewed Student's progress at his private school placements, discussed his past progress with his previous District general education teachers, reviewed his assessments, and discussed how his disability affected Student's ability to function in the classroom and impeded his success. The team determined that Student had continuing deficits that required access to a word processor, assistance with organizational skills, highlighting and check listing of assignments, copies of class notes, placement in the classroom close to the teacher, verbal and non-verbal cues, modifications in how Student's work would be assigned, and weekly checks and updates on his progress. The team also determined that Student required placement in a resource class for 25 percent of the time to support his inclusion in general education for 75 percent of his school day. The team further determined that Student benefits from a more structured, smaller group setting than was provided in the general education classes and that he needed that environment for at least some of his school day. The team considered input from Student's mother and his private school.

Designed to Meet Student's Unique Needs and Reasonably Calculated to Provide Educational Benefit

59. The IEP team reviewed Student's present levels of performance and developed goals to meet his needs in the area of writing mechanics and content, fine motor skills and, in particular, in the areas of organization and work completion. The team developed a program for the 2006-2007 school year that placed Student in general education for 75 percent of the day and special education for 25 percent. His program offered three classes per day in general education, and a resource class in Learning Strategies for one class per day.

Comport with Student's IEP

60. The services offered in the February 14, 2007 IEP were designed to deliver the program and services required by the IEP offer.

61. The District IEP team members are all educators who had either previously taught Student and/or had significant experience in the IEP process. They all felt that the goals and objectives in the IEP were appropriate based upon Student's functioning levels and that the programs were designed to provide Student educational benefit. Other than a brief comment by Student's mother at hearing that she believes that the goals and objectives were not appropriate, Student offered no evidence to contradict the evidence offered by the District's educators.

Least Restrictive Environment

62. As stated in Legal Conclusion 5, federal and state law require a school district to provide special education in the least restrictive environment. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the

student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." An ALJ must consider four factors in determining whether a placement is in the LRE: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom.[16]

63. Student contends that he does not require placement in a resource class. He contends that all modifications to his program, accommodations, and strategies for accessing his education can be addressed in his general education classes. Student offers his successes at Cathedral as a basis for his contention that he does not require any removal from general education. The District contends that Student has not shown any success at public school other than when he consistently attended the Learning Strategies. Therefore, in order to address Student's deficits, the Learning Strategies class for one period during the school day is an appropriate placement.

64. Student will have a significant amount of contact with non-disabled children during the three class periods he attends in general education. While at first blush Student's contention that his success at Cathedral demonstrates that he does not require placement in a resource class, a closer review of the lack of evidence surrounding the education provided at Cathedral undercuts Student's argument.

65. There was no evidence presented, other than the short observation of one of Student's classes at Cathedral by District psychologist Hilary Ward, as to what the educational program consisted of at Cathedral and what supports, if any, Student was receiving in his classes there. The fact that Student is successful in the very restrictive environment of a private school does not correlate to a finding that Student will automatically have the same success at a comprehensive public high school. Student's contention that he will be successful without the Learning Strategies class is based on conjecture and is not supported by any concrete evidence or expert opinion.

66. Given the nature of Student's disability and his past history of failure at the public school, the District's IEP team was justified in its believe that the combined program of general education and one resource class offered Student the best chance for success at Westview. Thus, the IEP team properly considered the LRE factors when decided upon Student's placement.

67. Student did not establish that the District failed to consider other placement options or what other services were necessary to meet Student's needs. Student did not offer any testimony or evidence regarding in what manner the IEPs were inappropriate or failed to

[16] The cost of mainstreaming and Student's affect on other students were not at issue in this case and, therefore, will not be addressed.

meet his unique needs. Student also failed to offer any testimony or evidence regarding what other aids and supports were required to meet Student's needs.

68. The IEP of February 14, 2007, with the exception of the ITP, took into account Student's unique needs and the nature of his disability. Based upon a review of the IEP documents and testimony received during the hearing, the ALJ concludes that with the exception of the ITP, the District offered Student a FAPE during the 2006-2007 school year.

