

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

In the Matter of:

STUDENT,

Petitioner,

vs.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005070660

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on December 12, 2005. Petitioner was represented by her mother and her grandmother, who are both attorneys at law. Respondent was represented by Ricardo R. Silva, Attorney at Law, and Victoria McKendall, Administrator Coordinator of the Los Angeles Unified School District.

Prior to the hearing, on September 20, 2005, respondent school district filed a Motion to Dismiss this matter. On October 26, 2005, petitioner filed an Opposition. On November 22, 2005, petitioner filed an additional opposition pleading. On November 27, 2005, petitioner filed an opposition entitled, "Requirements of Notice." On November 28, 2005, a prehearing conference was held with the parties. Issues were framed for the hearing and it was ordered that the administrative law judge assigned to the hearing in this matter would hear and rule upon the Motion to Dismiss.

At the outset of the hearing on December 12, 2005, the undersigned Administrative Law Judge denied respondent's Motion to Dismiss on the grounds that it was not clear that jurisdiction existed to consider the motion in the absence of any evidence. Respondent school district did not identify any authority in these circumstances. The matter proceeded to hearing.

Petitioner presented the testimony of Betty Winn, Head of the Heschel Day School, and Adina Kraim, Reading Specialist and Resource Coordinator at the Heschel Day School. Petitioner then presented a letter from Janice S. Weiss, M.A., M.F.T., which was admitted into evidence as Exhibit A, and indicated that she had completed her case-in-chief and was resting. Thereupon, respondent renewed its Motion to Dismiss and further argued that petitioner had not met its burden of going forward or its burden of proof. Respondent also presented documentary evidence in the form of individualized educational programs (Exhs. 1, 2, and 24) to which petitioner did not object; the documents were admitted into evidence.

On December 12, 2005, petitioner's counsel having presented evidence and rested, the Administrative Law Judge indicated that he wanted to review the Motion to Dismiss. The due process hearing was stayed and the parties directed to file written argument on the issue whether the due process complaint should be dismissed pursuant to respondent's Motion to Dismiss or whether petitioner was entitled to relief based on the state of the evidence. A briefing schedule was set and tentative dates for a continued due process hearing were set for February 1 – 3, 2005. Before adjourning, respondent's counsel requested that three prior Orders or Decisions from the Special Education Hearing Office (SEHO) be placed in the record. The Administrative Law Judge takes official notice of the orders and admits them into evidence as Exhibit 24, collectively.

On December 23, 2005, respondent filed a Brief in Support of Motion to Dismiss which was marked as Exhibit 25. On January 6, 2006, petitioner filed an Opposition to Respondent's Motion to Dismiss which was marked as Exhibit B. On January 11, 2006, petitioner filed an amended Opposition to Respondent's Motion to Dismiss, which was marked as Exhibit C.

Oral and documentary evidence and written argument having been received and considered, the Administrative Law Judge finds as follows:

ISSUES

The issues presented for ruling by respondent's Motion to Dismiss and the evidence in this matter are whether the school district has offered a free appropriate public education to petitioner-student and whether the school district is required to pay for or reimburse the parent for tuition and other services paid for the petitioner-student to attend a private and to receive other services.

FACTUAL FINDINGS

1. Petitioner (hereinafter also student) is a ten-year old child who has been attending Abraham Joshua Heschel Day School, a private or non-public school, since kindergarten. The student is now in fourth grade at Heschel Day School where she has made significant academic and social progress over the past few years due to the modifications and accommodations of the private school staff and the efforts of her mother. She lives with her mother in Northridge, which is within the boundaries of the Los Angeles Unified School District (hereinafter school district), but she has not ever attended or received services from respondent school district.

2. (A) Three years ago in or about early 2002, petitioner's student's mother requested that the school district conduct an assessment of her daughter to determine whether the student was eligible for special education services. The school district completed an assessment and, on March 22, 2002, held an individualized education program (IEP) meeting. The student's mother attended the IEP meeting and signed the IEP document. The student was found eligible for special education due to a specific learning disability. However, because the student was attending Heschel Day School, a private school, the school district developed a Services Plan for her rather than a formal individualized education program. The student continued attending her private school.

