

1 Education Division, on December 13, 14, 15, and 18, 2006. Following
2 the administrative hearing, Administrative Law Judge Elsa H. Jones
3 ("ALJ Jones") issued a lengthy decision on February 14, 2007 ("ALJ
4 Decision").

5 Plaintiff filed a complaint in this Court appealing the ALJ
6 Decision on May 9, 2007. Plaintiff filed her opening brief on October
7 11, 2007 (Docket # 21); the same day, defendants filed a motion for
8 summary judgment (Docket # 20). Defendants filed their response to
9 plaintiff's opening brief on November 5, 2007 (Docket # 26); plaintiff
10 filed her opposition to defendants' summary judgment motion on
11 November 7, 2007 (Docket # 29). Plaintiff filed a reply brief on
12 November 14, 2007 (Docket # 31), while defendants filed their reply
13 brief on November 19, 2007 (Docket # 32). This matter was set for
14 hearing on November 26, 2007, but on November 20, 2007, the Court
15 found the matter proper for resolution without oral argument, vacated
16 the hearing date, and took the matter under submission.

17 **I. BACKGROUND**

18 **A. Factual Background**

19 Plaintiff was born August 14, 1984, and is now 23 years old.
20 (Pl.'s Notice of Evidence (hereinafter, "Administrative Record" or
21 "AR"), Vol. 2, Ex. HH, at CT-374.) She was diagnosed with cerebral
22 palsy shortly after birth; associated with this condition, she has
23 moderate spastic quadriparesis. (Id. at CT-375; AR, Vol. 1, Ex. B, at
24 CT-038; ALJ Decision at 5, ¶ 2.) As a result, she has limited
25 mobility in her arms and legs, and has difficulty controlling her
26 movements. (ALJ Decision at 5, ¶ 2; AR, Vol. 1, Ex. A, at CT-032.)
27 She is confined to a wheelchair for most of the day, although she can
28 stand up with assistance and walk for short distances using a walker.

1 (ALJ Decision at 5, ¶ 2; AR, Vol. 1, Ex. B, at CT-038; AR, Vol. 2, Ex.
2 HH, at CT-416 to CT-418.)

3 Plaintiff has also been evaluated as "severely" or "profoundly"
4 retarded (AR, Vol. 1, Ex. A, at CT-032; AR, Vol. 1, Ex. Y, at CT-157;
5 AR, Vol. 1, Ex. AA, at CT-168); her mother disputes these exact labels
6 (AR, Vol. 4, Ex. JJ, at CT-761, CT-762), but there is no doubt that
7 plaintiff is significantly developmentally disabled. Plaintiff's IQ
8 has been estimated at less than 25 (AR, Vol. 1, Ex. A, at CT-032, CT-
9 033), and her mental age has been estimated in the range of 15 to 43
10 months (AR, Vol. 1, Ex. A, at CT-032, CT-033; AR, Vol. 1, Ex. B, at
11 CT-039). She has more ability in some areas than others, and her
12 various functional skills have been estimated at an age equivalence of
13 anywhere from 5 to 46 months. (AR, Vol. 1, Ex. A, at CT-036.) There
14 is no dispute that plaintiff has always needed, and will always need,
15 twenty-four-hour care and assistance with all of her daily needs,
16 including feeding, dressing, and toileting. (AR, Vol. 1, Ex. A, at
17 CT-035; AR, Vol. 1, Ex. B, at CT-038; AR, Vol. 2, Ex. HH, at CT-426;
18 AR, Vol. 2, Ex. HH, at CT-416, CT-418, CT-426, CT-437; AR, Vol. 3, Ex.
19 II, at CT-472.)

20 Plaintiff's verbal abilities are extremely limited. (ALJ
21 Decision at 5, ¶ 2; AR Vol. 1, Ex. A, at CT-032.) She is essentially
22 non-verbal and communicates primarily through gestures, facial
23 expressions, and occasional non-word vocalizations; she also
24 recognizably smiles and laughs when happy, and cries when sad. (ALJ
25 Decision at 5, ¶ 2; AR, Vol. 1, Ex. A, at CT-032, CT-034; AR, Vol. 1,
26 Ex. C, at CT-045; AR, Vol. 1, Ex. E, at CT-057; AR, Vol. 3, Ex. II, at
27 CT-492.) At various times, she has used assistive devices to help her
28 communicate (AR, Vol. 1, Ex. A, at CT-034; AR, Vol. 1, Ex. B, at CT-

1 041; AR, Vol. 1, Ex. D, at CT-053); two such devices at issue in this
2 case are known as a "Touch Talker" and "Intellikeys," both of which
3 were brought to the due process hearing for the ALJ to examine.¹ (AR,
4 Vol. 3, Ex. II, at CT-453, CT-454, CT-464.) Plaintiff's functional
5 communication skills were evaluated shortly before the due process
6 hearing; her expressive language ability was assessed at the level of
7 about 18-21 months, and her stronger receptive language ability was
8 assessed at the level of 30-33 months. (AR, Vol. 1, Ex. E, at CT-
9 057.)