Reimbursement of Cathedral Tuition and Compensatory Education for Failure to Provide a FAPE

69. As discussed in Factual Finding 21 and Legal Conclusions 17 through 22, the IDEA permits reimbursement of expenses incurred by a student's parents when they unilaterally place their child in a private school if a district has denied a FAPE to the child. Compensatory education is also a permissible remedy where the child has been denied a FAPE and proves that he or she needs additional education or services to make up for education and related services the child was denied. These are equitable remedies to ensure that a child is appropriately educated within the meaning of the IDEA. Remedies may be limited if a parent's actions are found to be unreasonable, where the private placement is not appropriate, or where a weighing of the evidence does not support awarding of a particular remedy.

70. As determined in Factual Findings 48 through 55, the District failed to offer a legally adequate ITP for Student as part of the February 14, 2007 IEP. Student contends that his parents are entitled to reimbursement of the tuition for his private placement at Cathedral and to compensatory education for this failure.

71. As stated in Factual Finding 8, Student's parents placed him at Cathedral at the beginning of the fall semester of the 2006-2007 school year. The placement was made prior to any IEP meetings being held for Student's October 2006 annual IEP and therefore was not in response to any inadequacies in the IEP or in response to the District's delay in making a firm offer of placement and services to Student. Further, there is no evidence that Student's parents notified the District of their intent to withdraw Student from Fusions and place him at Cathedral.

72. There is also evidence that Student's mother did not have the intent to return Student to a District placement. Student's mother was questioned regarding her reasons for limiting the District's access to Cathedral for purposes of observing Student and obtaining information about Student from staff there. Student's mother responded that she was afraid that the District would send too many staff members to Cathedral to observe Student and would otherwise antagonize Cathedral to such an extent that it would not offer Student an opportunity to return to school there. Student's mother was more concerned about Student's ability to continue at Cathedral than she was about the District's ability to obtain sufficient information about Student.

73. Finally, there is no evidence, other than Student's good grades, that Cathedral was an appropriate placement for Student. The fact that a student makes academic progress at a private placement does not mean the placement is appropriate. There is no evidence that this parochial school placement offered any special education programs, supports, or services to Student. The only deficiency the ALJ finds in the IEP is the District's failure to offer an adequate ITP to Student. Student contends that the failure to offer an adequate ITP denied him FAPE. Yet, there is no evidence that Cathedral's program provided any type of transition services to Student. Therefore, the ALJ finds that Cathedral was not an appropriate placement for Student.

74. Weighing all of the evidence and considering all of the factors, the evidence supports denial of Parents' reimbursement for their expenses at Cathedral. They did not give District an opportunity to discuss their decision to place Student at Cathedral and Student's parents did not base their decision to place Student there in response to any deficiencies in Student's IEP. There is evidence that Student's mother did not intend to return Student to a District school. Finally, Student has failed to show that Cathedral is an appropriate placement for him.

Other Relief

75. As discussed in Factual Finding 69 and Legal Conclusions 21 and 22, compensatory education is an equitable remedy. Relief must be reasonably calculated to provide the educational benefit that would have likely accrued from the special education services that the school district should have supplied.

76. Based upon the inadequacies of the ITP, Student has requested 180 hours of compensatory education in the form of transition services as well as 100 hours of compensatory services from an ITP case manager. Student, however, offered no evidence that supports the basis of his request, and offers no evidence as to what the makeup of the requested transition services should be. It is Student's burden to prove not only that he was denied a specific service but also to prove the basis for any specific request for compensatory relief.

77. However, given that the ITP is inadequate, the ALJ finds that the District owes some type of compensatory services to Student. Equity would not be served by denying any such services to him. Therefore, the ALJ finds that the District, if it has not already done so, must offer Student an age-appropriate transition assessment and that the IEP team must develop the new ITP in light of that assessment. The ALJ will order that the IEP team develop the new ITP by no later than October 31, 2007, so that Student, if he chooses to return to Westview, will be able to access services and assistance in time for him to apply for college, should he choose to apply. Additionally, the ALJ finds that Student is entitled to 20 hours of one-to-one transition services addressing how to research colleges, careers and employment, as well as how to contact college disability advisors, and how to take tests, irrespective of whether Student chooses to return to a District school. If the District has a career or college advisor on staff, that person may provided these services to Student. If the

District has no career or college advisor on its staff, or if it wishes to contract with an outside consultant to provide these services to Student, it may utilize a non-District employee. The District will provide these 20 hours to Student so that they do not conflict with Student's academic schedule at school.[17]

Failure to Properly Assess Student

78. As stated in Legal Conclusion 16, a school district is required to assess a child in all areas of suspected disability, including language function, general intelligence, academic performance, communicative status, and social and emotional status. A variety of assessments tools and strategies must be used to gather functional, developmental, and academic information. School districts must perform assessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor.