(B) The next year, on March 26, 2003, the school district conducted an annual review of petitioner's Service Plan. Her mother advised, that while she consented to the Service Plan, she wanted the school district to provide additional services, perform a reassessment, and hold an IEP meeting. The school district acceded to the parent's request and completed additional evaluations of her daughter. On October 27, 2003, the school district convened an IEP meeting; petitioner's mother participated in the meeting and consented to but did not sign the Service Plan.

(C) On January 14, 2004, the school district reconvened an IEP meeting to amend the IEP document developed from the meeting in October 2003 and to discuss the results of a school occupational therapy (OT) assessment of the student. Her mother and Adina Kraim, a reading specialist-resource coordinator from Heschel Day School, attended the meeting. Based on the OT assessment, the IEP team determined that the student had difficulties with her visual perception skills which affected her ability to print and write legibly or efficiently. The IEP team agreed that, if she were enrolled in a district or public school, the student would benefit from occupational therapy. The IEP team concluded that an IEP meeting should be held to consider her eligibility for OT services in the event that she ever enrolled in a school district or public school. The student's mother advised the IEP team that she wanted her daughter to continue attending her private school and demanded "outside services" for her. She further indicated her consent to the OT assessment and eligibility but stated she was or would be demanding more services in a due process hearing. Subsequently, the student's mother requested a due process hearing.

Prior Due Process Complaint

3. (A) On May 20, 2004, petitioner's prior due process complaint in Case No. SN04-00253 came up for hearing before a SEHO hearing officer. Petitioner was represented by her grandmother and her mother. Respondent school district was represented by Ricardo R. Silva, Attorney at Law. As a preliminary matter, and in order to make a ruling on respondent's previously filed motion to dismiss, the hearing officer requested the parties to present evidence on the limited issue of whether the student was a voluntarily placed private school student. Petitioner's mother presented testimonial evidence on the motion.

(B) The SEHO hearing officer made certain determinations from the evidence presented at the evidentiary hearing which are summarized heretofore. At that time, student was a third grader at Heschel Day School. She had been first placed there by her mother because her older sister attended the school. In 2002, her mother requested that respondent school district assess her daughter for special education services. The school district conducted an assessment and held an IEP meeting on March 22, 2002. Petitioner's mother attended the meeting. Because the student was voluntarily attending a private school, the school district developed a Service Plan for her rather than an IEP. The mother signed the IEP document. Subsequently, on March 27, 2003, the school district conducted an annual review of the Services Plan; the mother consented to the Services Plan but requested additional services. On October 27, 2003, the school district conducted an IEP team meeting. The mother consented to the IEP but did not sign the Services Plan.

(C) Based on the mother's legal background and the plain language of the IEP document, the SEHO hearing officer determined that, at the time of the IEP meeting of March 22, 2002, the student was voluntarily placed in a private school by her parent. The hearing officer found that petitioner's mother signed the IEP document which included the handwritten notation that read, "The parents agree that Free and Appropriate Public Education--FAPE--has been offered and will be implemented upon enrollment in a public school, but decline services and choose to place their child at a private school." Despite language in the IEP below her signature that she could withhold her consent to any portion of the IEP that she did not agree with, request an informal conference, or initiate a due process hearing, petitioner's mother did not avail herself of the opportunity to disagree or object to the IEP. Because she was voluntarily placed in a private school by her mother, the hearing officer ruled that the student was not entitled to due process protections and dismissed her claims from March 22, 2002, through October 27, 2003, pursuant to respondent's motion to dismiss.

(D) From the evidentiary hearing, the hearing officer further determined that petitioner's mother did not put the school district on notice that she was seeking a public school placement until the IEP meeting held on January 14, 2004, to amend the October 2003 IEP. The hearing officer found that, following this meeting, the mother disagreed with that IEP addendum and stated her intention to seek due process. She also stated that she had begun researching public school placement by placing her daughter on the waiting list at a district charter school and by observing the special day class at her district school of residence. Ruling on respondent's motion to dismiss, the hearing officer dismissed petitioner's claims from October 27, 2003, through January 14, 2004, on the grounds that student remained a voluntarily private-private placed student. However, the hearing officer denied respondent school district's motion to dismiss for any claim by petitioner arising after January 14, 2004.