10 Plaintiff's mother was able to care for her at home until she was
11 about 10 years old. (AR, Vol. 2, Ex. HH, at CT-377.) Then, in
12 August, 1995, two weeks before her eleventh birthday, plaintiff went
13 to live at Munchkin Manor, a group home for disabled children in
14 Hemet, California. (AR, Vol. 2, Ex. HH, at CT-380, CT-381.) This
15 home, where plaintiff lived for the next nine years, was run by Robin
16 Moody. (Id.) While plaintiff was at Munchkin Manor, she received
17 special education services from the Riverside County Office of
18 Education. (AR, Vol. 1, Ex. K.) Ms. Moody served as plaintiff's
19 guardian and advocate, attending meetings with school officials and
20 following up with plaintiff's teachers as needed. (Id.; AR, Vol. 2,

21
22 ¹ The Intellikeys board needs a computer and computer software
23 to function. (AR, Vol. 2, Ex. HH, at CT-412; AR, Vol. 3, Ex. II, at
24 CT-455.) It allows plaintiff to interface with educational programs
25 designed to teach math skills, language arts, etc. (AR, Vol. 3, Ex.
26 II, at CT-457.) The Touch Talker functions independently, and can be
27 attached to plaintiff's wheelchair. It has a number of buttons that
28 can be programmed with simple words and phrases; when pressed, a pre-
recorded voice is played saying the chosen word or phrase, such as
"yes," "no," "I want," "please," "to go," "to eat," "thank you," etc.
(AR, Vol. 1, Ex. I.) Thus, although she cannot speak herself,
plaintiff can use the Touch Talker to respond to questions and
initiate simple requests.

1 Ex. HH, at CT-381; AR, Vol. 3, Ex. II, at CT-450.) She served as "the
2 surrogate parent with the IEP parental rights." (AR, Vol. 3, Ex. II,
3 at CT-450.)

4 When plaintiff turned 20, she moved from the children's home in
5 Riverside County to Mavis House, a group home for adults with
6 developmental disabilities in Grand Terrace, California. (AR, Vol. 2,
7 Ex. HH, at CT-382, CT-383.) Grand Terrace is across the county line,
8 in San Bernardino County, and is generally served by defendant
9 District. (AR, Vol. 1, Ex. C, at CT-044.) Plaintiff was still
10 qualified for special education services, so in the fall of 2004 she
11 was enrolled at Rialto High School.² (AR, Vol. 1, Ex. C, CT-046, CT-
12 050.) While at Rialto, she attended a special day class for students
13 with significant orthopedic, cognitive, and developmental deficits,
14 taught by Ms. Latricia Harris. (AR, Vol. 1, Ex. A, at CT-031; AR,
15 Vol. 3, Ex. II, at CT-542.)

16 The IDEA, which in various versions governed plaintiff's entire
17 educational career, requires that students be thoroughly evaluated
18 before special education begins, and then re-evaluated at least every
19 three years thereafter. 18 U.S.C. § 1414(a). Such a triennial
20 assessment of plaintiff was conducted on March 4, 2004, while she was
21 still attending school in Riverside County. (AR, Vol. 1, Ex. B, at
22 _____)

23 ² According to plaintiff, Rialto High School "is a public school
24 which is located outside the District, but which is under the
25 jurisdiction of the Superintendent." (Pl.'s Opening Brief at 2, ¶ 4.)
26 Defendants object to the consideration of this "evidence," although it
27 is not obvious why this information is worth the effort of making an
28 objection. (Defs.' Obj. to Evid. in Pl.'s Opening Brief at 1, ¶ 1.)
Among other grounds, defendants object that this is "outside the
administrative record." (*Id.*) However, this statement matches almost
verbatim a finding in the ALJ Decision (ALJ Decision at 5), which
defendants completely fail to acknowledge. Accordingly, defendants'
objection is OVERRULED.

1 CT-038; AR, Vol. 1, Ex. C, at CT-050; AR, Vol. 1, Ex. K.) In
2 addition, a written statement of each student's "individualized
3 education program," or "IEP," must be developed, and reviewed at least
4 annually. 18 U.S.C. ¶ 1414(d).

5 Plaintiff's first IEP at Rialto High School was finalized at a
6 meeting on December 16, 2004. (AR, Vol. 1, Ex. C.) Her second Rialto
7 IEP was finalized at a meeting on December 6, 2005. (AR, Vol. 1, Ex.
8 P.) Although Ms. Moody had attended plaintiff's IEP meetings while
9 plaintiff attended school in Riverside, Ms. Moody had no involvement
10 with plaintiff after she left Munchkin Manor, and did not attend
11 either IEP meeting at Rialto. (AR, Vol. 1, Exs. C, P; Vol. 2, Ex. HH,
12 at CT-383; Vol. 3, Ex. II, at CT-492.) Instead, someone from
13 plaintiff's new residence, Mavis House, attended the 2004 IEP meeting.
14 (AR, Vol. 4, Ex. JJ, at CT-706.) Plaintiff's mother did not attend
15 the 2004 IEP meeting, but did attend the meeting in 2005. (AR, Vol.
16 2, Ex. HH, at CT-388, CT-390.) Late in the 2005-2006 school year,
17 plaintiff's mother sought to revoke her consent to that year's IEP,
18 and a supplemental IEP meeting was held on June 5, 2006. (AR, Vol. 1,
19 Ex. Q, at CT-108.) At this meeting, Ms. Tapie expressed concerns
20 about the development of the IEP; notes from the meeting also indicate
21 that she claimed plaintiff's communication skills had regressed, and
22 that plaintiff did not receive the speech therapy the IEP required.
23 (Id. at CT-109.)