79. Student contends that the District did not prove it properly assessed him because the assessors did not specifically testify at hearing that they were knowledgeable about the test instructions or protocols or that they followed the instructions in administering the tests. Student also contends that the District did not properly administer the TOWL-III assessment test because Student scored much lower on the contextual conventions subtest than he did on other portion of the TOWL-III and lower than he had on similar tests the District administered which also measure writing skills. Student further contends that his intelligence quotient (IQ) score of 91 from the Wechsler Intelligence Scale for Children – Fourth Edition is inaccurate because Student scored higher on his academic testing than his full scale IQ score. Student also appears to argue that the District should have performed an electroencephalogram (EEG) on Student as part of his medical history review because of Student's history of seizures. Finally, Student contends that the District should have assessed Student for depression to determine if he needs counseling. The District contends that it conducted proper assessments of Student.

80. School Psychologist Hilary Ward and Student's case manager Michael Murray administered psycho-educational assessments to Student on October 6, October 15, and October 25, 2006. Ms. Ward reviewed previous assessment results for Student and also did an observation of Student in his classroom at Cathedral on November 20, 2006. The tests administered were the Wechsler Individual Achievement Test –II, the Woodcock Johnson Tests of Achievement – III, the Test of Written Language – III, the Cognitive Assessment System, the Test of Auditory – Perceptual Skills – Third Edition, Motor-Free Visual Perception Test – Third Edition, the Wide Range Assessment of Memory and Learning – Second Edition, the Bender Visual-Motor Gestalt Test –Second Edition, the Beery – Buktenica Developmental Test of Visual – Motor: Integration – Fifth Edition, and various

[17] However, conflicts with Student's extracurricular activities will not be a reason to refuse the services at times otherwise convenient to the District.

ratings on the Conners Rating Scales – Revised, including the Conners – Walls' Adolescent Self – Report Scale: Long Version.

81. The evidence presented at hearing indicates that the assessments administered to Student were appropriate and the assessors who administered the tests were qualified to do so. The evidence also supports the District's contention that the results were accurate.

82. Student presented absolutely no evidence in support of his contentions challenging the assessments. He also failed to provide any statutory or case law support for his contention that a school district must diagnose a child's medical disability as part of its health history update of the student or that a district is required to contest the results of medical tests, such an an EEG, and perform its own medical examination of a Student. There is mention in Student's IEPs that he has suffered from depression, but Student provided no testimony or documentary evidence indicating that the depression is affecting his ability to access his education or that he otherwise needs counseling. Student's parents have not sent him to a psychologist or psychiatrist, and Student is doing very well at school without any counseling services. Student therefore has failed to prove that the District should have assessed him for depression or should have had an EEG administered to Student.

83. The only evidence offered by Student in support of his contention that his scores are not accurate, and that, therefore the tests were not properly administered, is the fact that his score on the contextual conventions subtest of the TOWL-III is lower than his scores on other writing tests he took as part of the assessment process. Student's case manager Michael Murray, who followed all proper procedures in administering it, administered the test. Student does not contend that the test was not a proper one to give him or that Mr. Murray is not qualified to administer it. There are many reasons why Student may have scored lower on this subtest than he did on the many other tests administered to him, but there is no evidence which specifically identifies what that reason is, or if it was just an anomaly. Without more, the fact that Student scored lower on one assessment subtest does not prove that the test was not administered properly.

84. The evidence establishes that the District properly administered all assessments given to Student and that the assessments covered all areas of Student's suspected disabilities.