(E) Moreover, following the evidentiary hearing on May 20, 2004, the hearing officer dismissed petitioner's claims under the Americans with Disabilities Act and Rehabilitation Act and ordered the parties to participate in a telephonic prehearing conference prior to the next hearing date. Petitioner's counsel had filed an issue statement that the hearing officer found was incoherent and she refused to identify all of her issues at the hearing. The due process was continued to June 3, 2004.

4. (A) On June 2, 2004, the SEHO hearing officer conducted a telephonic prehearing conference in the prior due process matter of Case No. SN04-00253. The grandmother, an attorney, appeared for petitioner. Attorney Silva appeared for respondent school district. Based on petitioner's representation, the hearing officer determined that the following issue was to be decided at the prior due process hearing scheduled for June 3: "Did the District fail to offer Amy a free appropriate public education by failing to offer an appropriate placement and services beginning January 14, 2004?"

(B) In addition, the SEHO hearing officer denied petitioner's motion to continue the due process hearing. Petitioner's counsel requested the continuance on the grounds that she needed additional time to prepare or amend her brief, she had an appointment at the Department of Motor Vehicles, and the student's mother was unavailable for the hearing due to criminal court appearances required by the mother's employment as a county deputy public defender. The hearing officer noted that the matter had been continued three times previously and found good cause was not shown to grant petitioner's continuance request. Petitioner's counsel indicated that she would not be appearing for the June 3 hearing regardless of the ruling on her motion for continuance. The hearing officer advised counsel that, if she did not appear at the hearing, the matter may be dismissed for failure to prosecute.

5. At the hearing on the prior due process matter in Case No. SN04-00253 that was scheduled for June 3, 2004, no appearance was made on behalf of petitioner. Neither her counsel-grandmother nor her mother appeared at the due process hearing. Respondent school district was represented by counsel who made a motion to dismiss the due process complaint, arguing, in part, that petitioner had abandoned her claim. Due to the failure of her attorney or mother to appear on her behalf, the SEHO hearing officer dismissed petitioner's due process complaint without prejudice.

Present Due Process Matter

6. (A) On May 24, 2005, the school district held an IEP team meeting for purposes of a three-year review of petitioner's Service Plan as well as of her academic performance and educational programming. The student's mother and a private school consultant attended the meeting. At this time, the IEP still had not been implemented because student continued to attend private school. The student was receiving consultative services pursuant to the school district's Service Plan and private school policy. During the IEP team meeting, the parent was provided with a copy of the report of the school psychologist. In addition, a speech pathologist summarized a review of records; a speech assessment was not performed because the parent did not bring her daughter in for formal testing. A resource specialist summarized the student's present level of performance as reported by her private school teachers. Formal academic testing had not been conducted because the parent refused to have the student assessed by the school district on four occasions. OT and health assessments also had not been conducted due to the parent's decision not to bring the student in for assessments. The IEP team discussed the need for complete comprehensive testing but the parent stated that her daughter had been tested enough and the IEP team could review previous reports and interview her teachers at her private school. The IEP team received information about test results from a school psychologist and heard about interviews with the private school teachers and staff.

(B) With the information received from student's private school teachers, which included work samples and observations, the IEP committee reviewed and discussed Amy's present levels of performance in several academic and skill areas. In the area of reading, it was revealed that student struggled to comprehend and complete reading assignments on material at her grade level. In language arts, she had demonstrated effort and improvement in writing. In math, she had learned basic math skills but had difficulty with word problems and math reasoning. In language function, the IEP learned that the student had repeated third grade but had improved in all academic areas and showed strengths in creative writing and thinking and the ability to follow directions. She had weaknesses in short term and visual memory and organizational skills. In general ability, data and test results from the private school showed that Amy's cognitive functioning, motor perceptual skills, perceptual skills were in or about average range. With respect to her social and emotional functioning, the student was described as a sweet, happy, well-adjusted, and confident child who was well liked by her peers. The IEP team developed annual

goals and objectives for the student in written language, math, language and speech, and reading comprehension; her goals were to be measured, in part, by trials based on student work samples and teacher observations.