24 Plaintiff attended Rialto High School for almost two school
25 years, until June, 2006, when she received her certificate of
26 completion and was exited from special education due to her age.³

27
28 ³ California law provides for special education through the age
of 21. Cal. Educ. Code § 56026(c)(4). Generally, students who turn

1 (AR, Vol. 1, Ex. R; AR, Vol. 4, Ex. JJ, at CT-725, CT-728.) Sometime
 2 after receiving her certificate of completion, plaintiff began
 3 attending the Redlands Adult Basic Learning Environment ("Redlands
 4 ABLE"). (ALJ Decision at 6, ¶ 4; AR, Vol. 1, Ex. A, at CT-031; AR,
 5 Vol. 1, Ex. E, at CT-056, CT-059.) At the time of the hearing before
 6 ALJ Jones, plaintiff was still attending Redlands ABLE, and still
 7 residing at Mavis House. (ALJ Decision at 6, ¶¶ 3-4.)

8 **B. Issues Before ALJ Jones**

9 ALJ Jones outlined the issues raised by plaintiff as follows:

- 10 a. Did Defendants deny Plaintiff a free, appropriate,
 11 public education ("FAPE") during the 2004-2005 and
 12 2005-2006 school years by failing to conduct an
 appropriate reassessment of Plaintiff upon her
 enrollment at Rialto High School?
- 13 b. Did Defendants deny Plaintiff a FAPE during the 2004-
 14 2005 school year by:
- 15 (1) Failing to conduct a functional analysis
 16 assessment and to create a behavioral intervention
 plan?
 - 17 (2) Failing to provide an appropriate statement of
 18 Plaintiff's present levels of educational
 performance in Plaintiff's Individualized
 Education Plan (IEP) of December 16, 2004?
 - 19 (3) Failing to develop appropriate annual goals and
 20 short-term objectives for Plaintiff in the IEP of
 December 16, 2004, and failing to include an
 21 appropriate method of measuring Plaintiff's
 progress in the IEP?
 - 22 (4) Failing to provide assistive technology devices
 23 and services to Plaintiff?

24
 25 _____
 26 22 during a school term may complete that term. Id. at
 27 § 56026(c)(4)(A). However, a student who turns 22 over the summer,
 like plaintiff, may not begin a new school term in the fall, even if
 28 she has not completed all goals in her IEP. Id. at § 56026(c)(4)(B).
 Local school districts are not allowed to develop IEPs that extend
 these dates. Id. at § 56026(c)(4)(D).

- 1 (5) Failing to develop an appropriate Individualized
2 Transition Plan (transition plan), including
3 failing to invite the Inland Regional Center
(Regional Center) to participate in the
4 development of the transition plan?
- 5 (6) Failing to measure and/or record Plaintiff's
6 progress and failing to regularly report
7 Plaintiff's progress to her mother?
- 8 (7) Failing to provide Plaintiff with a teacher who
9 was qualified to teach students whose primary
10 eligibility is orthopedic impairment?
- 11 c. Did Defendants deny Plaintiff a FAPE during the 2005-
12 2006 school year by:
- 13 (1) Failing to conduct a functional analysis
14 assessment and to create a behavioral intervention
15 plan?
- 16 (2) Failing to provide an appropriate statement of
17 Plaintiff's present levels of educational
18 performance in Plaintiff's IEP of December 6,
19 2005?
- 20 (3) Failing to develop appropriate annual goals and
21 short-term objectives for Plaintiff [in the IEP of
22 December 6, 2005] and failing to include an
23 appropriate method of measuring Plaintiff's
24 progress?
- 25 (4) Failing to provide assistive technology devices
26 and services to Plaintiff?
- 27 (5) Failing to develop an appropriate transition plan,
28 including failing to invite the Regional Center to
participate in the development of the transition
plan?
- (6) Failing to measure and/or record Plaintiff's
progress, and failing to regularly report
Plaintiff's progress to her mother?
- (7) Failing to provide Plaintiff with a teacher who
was qualified to teach students whose primary
eligibility is orthopedic impairment?
- (8) Failing to provide a copy of the IEP of December
6, 2005, to Plaintiff's mother in a timely manner?
- (9) Changing Plaintiff's placement without her
mother's written consent?

1 d. Is Plaintiff entitled to compensatory education?

2 (ALJ Decision at 2-3.)