LEGAL CONCLUSIONS

Applicable Law

Burden of Proof

1. The petitioning party seeking relief has the burden of proof. (*Schaeffer v. Weast)* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387] (hereafter, *Schaeffer*).) Student raised issues 1 through 4, inclusive, in his due process complaint; issues 5 and 6 were raised

by the District in its complaint. The Student has the burden of proof as to the issues he raised and the District has the burden as to the issues it raised.[18]

Elements of a FAPE

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.)[19] FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (hereafter, *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id*. at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id*. at p. 201.) De minimus benefit or trivial advancement, however is insufficient

[18] Student posits, however, that he should not have the burden of proof except as to issue 1 since the District's stated issues encompass the procedural and substantive alleged violations Student raises in his issues 2 and 3. Student offers no statutory or legal authority for his position that the District, by cross-filing on the issue of FAPE, assumed Student's burden of proof. Student filed his due process complaint prior to the filing by the District of its own complaint. The prehearing conference order indicated that Student would present evidence first and, indeed, Student's case-in-chief addressed the majority of the issues he raised in his complaint, as modified by the prehearing conference order. The Supreme Court in *Schaeffe*r stated that "[a]bsent some reason to believe that Congress intended otherwise . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." (*Schaeffer*, 126 S. Ct. at 535.) The Ninth Circuit, in a recent decision, declined to shift the burden from the petitioning student to the respondent district in a case involving the failure to implement parts of an IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. April 3, 2007) 481 F.3d 770.)

[19] All statutory citations to the Education Code are to California law, unless otherwise noted.

to satisfy the Rowley standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130 (hereafter, *Walczak*).)

4. To determine whether a school district substantively offered FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (*Walczak* 142 F.3d at p.133.) The requirement that children be educated in the least restrictive environment means that children should only be removed from general education classes when the nature and severity of the children's disabilities is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301.)

Least Restrictive Environment

5. 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 aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a)(5)(A); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. *(Sacramento Unified School District v. Holland* (9th Cir. 1994)14 F.3d 1398, 1403.)

Requirements of an IEP

6. School districts receiving federal funds under IDEIA 2004 are required under 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional

goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id*. at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist*, *supra*, 811 F.2d at p. 1314.)

8. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770 (hereafter, *Van Duyn*).)

Individual Transition Plans

9. Beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must contain a transition plan that contains appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. The plan must also contain the transition services needed to assist the pupil in reaching those goals. (*Board of Education of Township High School District No. 211 v. Ross, et al.* (7th Cir. May 11, 2007) 47 IDELR 241, 107 LRP 26543; 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8)(A).)

Procedural Violations

10 The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Rowley*, *supra*, 458 U.S. 176 at p. 205, 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 individual education program (IEP) to determine if it was reasonably calculated to enable the student to receive some educational benefit (See

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

11. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505 (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County School Dist*. (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*W.G. v. Board of Trustees, supra*, 960 F.2d at p. 1482.)

12. Procedural errors during the IEP process are subject to a harmless error analysis. In *M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, fn. 9, the Ninth Circuit decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA. Utilizing the harmless error analysis, the court determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid*.) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. *(Id*. at pp. 652, 658.)[20]

Participation of a General Education Teacher at an IEP Meeting

13. Education Code section 56341, subdivision (b)(2), provides that the IEP team shall include not less than one regular education teacher of the pupil, "if the pupil is, or may be, participating in the regular education environment." The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, "including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program modifications or supports" pursuant to section 1414(d) of title 20 of the United States Code.

Annual Revision of the IEP

14. The IEP team must periodically review the IEP, no less frequently than annually, to determine whether the annual goals are being achieved, and revise it as

[20] Judge Alarcon, the author of the opinion in *M.L.*, utilized a structural defect analysis in concluding that the failure of a general education teacher to participate in the IEP process denied M.L. a FAPE.

appropriate to address (1) any lack of expected progress toward the annual goals and in the general curriculum; (2) the results of any reassessment; (3) information about the student provided to or by the parents in connection with a reassessment; (4) the student's anticipated needs; and (5) any other relevant matter. (20 U.S.C. § 1414(d)(4)(A); Ed. Code, § 56341.1, subd. (d).)