(C) Following the IEP meeting of May 24, 2005, the IEP team determined that the student remained eligible for special education services due, in part, to difficulties in attention and auditory processing. The IEP team found that she needed more intensive instruction and services than could be provided solely in a general education setting. She had been provided several years of educational therapy, tutoring, and resource services at her private school and was a cooperative, hard-working student but she had to repeat third grade and continued to struggle to achieve grade level work. For the remainder of 2004-2005 school year and the 2005-2006 school year, the IEP team recommended that the student be placed at Castlebay Lane Elementary School, a general education elementary school of the school district, with additional services in extended school year and/or intersession periods as appropriate. Educational services were to be provided to the student by a special education teacher in a special day class or program setting. The IEP team also recommended that petitioner be mainstreamed with a general education classroom and program for up to 40 percent of the school day for all school activities, including lunch and recess. Her special education and general education teachers would collaborate on the appropriate accommodations and supports necessary for her to succeed in the school setting. Teachers were expected to attend professional training and curriculum meetings to develop a consistent program that would provide student with access to the general education curriculum. With respect to modifications or supports for the student during instruction, it was further recommended that the special education teacher use prompting and cues to elicit appropriate responses and facilitate reading comprehension, provide her with preferential seating in the classroom, present new material to her in smaller segments, check that she understands directions, repeat directions for her, use manipulatives in math, and provide visual prompts. The IEP team also granted the student 60 minutes of language and speech services based on a prior assessment. The parent declined vision therapy because she believed such therapy was not helpful or needed. The IEP team determined that an assessment plan would be prepared if the student ever enrolled in a public school.

(D) On the IEP document for May 24, 2005, petitioner's mother indicated that she disagreed with the assessment, eligibility, instructional setting, and the specific instruction and services offered by the school district. The mother added that she wanted services for her daughter from the school district but she requested that the services be provided at her private school. She indicated that she wanted to keep her daughter at Heschel Day School because she believed the private school is appropriate for her. She requested another IEP before the end of the school year and indicated her intention to file a request for a due process hearing.

7. On June 3, 2005, petitioner filed a Request for Due Process with the Special Education Hearing Office, which is the subject of the instant matter of Case No. N2005-07-0562. Petitioner stated that she wanted another or a new IEP before the end of the school year. On the due process complaint form, petitioner added that the assessment of respondent school district was not based on fact and that her current placement at Heschel Day School was appropriate. Petitioner further requested that respondent school district pay for services that she receives at Heschel Day School.

8. (A) On September 27, 2005, the school district convened an IEP meeting to amend the May 2004 IEP to add information from the student's private school teachers. The student's mother attended the meeting. The IEP team noted that the student left Heschel Day School everyday at 1:30 p.m. to receive private tutoring and she met with an educational therapist once weekly. Every month, the student's mother, teachers, and therapist met to discuss the student's progress. Heschel Day School staff reported that petitioner wants to do well in school and receives a lot of support from her teachers and parent. She was characterized as a happy child who would be devastated socially if she had to attend a special day program in the school district.

(B) As result of the meeting on September 27, 2005, the IEP team amended the programming set forth in the May 2004 IEP by recommending that the student be mainstreamed into the general education program for up to 40 percent of the school day. The IEP team further recommended that student's special education and general education teachers collaborate on appropriate accommodations and supports necessary for the student to succeed at school. Finally, the IEP team noted that student's mother disagreed with the school district's offer of educational programming, wanting more services, and had filed a due process complaint; her daughter continued to attend Heschel Day School.

9. (A) At the hearing on December 12, 2005, petitioner presented the testimony of Heschel Day School employees, Head Betty Winn and Reading Specialist and Resource Coordinator Adina Kram. Their testimonies were consistent and also corroborated the documentary and other evidence in this matter. The following factual findings are made from the testimony of the two private school employees

(B) The student has now attended Heschel Day School for six or seven years. She is a happy, confident, and sociable fourth grader who seeks to please others and works very hard at her academic coursework. At school, she knows most of the teachers, has lots of friends, loves to perform on stage, and participates in her classroom. Student has made significant academic, social, and emotional progress at Heschel Day School due to the supports and modifications that are afforded her there and outside of school and the collaborative efforts and resources of her mother and teachers.