3 The administrative hearing took place over a four-day period in
4 December, 2006. ALJ Jones heard testimony from seven witnesses, and
5 received documentary evidence from both sides. She ultimately found
6 that defendants did not deny plaintiff a FAPE in either school year at
7 issue by: (1) Failing to conduct a reassessment when she transferred
8 to Rialto High School (ALJ Decision at 29, ¶ 22); (2) failing to
9 conduct a functional analysis assessment and/or to create a behavioral
10 intervention plan (id. at 29, ¶ 23); (3) failing to include an
11 appropriate method of measuring student's progress in the IEPs (id. at
12 29, ¶ 25); (4) failing to invite the Regional Center to the IEP
13 meetings to discuss the transition plan (id. at 30, ¶ 27); (5) failing
14 to measure and/or record plaintiff's progress (id. at 30, ¶ 28);
15 (6) failing to report that progress regularly to plaintiff's mother
16 (id. at 30, ¶ 28); (7) failing to provide plaintiff with a teacher who
17 was qualified to teach students whose primary eligibility is
18 orthopedic impairment (id. at 30, ¶ 29); (8) failing to provide a copy
19 of the IEP of December 6, 2005, to plaintiff's mother in a timely
20 manner (id. at 30, ¶ 30); or (9) changing plaintiff's placement
21 without her mother's written consent (id. at 31, ¶ 31).

22 However, the ALJ also found that defendants did deny plaintiff a
23 FAPE by: (1) Failing to provide an appropriate statement of
24 plaintiff's present levels of educational performance in either IEP
25 (id. at 29, ¶ 24); (2) failing to develop appropriate annual goals and
26 objectives for plaintiff (id. at 29, ¶ 25); (3) failing to provide
27 necessary assistive technology devices and services to plaintiff in
28

1 both school years at issue (id. at 29, ¶ 26); and (4) failing to
2 develop an appropriate transition plan (id. at 30, ¶ 27).

3 Further, the ALJ found that plaintiff was entitled to
4 compensatory education, ordering defendants to provide plaintiff with
5 60 minutes of one-to-one training per week on the Intellikeys device,
6 and 60 minutes of one-to-one training per week on the Touch Talker
7 device, for 52 weeks over 14 consecutive months. (Id. at 31, ¶ 32 and
8 Order ¶¶ 1-2.) Defendants were also ordered to provide
9 transportation, if required for plaintiff to attend these training
10 sessions. (Id. at 31, Order, ¶ 3.)

11 In this Court, plaintiff explicitly challenges only two of the
12 ALJ's conclusions. Her main contention is that the amount of
13 compensatory education awarded by the ALJ is not sufficient to
14 compensate her for the four ways in which defendants were found to
15 have denied plaintiff a FAPE. Her second contention is that the ALJ
16 should have found that defendants failed to provide a FAPE in yet a
17 fifth way: By failing to provide plaintiff with a teacher who was
18 qualified to teach students whose primary eligibility is orthopedic
19 impairment. She does not otherwise appeal any of the ALJ's findings.

20 Conversely, defendants do not challenge any of the ALJ's
21 conclusions that certain of their actions denied plaintiff a FAPE. On
22 the merits, they confine themselves now to arguing that the ALJ's
23 award of compensatory damages was appropriate, and that her finding
24 that the qualifications of plaintiff's teacher did not deny plaintiff
25 a FAPE is correct.⁴ Thus, many of the questions that were in dispute

26
27 ⁴ The Motion for Summary Judgment also raised five more
28 procedural arguments, three of which were withdrawn in the reply
brief.

1 before the ALJ are no longer at issue. Accordingly, this Court will
2 focus on the only two substantive questions appealed: (1) Whether
3 plaintiff's teacher's qualifications (or lack of them) denied
4 plaintiff a FAPE; and (2) whether the award of compensatory damages
5 was appropriate. The issue of attorney fees will also be addressed.

6 **II. LEGAL STANDARD**

7 **A. The IDEA**

8 The IDEA guarantees all disabled children a FAPE "that emphasizes
9 special education and related services designed to meet their unique
10 needs and prepare them for further education, employment, and
11 independent living." 20 U.S.C. § 1400(d)(1)(A).⁵ A FAPE is defined
12 as special education and related services that: (1) Are available to
13 the student at public expense, under public supervision and direction,
14 and without charge; (2) meet the state education standards;
15 (3) include an appropriate education in the state involved; and
16 (4) conform with the student's IEP. 20 U.S.C. § 1401(9).⁶

17 "Special education" is defined as instruction specially designed
18 to meet a disabled student's unique needs, at no cost to parents,
19 whether it occurs in the classroom, at home, or in other settings.
20

21
22 ⁵ The IDEA was amended by the Individuals with Disabilities
23 Education Improvement Act of 2004, which became effective July 1,
24 2005, between the two school years at issue here. However, this Court
25 must apply the law in effect at the time of the events in this case.
26 R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932,
27 938 n.2 (9th Cir. 2007). Accordingly, as did ALJ Jones, the Court
28 will apply the pre-amendment version of the Act to claims arising from
the 2004-2005 school year, and the post-amendment version of the Act
to claims arising from the 2005-2006 school year, to the extent there
is a difference.