Statement of Special Education Based Upon Peer-Reviewed Research

15. Title 34 Code of Federal Regulations section 300.320 states IEPs shall include statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable. The language "to the extent practicable" regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program. Courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Deal v. Hamilton County Dept. of Educ*. (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57)

Assessments

16. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Reassessments can be conducted as often as annually, but no less than every three years. (Ed. Code, § 56381, subd. (a)(2).)

Reimbursement for Private School Placement and/or Compensatory Education

17. A district is not required to pay for the cost of education, including special education and related services, for a child attending a private school if the district made a FAPE available to the child and the parents chose to place the child in a private school. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a); Ed. Code, § 56174.)

18. A district may be required to reimburse a student's parents for the costs of a private school if the child previously received special education and related services from the district and the district failed to make a FAPE available to the child. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.)

19. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385]; 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

20. Additionally, a student is only entitled to reimbursement of private school tuition if it is determined that the placement at the private school was appropriate for the student. The placement does not have to meet the standard of a public school's offer of FAPE; it must, however, address the student's needs and provide educational benefit to him or her. (*Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 13 [114 S.Ct. 361, 126 L.Ed.2d 284] (hereafter, *Carter*); *Parents of Student W. ex rel. Student v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489; *Alamo Heights Independent Sch. Dist. v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161; 34 C.F.R. § 300.148.) The fact that a child has been progressing academically at the private school placement does not mean that the placement was appropriate. (*Gagliardo v. Arlington Central School District* (2d Cir. May 30, 2007) 107 LRP 30223.)

21. Court decisions subsequent to *Burlington* have also extended relief in the form of compensatory education to students who have been denied a FAPE. (See, e.g., *Lester H. v. K. Gilhool and the Chester Upland School District* (3d Cir. 1990) 916 F.2d 865; *Miener v. State of Missouri* (8th Cir. 1986) 800 F.2d 749.) Compensatory education is an equitable remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Student W. v. Puyallup School District, supra*, 31 F.3d at p. 1497.)

22. There is broad discretion to consider equitable factors when fashioning relief. (*Carter, supra,* 510 U.S. at p. 16.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid*.)

Determination of Issues

Issue1. The District materially failed to implement Student's IEP by failing to provide Student with an AlphaSmart, failing to do daily checks of his assignment calendar, and by failing to provide Student with copies of class notes and with a study buddy. The District did not fail to provide Student with a small, well-structured class setting. Further, the clerical error in assigning Student to his Learning Strategies class for two, rather than five, days a week was not material error.

1. Based upon Factual Findings 9 and 10, and 13 through 20 and Legal Conclusions 2 through 4, 6 and 8, the District materially failed to provide Student with an AlphaSmart word processor, with a study buddy and copies of his class notes, and with daily checks of Student's assignment calendar, as provided in his IEP. Student's IEP dated October 1, 2003, as amended on June 2, 2004, specifically called for these program modifications to address Student's disability. As stated by the Ninth Circuit in *Van Duyn, supra,* a material failure to implement an IEP occurs when the services a school district is supposed to provide a student by the terms of the IEP significantly fail to do so. Since the modifications at issue constituted the core of the program designed to assist Student in accessing his education, the failure to provide the modifications was material. Student's parents are therefore entitled to reimbursement for a portion of Student's private school tuition at Fusions, as detailed below.

2. Based upon Factual Findings 9, 10, 11, and 19, and Legal Conclusions 2 through 4, 6 and 8, Student did not sustain his burden of proof that the District failed to provide him with a small, well-structured class setting.

3. Based upon Factual Findings 9, 10, 11, and 19, and Legal Conclusions 2 through 4, 6 and 8, the District did not materially fail to implement Student's IEP when a school clerical error assigned him to his Learning Strategies class for two days, rather than five days a week, as mandated by Student's IEP. The improper assignment lasted for approximately one month. Thereafter, Student stipulated that he would attend the class only once every ten days, rather than five days a week. Student has failed to sustain his burden of proof that the one-month failure to provide him with the Learning Strategies class on a daily basis was a material failure by the District to implement Student's IEP.