(C) At Heschel Day School, student is enrolled in a general education fourth grade classroom with about 16 other pupils. From 7:50 a.m. until 1:30 p.m., she receives instruction and participates in general studies in the areas of language arts, math, social studies, science, fine arts, physical education, and computers. She also accesses the reading laboratory. Student is able to keep up with the classroom instruction and assignments with certain individual supports and modifications of the curriculum. She is provided with individual and group support from teachers and encouragement from her peers. Heschel Day School teachers are aware of her learning disability and recognize her need for constant preview, review, and reinforcement of information to be able to learn and progress. Her teachers review her assignments, modify or rephrase questions and written assignments, and engage her in cooperative group activities. To help the student achieve and participate in the general education classroom, teachers assign her fewer assignments or fewer number of pages to read, revise writing and reading assignments to take into account her strengths and academic levels, and modify assessment and grading standards. In class, the student receives individual instruction from her teachers and a reading specialist so that she can continue to access the general education curriculum along with her peers. Once monthly, the teachers, reading specialist, and the parent meet to evaluate student's ongoing educational program, review testing, and address her needs. At Heschel Day School, the student is performing or achieving at the basic fourth grade level and, with diligence and hard work and the continued support of her teachers and parent, she can progress to the fifth grade although it will be difficult and challenging for her.

(D) Adina Kraim, a reading specialist and resource coordinator at Heschel Day School, has worked with the student on her reading skills since she was in first grade. This school year, the reading specialist helps petitioner while she is in her general education classroom rather than pulling her out for private instruction. To help petitioner learn, Ms. Kraim modifies questions and the reading assignments. The reading specialist provides prompts and cues and presents information in small components. She also reinforces and repeats information for the student. She helps her with word retrieval. Under her guidance and tutelage, petitioner has progressed and learned to read in this structured, individualized manner over the past five years.

(E) Since September 2005, student has been permitted to leave Heschel Day School at 1:30 p.m. to receive private tutoring. She leaves campus with her tutor, who is also a part-time teacher at the private school, and receives two hours of one-on-one tutoring at home or outside of school. Because he teaches at Heschel Day School, the tutor speaks with the student's teachers daily about what she is being taught or expected to learn in her classroom. With this information, the tutor reinforces and repeats the schoolwork and helps her to understand the curriculum in the private tutoring sessions. Student is very motivated to learn and has benefited from the tutoring. In addition, she receives services from an educational therapist, speech therapist, and psychologist, all of which are arranged and paid for by her mother.

(F) Because of the supports and services that she receives there, the student's mother and teachers believe that Heschel Day School is the best learning and social environment for the student. The mother believes she is thriving at her private school and does not want to change her school placement. The mother asserts that the student would not progress as well or be as happy or comfortable if she were placed in a special day class in an elementary school of the school district. In a public school, she presumably would not receive as much individual attention and the curriculum would not be as specially tailored to her strengths and weaknesses. The mother believes that she would not progress as much as she has with only 20 minutes three times weekly of individual tutoring that has been offered by the school district in its latest IEP. Very likely, she would be in a special day class with more pupils than she is used to seeing at her private school. The special day class may have more noise, which the student does not enjoy, and her attention and learning may be hampered by the noise. She is a bright child and would not necessarily be stimulated in a special day class that has pupils who are not as high functioning as she. Thus, if placed in a special day class, the mother believes that the student, after attending a small private school for all of her school years, would likely lose her self-esteem and confidence, become frustrated, internalize her feelings and shut down, and not participate in the classroom. In the view of petitioner's mother and her private school teachers, placement of the student in a special day class would be detrimental to her academic progress and her emotional and social well-being.

(G) Heschel Day School is a private school which is not certified as a non-public school or agency. The private school does not receive or accept funds from public school districts for special education. The student does not receive special education services at her private school.