⁶ The 2004 Act relocated the definition of FAPE from § 1401(8)
to § 1401(9), but the definition did not change.

1 20 U.S.C. § 1401(29);⁷ Cal. Educ. Code § 56031. "Related services"
2 include developmental, corrective, and supportive services, such as
3 speech-language services, needed to assist a disabled child in
4 benefitting from education, and to help identify disabling conditions.
5 20 U.S.C. § 1401(26);⁸ Cal. Educ. Code § 56363.

6 The primary tool for achieving the goal of providing a FAPE to a
7 disabled student is the IEP. Van Duyn ex rel. Van Duyn v. Baker
8 School Dist. 5J, 502 F.3d 811, 818 (9th Cir. 2007). An IEP is a
9 written statement containing the details of the individualized
10 education program for a specific child, which is crafted by a team
11 that includes the child's parents and teacher, a representative of the
12 local education agency, and, whenever appropriate, the child.

13 20 U.S.C. § 1401(14),⁹ § 1414(d)(1)(B). An IEP must contain:

- 14 (1) Information regarding the child's present levels of performance;
15 (2) a statement of measurable annual goals;¹⁰ (3) a statement of the
16 special educational and related services to be provided to the child;
17 (4) an explanation of the extent to which the child will not
18 participate with non-disabled children in the regular class; and
19 (5) objective criteria for measuring the child's progress. 20 U.S.C.
20 § 1414(d)(1)(A).

21
22 ⁷ Previously at 20 U.S.C. § 1401(25).

23 ⁸ Previously at 20 U.S.C. § 1401(22).

24 ⁹ Previously at 20 U.S.C. § 1401(11).

25 ¹⁰ Prior to the 2004 Act, the measurable annual goals in every
26 IEP had to include "benchmarks or short-term objectives." After July
27 1, 2005, such benchmarks have only been required for certain students.
28 It does not appear that short-term goals were required in plaintiff's
2005-2006 IEP, although benchmarks similar to those in the previous
year's IEP were nonetheless included.

1 The Act contains numerous procedural safeguards to ensure that
2 the parents or guardians of a disabled student be kept informed and
3 involved in decisions regarding the child's education. 20 U.S.C.
4 § 1415. As part of this procedural scheme, the local educational
5 agency must give parents an opportunity to present complaints
6 regarding the provision of a FAPE to the child. 20 U.S.C.
7 § 1415(b)(6). Upon the presentation of such a complaint, the parent
8 or guardian is entitled to an impartial due process administrative
9 hearing conducted by the state or local educational agency.¹¹
10 20 U.S.C. § 1415(f).

11 **B. Judicial Review of Administrative Decisions**

12 The IDEA provides that a party aggrieved by the findings and
13 decisions made in a state administrative due process hearing has the
14 right to bring an original civil action in federal district court.
15 20 U.S.C. § 1415(i)(2). The party bringing the administrative
16 challenge bears the burden of proof in the administrative proceeding.
17 Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005).
18 Similarly, the party challenging the administrative decision bears the
19 burden of proof in the district court. Hood v. Encinitas Union Sch.
20 Dist., 486 F.3d 1099, 1103 (9th Cir. 2007).

21
22 ¹¹ Under the terminology used in the California Code of
23 Regulations, the word "parent" includes, for minor students, "any
24 person having legal custody of a child," and for adult students, "any
25 adult pupil for whom no guardian or conservator has been appointed."
26 2 Cal. Code Regs. § 60010(p). Margaret Tapie, plaintiff's mother, was
27 appointed plaintiff's guardian in September 2006. (AR, Vol. 4, Ex.
28 JJ, at CT-763.) For approximately four years, however, plaintiff does
not appear to have had any official guardian or conservator, and so
was the holder of her own procedural rights under the IDEA. Even the
final Riverside IEP from March, 2004, acknowledged that plaintiff was
over 18 and held her own "educational rights." (AR, Vol. 1, Ex. K, at
CT-086.)

1 The standard for district court review of an administrative
2 decision under the IDEA is set forth in 20 U.S.C. § 1415(i)(2), which
3 provides as follows:

4 In any action brought under this paragraph the
5 court -- (i) shall receive the records of the
6 administrative proceedings; (ii) shall hear
7 additional evidence at the request of a party; and
8 (iii) basing its decision on the preponderance of
9 the evidence, shall grant such relief as the court
10 determines is appropriate.