Issue 2. The District failed materially to implement Student's IEP when it did not provide pertinent portions of his IEP to his teachers. However, Student provided no evidence that the District failed to provide quarterly reports of his progress.

4. Based upon Factual Findings 9, 10, 18, 19, and 20, and Legal Conclusions 2 through 4, 6 and 8, the District failed to provide pertinent portions regarding Student's program modifications to his general education teachers. The failure to do so prevented these teachers from having knowledge of the portions of Student's IEP, which they should have implemented in their classes. After September of 2005, Student was only assigned to attend his Learning Strategies class once every ten days. Therefore, it was even more

important that his general education teachers be aware of the program modifications in Student's IEP and the need to implement the program modifications in the general education classes. The failure of the District to inform the general education teachers of the modifications was therefore material and contributed to the inability of Student to benefit from his education.

Issue 3. The District did not deny Student a FAPE by failing to revise his annual IEP by no later than his annual date of October 10, 2006 and/or failing to hold Student's triennial IEP meeting by its due date of October 1, 2006.

5. Based upon Factual Findings 26 through 35, and Legal Conclusions 10 through 12 and 14, Student has failed to sustain his burden of proof that the District's failure to make an offer of placement and services to him by no later than his annual IEP date, or hold his triennial IEP meeting by no later than October 1, 2006, constituted a violation of the IDEA. Student has presented no statutory authority or case precedent that supports his argument.[21] Furthermore, Student has failed to meet his burden of persuasion that the District's actions, even if they amounted to a procedural violation of the IDEA, impeded Student's right to a FAPE, deprived him of an educational benefit, or impeded the right of Student's parents to participate in the IEP process. Had Student returned to Westview at the beginning of the 2006-2007 school year, he would have received special education under a previous IEP, which had been validated by a decision of an ALJ. Student's previous IEPs provided a similar educational plan and similar program modifications to the IEP offer eventually made by the District on February 14, 2007. Therefore, even if there was a procedural violation based upon the District's delay, there was no substantive harm caused to Student.

Issue 4. The District did not fail to have a general education teacher present for a substantial portion of each IEP meeting resulting in the appropriate IEP offer made on February 14, 2007, nor did the failure to include a statement of specialized instruction and/or special education based upon peer-reviewed research in the IEP deny Student a FAPE. However, the District did fail to include an age-appropriate assessment and appropriate transitions services in the IEP.

6. Based upon Factual Findings 26 and 27, and 39 through 43, and Legal Conclusions 10 through 13, the District did not commit a procedural violation when Student's general education teachers failed to remain in attendance through each IEP meeting. Student has not sustained his burden of proof that such a failure constitutes a procedural violation of the IDEA. Further, Student has not sustained his burden of proof that such a failure, even if it were to constitute a procedural violation of the act, amounted to more than harmless error. There was a general education teacher present at each IEP. The teacher present participated in the IEP process and gave significant input regarding his or her impressions of Student. The teachers also contributed to the formulation of the IEP.

[21] The ALJ does not condone the slow pace at which the District held IEP meetings, but only finds that Student has not met his burden of proof to show a violation of his rights.

Therefore, Student has failed to show that the late arrival or early departure of any of the teachers resulted in any substantive harm to him.

7. Based upon Factual Findings 26, 27, 44, 45, 46, and 47, and Legal Conclusions 10, 11, 12, and 15, Student has not sustained his burden of proof that the District's failure to include in Student's IEP a statement of specialized instruction based upon peer-reviewed research resulted in any substantive harm to him. First, Student has not shown that the program developed for him in the IEP failed to meet his educational needs. Second, Student has failed to show that there exists any peer-reviewed, research-based educational program that would be appropriate to address his specific disability. Therefore, the District's failure to provide the statement did not result in a denial of FAPE to Student.

8. However, based upon Factual Findings 26 and 27, and 48 though 55, and Legal Conclusions 10, 11, 12 and 14, the District denied Student a FAPE by failing to include an age-appropriate assessment and appropriate transition services in the February 14, 2007 IEP. The IEP was to cover Student's junior year of high school and a portion of his senior year, pivotal times for him. It was important that this IEP contain an appropriate statement of transition services based upon an age-appropriate assessment to prepare Student for his transition from high school to post-secondary education. The lack of specific guidance to Student resulted in a loss of educational benefit to him. Student is therefore entitled to an award of compensatory services, as addressed below.