10. Janice S. Weiss, M.A., M.F.T, of Encino has seen the student and her family in therapy since July 1, 2000. Ms. Weiss believes that the student is properly placed at the Heschel Day School, for the student has made progress there with the support of the staff at the private school and by working with her teacher, Adina Kraim, and one-on-one tutor, Peter McCabe. Student is also flourishing in social relationships at Heschel Day School. Ms. Weiss opines that placing her at the Castle Bay Special Day School would impede the progress that she has made in compensating for and overcoming her learning disabilities and affect her fragile sense of self-esteem.

11. (A) On September 20, 1995, respondent school district file a Motion to Dismiss, contending, in part, that, where a parent has voluntarily chosen to place her child in a private school, the child does not have any individual entitlement to services from a public educational agency. In support of its motion, the school district filed the Declaration of Doug Howard, the IEP document dated May 24, 2005, and Service Plans for petitioner.

(B) As established by the Declaration of Doug Howard, who is an Assistant Principal with the school district, the student resides within the attendance boundaries of Andasol Elementary School, which the school district considers her public school of residence. Student has never been enrolled or attended Andasol Elementary School. On or about March 22, 2002, the school district developed a Services Plan for the student as a “voluntarily, parentally placed private school student.” The parent and the private school have accepted consultative services from the school district under the Services Plan.

(C) As set forth in the Services Plan dated May 24, 2005, the school district convened a team meeting to review the student’s Services Plan on that date. Her mother and a representative of her private school attended this meeting. Under this Services Plan, the school district offered consultative services in classroom instructional strategies to the student, which consisted of ten sessions of no more than 60 minutes duration each within a 12-month period. The goal of the consultative services was to provide remediation, strategies, and modifications in reading, math applications, and written expression. The objectives of the consultative services were to enable the student to answer questions requiring comprehension and to identify the correct math answers. The private school accepted the consultative services for the student. Parent noted on the Services Plan that she wanted additional services and different options for her daughter.

(D) On October 20, 2005, the school district held a team meeting to review the student’s Services Plan. Her mother attended this meeting. Under the Services Plan that was developed as result of this meeting, the school district offered consultative services in classroom instructional strategies. It was noted that the student has difficulties in auditory and visual processing, short term memory, and word recall. The goal of the consultative service was to provide help to the student in reading, math applications, and written expression. The parent refused academic or psychological testing of her daughter and requested that the school district provide or pay for all the services that she was receiving at her private school.

12. In the instant due process proceeding, petitioner requests services not offered in the May 2005 IEP and the September 2005 addendum. For the past and current school years, the parent requests reimbursement from the school district for tuition paid to the private school and for fees paid to her private tutor. The parent wants her daughter to continue her private school. She does not contend that there is any issue of child find, for her daughter has been assessed by the school district. The parent disagrees with the assessment as well as services offered by the school district. She contends that the student needs individualized one-on-one tutoring and instruction in small groups but at her private school. The student receives those services at Heschel Day School and the parent believes that her continued enrollment at the private school and the services provided there are appropriate for her needs and in her best interest. The parent does not want her daughter to attend a special day class at a district school.

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist to grant respondent's Motion to Dismiss and to dismiss petitioner's due process complaint in that it was established by the preponderance of the evidence and applicable law that the student is a voluntary-placed private school pupil and the respondent school district does not have a legal obligation to provide or pay for services for the student while she attends her private school under the circumstances of this matter, based on Findings 1 – 12 above.

2. Summary of Applicable Law: Under the federal Individuals with Disabilities Education Act (IDEA) and state law, pupils with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400 (2005); Ed. Code §56000 et seq.) The term “free appropriate public education” means special education and related services that are available to the pupil at not cost to the parents, meet state educational standards, and conform to the pupil's individualized education program. (20 U.S.C. §1401(9).) This right to FAPE arises only after a pupil has been assessed and determined to be eligible for special education.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 485 U.S. 176, 200-202, 102 S.Ct. 3034 (1982), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with disabilities to satisfy the requirements of the IDEA. The *Rowley* Court determined that a pupil's IEP must be reasonably calculated to provide the pupil with some educational benefit but that the IDEA does not require school districts to provide special education pupils with the best education available or to provide instruction or services that maximize a pupil's abilities. (*Id.* at p. 198 - 200). Finding that Congress included no language suggesting an obligation to maximize the potential of disabled pupils, the *Rowley* Court stated 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 pupil. (*Id.* at p. 201).