11 20 U.S.C. § 1415(i)(2)(C).¹² Thus, judicial review of IDEA cases is
12 quite different from review of most other agency actions, in which the
13 record is limited and review is highly deferential. Ojai Unified Sch.
14 Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir. 1993). However, de novo
15 review is not appropriate. Amanda J. v. Clark County Sch. Dist., 267
16 F.3d 877, 887 (9th Cir. 2001). Rather, the statute has been
17 interpreted as requiring that "due weight" be given to the
18 administrative proceedings. Board of Educ. of the Hendrick Hudson
19 Central Sch. Dist. Westchester County v. Rowley, 458 U.S. 176, 206
20 (1982); Van Duyn, 502 F.3d at 816. Just how much weight is "due" is a
21 question left to the court's discretion. Gregory K. v. Longview Sch.
22 Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In exercising this
23 discretion, the court should consider the thoroughness of the hearing
24 officer's findings and award more deference where the hearing
25 officer's findings are "thorough and careful." Capistrano Unified
26 Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995).

27 A hearing officer's findings are treated as "'thorough and
28 careful' when the officer participates in the questioning of witnesses
and writes a decision 'contain[ing] a complete factual background as

¹² Previously at § 1415(i)(2)(B).

1 well as a discrete analysis supporting the ultimate conclusions.'"
2 R.B., 496 F.3d at 942 (quoting Park ex rel. Park v. Anaheim Union High
3 Sch. Dist., 464 F.3d 1025, 1031 (9th Cir. 2006)). A high degree of
4 deference is warranted because, "if the district court tried the case
5 anew, the work of the hearing officer would not receive 'due weight'
6 and would be largely wasted." Wartenberg, 59 F.3d at 891. Further,
7 courts must be careful not to "'substitute their own notions of sound
8 educational policy for those of the school authorities which they
9 review.'" Van Duyn, 502 F.3d at 817 (quoting Rowley, 458 U.S. at
10 206).

11 At the hearing in this case, ALJ Jones participated in the
12 questioning of several witnesses, asking follow-up questions and
13 clarifying testimony. She issued a lengthy opinion, with detailed
14 factual findings, and analyzed all of the issues presented for each of
15 the two school years at issue. Her decision was impartial, and her
16 reasoning reflected her thorough understanding of the complexities of
17 the case. Accordingly, her careful decision here is entitled to
18 substantial weight.

19 **C. Additional Evidence**

20 The Act provides that district courts can hear evidence in
21 addition to what was presented at the due process hearing. 20 U.S.C.
22 § 1415(i)(2). However, the parties here stipulated to submit the case
23 solely on the administrative record, without offering any new
24 evidence. Pursuant to this stipulation, originally reached at the
25 Scheduling Conference on August 13, 2007, the parties agreed, and this
26 Court ordered, that certain documents submitted with the briefs in
27 this case would not be entered into evidence or considered by this
28

1 Court.¹³ (Stip. of Parties Re: Evid. & Order, Oct. 31, 2007, Docket
2 # 25.)

3 Accordingly, the Court will not now consider any evidence that
4 was not presented to ALJ Jones prior to her ruling in the proceedings
5 below. For this reason, the Court finds that defendants' objections
6 to certain evidence referenced in plaintiff's Opening Brief,
7 pertaining to events that occurred after the hearing, are well-taken;
8 the objections raised by defendants in paragraphs 4-12¹⁴ and 13 of
9 defendants' Objections to Evidence in plaintiff's Opening Brief
10 ("Defendants' Objections") are hereby SUSTAINED. Defendants'
11 remaining objections (that is, paragraphs 2-3, 11-12¹⁵, and 14 of
12 Defendants' Objections), are OVERRULED.

13 **III. ANALYSIS**

14 **A. Plaintiff's Teacher's Qualifications (or Lack of Them) Did**
15 **Not Deny Plaintiff a FAPE**

16 Plaintiff challenges only the ALJ's conclusion that "even though
17 Defendants failed to provide Student with a teacher who was qualified
18 to teach students whose primary eligibility is orthopedic impairment,
19 this did not deny Student a FAPE." (Pl.'s Compl./Appeal of Admin.
20 Hrg. Decision Under Individ. with Disabilities Educ. Act, and for
21
22

23 ¹³ Specifically, the following documents were ordered excluded:
24 Exhibit A to defendants' Motion for Summary Judgment/Opening Brief,
25 and Exhibits O, DD, and FF to plaintiff's Evidence.

26 ¹⁴ That is, through the first of two paragraphs numbered "12" on
27 page 5 of defendants' Objections.

28 ¹⁵ Here, the paragraph 11 on page 5 of Defendants' Objections
(not the paragraph 11 on page 4), and the second of the two paragraphs
numbered "12" on page 5.