Issue 5. The District's offer of placement and services contained in Student's IEP dated February 14, 2007, with the exception of the transition services as described in paragraph 8 above, constitutes a FAPE for the 2006-2007 school year.

9. Based upon Factual Findings 56 through 68 and Legal Conclusions 2 through 8, the District's IEP offer of February 14, 2007, addressed Student's unique needs, was reasonably calculated to provide Student with educational benefit in the least restrictive environment, and comported with his IEP. Although Student had progressed well while placed solely in a general education program at Cathedral, the District sustained its burden of proof that Student needs some resource support at public school in order to access his education. The IEP of February 14, 2007, therefore offered a FAPE to Student.

Issue 6. The District administered appropriate triennial assessments of Student.

10. Based upon Factual Findings 78 through 84, and Legal Conclusion 16, the District sustained its burden of proof that the assessments it administered to Student were appropriate and that the assessors properly administered them. There is no basis for Student's contention that the District was required to conduct an EEG of Student or that Student's low score on the contextual conventions subtest of the TOWL-III assessment was the result of improper administration of the test.

Issue 7. Student is entitled to some requested reimbursement of private school tuition expenses and some requested compensatory education.

11. Based upon Factual Findings 9, 10, 13 through 20 and 21 through 25, and Legal Conclusions 2 through 4, 6, 8, and 17 through 22, Student's parents are entitled to partial reimbursement of his tuition for his private placement at Fusions. The District materially failed to implement Student's IEP in the first semester of Student's 2005-2006 school year, justifying the decision of his parents to withdraw him from Westview and privately place him. Student's parents gave proper notice to the District of their intent to place Student at a private school, and Fusions was an appropriate placement at the time.

12. Based upon Factual Findings 26 and 27, 48 though 55, and 75 through 77, and Legal Conclusions 10, 11, 12, 14 and 17 through 22, Student is entitled to compensatory education for the failure of the District to administer an age-appropriate transition assessment to him and for the District's failure to provide appropriate transition services for Student in the IEP dated February 14, 2007. However, Student has failed to demonstrate that he is entitled to the extent of the compensatory services requested in his complaint. The award of compensatory services will be limited as detailed in this decision.

13. Based upon Legal Conclusions 17 through 22, there is broad equitable authority to award monetary relief to a student or his parents in the form of reimbursement of expenses or compensatory education. However, based upon Legal Conclusions 22, 23 and 69 through 75, Student has failed to sustain his burden of proof that he is entitled to any remedies other than those stated in paragraphs 11 and 12 above. The weight of the equities does not support Student's request for reimbursement of his tuition at Cathedral or for costs of private tutoring.

ORDER

1. Student's request for reimbursement from the District for his placement at Fusions is partially granted, for $6,000. The District is ordered to pay this sum to Student's parents within 60 business days of the date of this decision.[22]

2. Student's request for compensatory education for transition services is partially granted. By no later than October 31, 2007, the District shall provide Student with 20 hours of one-on-one transition services, as provided for in this Decision. They may be provided by a District career or college advisor, if one is employed by the District, or by a privately contracted transition specialist, at the District's discretion.

3. If the District has not already done so, it shall administer an age-appropriate transition assessment to Student, no later than September 30, 2007.

[22] The reimbursement ordered is based upon the invoice provided by Student's parents showing that they paid $6,000 of the bill. As stated above, the cost of Student's physical education classes has also been disallowed.

4. All other requests for relief by Student are denied.

5. The District's request that its offer of placement and services to Student in the IEP dated February 14, 2007, constituted FAPE, is granted, with the exception of the provision of transition services.

6. The District's request for a finding that its triennial assessments were appropriate, is granted.

PREVAILING PARTY

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

1. Student substantially prevailed on Issue 1 and Issue 2, and prevailed fully on Issue 4(C).

2. The District prevailed on all other issues heard and decided.

RIGHT TO APPEAL THIS DECISION

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

DATED: June 18, 2007

DARRELL L. LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings
Special Education Division