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special educational services to a disabled pupil to constitute a free appropriate public education under the IDEA and the *Rowley* case, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and reasonably calculated to provide the pupil

with some educational benefit in the least restrictive environment. (*Ibid.*)

The Individuals with Disabilities Education Act also confers rights and procedural safeguards upon handicapped students and their parents. (20 U.S.C. § 1401 et seq.) Any state qualifying for federal funds available under the IDEA must adopt policies and regulations that assure school districts will provide a free appropriate public education (FAPE) and related services to students with educational disabilities. (20 U.S.C. § 1401 et seq.) The IDEA emphasizes participation by parents in developing and assessing the effectiveness of the child's education program. (34 C.F.R. 300.345.) In the *Rowley* case, the United States Supreme Court recognized the importance of adhering to the procedural requirements and protections afforded by the IDEA, which are designed to ensure effective parental participation in the IEP process and careful consideration of a pupil's educational needs. (See 20 U.S.C. §1400 et seq.) The United States Supreme noted that, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at pp. 205-206.) Under both federal and state law, parents are guaranteed minimum procedural safeguards such as access to school records, notice of proposed changes in a pupil's educational placement, and the right to file due process complaints related to the placement or provision of a free appropriate public education. (See 20 U.S.C. § 1400 et seq.; Ed. Code § 56500 et seq.)

A parent or school district may request a due process hearing when: (1) there is a proposal to initiate or change the identification, assessment, or educational placement of the pupil or the provision of FAPE to the pupil; (2) there is a refusal to initiate or change the identification, assessment, or educational placement of the pupil or the provision of FAPE to the pupil; (3) the parent refuses to consent to an assessment of the pupil; or (4) there is a disagreement between the parent and a school district regarding the availability of an educational program that may be appropriate for the pupil. (20 U.S.C. § 1415(b)(6); Ed. Code § 56501, subd. (a)45401, subd. (a).) In general, the due process procedures do not apply to complaints by a parent that a school district has failed to provide services, including services under a services plan, to a pupil with disabilities who is voluntarily enrolled by the parent in a private school. (34 C.F.R. § 300.457(a).)

Under the IDEA, school districts are required only to expend a proportionate amount of federal funds on children who have been enrolled in private schools by their parents. (20 U.S.C. § 1412(a)(10)(A)(i)(II); 34 C.F.R. § 300.453.) No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. (34 C.F.R. § 300.454(a).) Private school children with disabilities may receive a different amount of services than children with disabilities enrolled in a public school and no private school child with a disability is entitled to any service or

to any amount of the services that child would receive if enrolled in a public school. (34 C.F.R. § 300.455.) When the school district has offered them a free appropriate public education and their parents elect to enroll them in a private school, such disabled private school children have no individual entitlement to special education and related services from the public educational agency. (20 U.S.C. §1412(a)(10)(C)(i); see *Foley v. Special School District of St. Louis County* (8th Cir. 1998) 153 F.3d 863, 864; *K.R. v. Anderson Community School Corporation* (7th Cir. 1997) 125 F.3d 1017, 1019, cert. denied, 118 S.Ct. 1360 (1998).)

3. Issue No. 1--It was established by the school district that it has offered the student a free appropriate public education for the 2004-2005 and 2005-2006 school years. Beginning in March 2002, the school district performed an assessment of the student, found her eligible for special education services due to a specific learning disability, and prepared a Services Plan for her inasmuch as she was a private school pupil at Heschel Day School. In March 2003, the school district reviewed the Services Plan and performed additional evaluations of the student at the parent's request. In January 2004, the school district performed an OT assessment of the student and recommended OT services for her if she ever enrolled in public school. The parent did not disagree with the OT assessment or finding of eligibility but filed an earlier due process complaint because she wanted services for the student to be provided at the private school. In June 2004, petitioner's earlier due process complaint was dismissed for lack of prosecution.