1 Compensatory Educ. and Attorneys Fees and Costs ("Compl."), at 11,
2 Claim # 2.)

3 Initially, it must be noted that although plaintiff phrases this
4 standard in terms of students with "orthopedic impairments," most of
5 her arguments have nothing to do with orthopedic impairments but are
6 more general in scope. The overall tone of plaintiff's papers is that
7 Ms. Harris was not competent to teach anyone, not just students with
8 orthopedic impairments. Undoubtedly, plaintiff formulated her
9 standard in terms of orthopedic impairments because her teacher did
10 not have a particular certificate issued by the California Commission
11 on Teacher Credentialing to individuals who wish to teach students
12 whose primary disability is an orthopedic impairment. That is, Ms.
13 Harris did not possess an "Education Specialist Instruction Credential
14 in Physical and Health Impairments." (Pl.'s Opening Brief at 11,
15 ¶¶ 1-2.) Instead, she had an "Internship Education Specialist
16 Instruction Credential" (id. at ¶ 2), which authorized her to teach
17 "individuals with a primary disability of autism, moderate/severe
18 mental retardation, deaf-blindness, serious emotional disturbance, and
19 multiple disabilities" (AR, Vol. 1, Ex. P).¹⁶ However, plaintiff
20 offers no authority to support the argument that a teacher's lack of
21 some certificate or other technical qualification, in and of itself,
22 can constitute a denial of FAPE. Nor does she offer an explanation of
23 how the lack of this particular certificate caused her any harm.

24
25
26 ¹⁶ It is noteworthy that the "evidence" submitted by plaintiff
27 in support of this point, a printout from the California Commission on
28 Teacher Credentialing website listing Ms. Harris's credentials as of
June 6, 2006, specifically states that "[l]ocal employing agencies
have the flexibility to assign individuals to serve in subject areas
other than those authorized on credentials." (Id.)

1 In fact, it is clear from plaintiff's papers that the lack of a
2 certificate is the least of her complaints against Ms. Harris.
3 plaintiff offers a long list of specific failures by Ms. Harris that
4 purportedly led to a denial of a FAPE, but none relate to her paper
5 credentials. It is not surprising, though, that plaintiff focuses on
6 Ms. Harris's actions, rather than the certificate. Logically, it is a
7 teacher's actions that impact whether a student receives a FAPE, not
8 whether a teacher meets a particular technical qualification --
9 especially one which the credentialing agency itself suggests may not
10 always be mandatory.

11 Rather than focusing on the lack of certificate, plaintiff asks
12 the Court to adopt a brand new standard that was not presented to the
13 ALJ: "[A] classroom teacher must be reasonably competent and
14 adequately qualified in order to provide a FAPE to a student with an
15 orthopedic impairment." (Pl.'s Opening Brief at 11, ¶ A.) This
16 standard itself omits reference to any technical requirement,
17 suggesting instead a general desire that students with orthopedic
18 impairments be provided with good teachers.

19 Further, plaintiff makes no attempt to relate this proposed test
20 to any IDEA case law. In fact, she concedes there is no Ninth Circuit
21 authority to support her position, invoking instead "common sense,"
22 and "implor[ing]" the Court to establish some sort of competency
23 threshold for special education teachers. (Pl.'s Reply to Defs.'
24 Opp'n Brief, at 20, ¶ 4.) Essentially, she is simply asking the Court
25 to find that Ms. Harris was a "bad" teacher.

26 Although the Court sympathizes with plaintiff's desire to ensure
27 that special education teachers are, at the least, "reasonably
28 competent and adequately qualified," inventing some new test specific

1 to teacher competency would put courts in an untenable position.
2 Courts would be forced to step outside the case-specific questions of
3 whether a particular student actually received an appropriate
4 education, and venture into the realm of whether an individual is a
5 "good," or at least a "competent," teacher. This is a task for
6 principals, or school districts, or even state agencies such as the
7 California Commission on Teacher Credentialing, but decidedly not for
8 the courts. And it seems highly unlikely that Congress had anything
9 like this in mind when it enacted the IDEA. Cf. Rowley, 458 U.S. at
10 207-08 (noting that "courts must be careful to avoid imposing their
11 view of preferable educational methods upon the States," and that
12 "Congress' intention was not that the Act displace the primacy of
13 States in the field of education, but that States receive funds to
14 assist them in extending their educational systems to the
15 handicapped"); 34 C.F.R. § 300.18(f) (no private right of action when
16 special education teachers are not "highly qualified"). In any event,
17 plaintiff has submitted nothing to support the view that having courts
18 separately evaluate teacher competency would be advisable, feasible,
19 or permissible.

20 Nor, as it turns out, is it necessary. There is no need to
21 invent a new test to address plaintiff's complaints. Rather, her
22 specific attacks on Ms. Harris's actions can, and should, be addressed
23 within the existing framework of IDEA case law. The typical IDEA case
24 in which a plaintiff claims to have been denied a FAPE turns on
25 whether the IEP at issue was sufficient. See Van Duyn, 502 F.3d at
26 818. This is a two-fold inquiry: (1) Whether the correct procedures
27 were followed in drafting the IEP; and (2) whether the IEP is
28 reasonably calculated to provide the student with educational

1 benefits. Rowley, 458 U.S. at 206-07; Amanda J., 267 F.3d at 890.
2 The less common case involves an IEP that has been properly prepared
3 and is calculated to provide an educational benefit, but which has not
4 been correctly implemented or followed by school officials after its
5 adoption. See Van Duyn, 502 F.3d at 818-19. Material failures in
6 implementing an IEP violate the IDEA. Id. at 822. "A material
7 failure occurs when there is more than a minor discrepancy between the
8 services a school provides to a disabled child and the services
9 required by the child's IEP." Id.