Following the May 2005 IEP, the student's mother filed the present due process complaint in June 2005 and has again requested that the school district provide and/or pay for services so that her daughter can continue attending her private school. The mother has also asserted that the school district's assessment was false or incorrect. The mother also requested another IEP before the end of the school year but this complaint is necessarily moot inasmuch as the school district held a follow-up meeting to amend the IEP in September 2005.

Under the May and September 2005 IEP's, the school district offered the student placement at Castlebay Lane Elementary School with extended and intersession services. The student was offered educational services by a special education teacher in a special day class with mainstream placement in a general education program for up to 40 percent of the school day for all activities. Her special and general education teachers were required to collaborate on appropriate modifications and supports for the student and to use prompts to facilitate her learning and access to the curriculum. In addition, the school district offered sixty minutes of speech and language and recommended comprehensive assessment of the student on enrollment in the public school.

Based on the information available to it, the school district offered the student a free appropriate public education for the school years from 2004 through 2006. The school district IEP team determined that the student had difficulties in attention

and auditory processing, had been receiving therapy and tutoring at her private school, and needed more intensive instruction than could be provided in a general educational classroom. The IEP team reviewed and took into consideration the report of the school psychologist who reviewed records and received information from the student's private school teachers about her academic performance. As such, the school district's offer of special education services was designed to meet the student's unique needs in processing and took into account her the services that she had been receiving in private school and therapy. With placement in a special day class and mainstream activities for 40 percent of the school day, the school district's offer was reasonably calculated to provide the student with some educational benefit in the least restrictive school environment.

While the parent asserts that the school district's assessment was false or incorrect, it was due to the parent's choice that the school district was unable to fully assess the student before the May 2005 IEP meeting. The school district did not perform assessments in speech, academic performance, occupational therapy, and health because the parent did not make the child available for evaluation or simply declined to have the child assessed. The school district had to use alternative means to assess the child and develop an IEP. The law provides that a school district take into consideration a pupil's most recent evaluation (20 U.S.C. § 1414(d)(3)(A), Ed. Code § 56341.1, subd. (a)(3)) and use a variety of assessment tools and strategies to gather relevant functional and developmental information about a pupil and to determine the pupil's educational needs (34 C.F.R. §300.532). In developing the student's IEP or Services Plan here, respondent school district followed the law by taking account a review of records and information from her private school teachers.

Moreover, the parent has not shown with other medical, educational, or professional evidence that the school psychologist who prepared the report was not a qualified person to do so under Education Code section 56320 or that, under the circumstances, the student was not assessed in all areas related to her suspected disability under Education Code section 56320, subdivision (f). The parent did not offer a countervailing assessment or opinion by another school psychologist or other educational expert to demonstrate that the school district assessment or IEP was inappropriate under the circumstances of this matter.

4. Issue No. 2--It was not established by petitioner that the school district is obligated to reimburse the parent for or to pay for the private school tuition and individualized services provided to the student at or outside of the private school. Since kindergarten, the student has always attended her private school and has never enrolled or attended a public school within the school district. The student is now in fourth grade. The parent has voluntarily elected to enroll her daughter in private school because she believes that the private school is the most appropriate setting for her and provides services that meet her unique needs. However, under the law, the school district is not required to provide the best education available or to provide

instruction that maximizes a pupil's abilities. Nor is the school district required to place the student in a program preferred by the parent even if the program will result in greater educational benefit to the student. Rather, the school district is obligated to provide the student with a free appropriate public education. Here, because the student has been voluntarily enrolled in a private school by her parent and school district has offered the student a free appropriate public education, the student as a private school pupil with a disability is not entitled to special education and related services from the school district or to reimbursement from the school district for private school tuition and private instructional services.

PREVALING PARTY

Under Education Code section 56507, subdivision (d), this Decision must indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to said mandate, it is determined that respondent school district prevailed on each and every issue heard and decided in this matter.

Wherefore, the Administrative Law Judge makes the following Order:

ORDER

All of the Student's requests for relief are denied and the due process complaint in OAH Case No. N2005070660 is dismissed with prejudice, based on Conclusions of Law Nos. 1 - 4, jointly.

Dated: March 3, 2006

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS

This is the final administrative decision and both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.