10 The particular issues plaintiff identifies as purportedly
11 demonstrating her teacher's lack of competence fall easily into these
12 familiar categories: Problems in drafting the IEP; deficiencies in
13 the IEP itself; and/or problems in implementing the IEP. Although the
14 Court may not be suited to evaluating Ms. Harris's general level of
15 competence, the Court can look at specifically challenged actions by
16 Ms. Harris, and determine whether those actions resulted in a
17 deficient IEP or implementation problems.

18 Accordingly, the appropriate question to ask is whether any of
19 Ms. Harris's challenged actions resulted in a faulty IEP, or a failure
20 to implement the IEP correctly, thus denying plaintiff a FAPE. In
21 fact, plaintiff implicitly recognizes that this is how the issue
22 should be framed, emphasizing that Ms. Harris had a substantial role
23 in both the development and implementation of plaintiff's IEP (Pl.'s
24 Reply, at 21, ¶ 1), and that her lack of competence and understanding
25 of her duties thus led to deficiencies in the IEP (id.), and failures
26 in its implementation (id. at 16, ¶ 1; id. at 19, ¶ 3).

27 In answering this question, it is important to determine first
28 whether any of the challenged sections of the IEP are actually

1 invalid, and why. If an IEP is found to be deficient because it was
2 not reasonably calculated to provide an educational benefit, then the
3 inquiry should end. There is no reason to determine whether deficient
4 sections of an IEP were properly implemented, since no educational
5 benefit would have resulted even if they had been implemented
6 correctly. Only if the IEP was properly designed to confer a benefit
7 can failure to carry it out be material. Thus, if challenged sections
8 of an IEP are found to be valid, then it would be necessary to
9 determine whether those sections were implemented correctly.

10 In her Opening Brief, plaintiff identifies five specific reasons
11 why her teacher should be found to be less than reasonably competent,
12 all phrased as "substantial departures from the standards of IDEA":¹⁷
13 (1) The statement of "present levels of performance" she drafted
14 (Pl.'s Opening Brief at 12); (2) the "goals and objectives" she
15 drafted and implemented (id. at 15); (3) "her failure to measure,
16 record, and report" plaintiff's progress (id. at 17); (4) "her
17 inability to correctly operate and implement Student's assistive
18 technology devices in her educational program" (id. at 18-19); and
19 (5) the "ITPs she drafted and implemented" (id. at 21). As set out in
20 her Opening Brief, these issues are consistent with the allegations in
21 plaintiff's Complaint.

22
23
24 ¹⁷ Plaintiff cites Youngberg v. Romeo, 457 U.S. 307 (1982), for
25 the proposition that "substantial departures" by a teacher from the
26 "professional" standards of the IDEA should be viewed as a denial of a
27 FAPE. (See, e.g., Pl.'s Opening Brief at 12.) Youngberg, however, was
28 a civil rights case against three individual administrators of a state
mental health facility, alleging violations of an inmate's substantive
due process rights under the Fourteenth Amendment. Youngberg thus has
little relevance to the instant case.

1 Broken out this way, it becomes evident that not only is it
2 appropriate to analyze whether these acts resulted in a deficient IEP
3 or faulty implementation, but that this has already been done. All
4 five challenged areas involve parts of the IEP that the ALJ examined;
5 four were found to be deficient, and one was not. To the extent
6 plaintiff claims that the "present levels of performance" in the IEPs
7 were deficient, the ALJ agreed, and found that the levels of
8 performance in the IEPs prepared by Ms. Harris did not accurately
9 reflect plaintiff's current levels of ability. (ALJ Decision at 10,
10 ¶ 22; id. at 12, ¶ 28; id. at 17, ¶ 50; id. at 18, ¶ 53.) Further,
11 the ALJ found that the "goals and objectives" Ms. Harris drafted were
12 likewise deficient. (Id. at 12, ¶ 28; id. at 18, ¶ 53.) These
13 findings contributed to the ALJ's holding that neither of the IEPs at
14 issue provided plaintiff with a FAPE, as they were not addressed to
15 plaintiff's unique needs or reasonably calculated to provide her with
16 an educational benefit. (Id. at 12, ¶¶ 28-29; id. at 18, ¶¶ 53-54.)
17 In addition, the ALJ found that defendants failed to provide in either
18 IEP for the proper use of assistive technology, presenting another way
19 in which the IEP failed to address plaintiff's unique needs and was
20 not reasonably calculated to provide any educational benefit,
21 therefore denying plaintiff a FAPE. (Id. at 13, ¶ 32; id. at 19,
22 ¶ 57.) Finally, the ALJ found that the transition plans, or ITPs, in
23 the two IEPs were also insufficient, failing to address plaintiff's
24 unique needs and not being reasonably calculated to provide an
25 educational benefit, thus constituting yet another way plaintiff was
26 denied a FAPE. (Id. at 14, ¶37; id. at 20, ¶ 61.)

27 No one has appealed these four aspects of the ALJ Decision; the
28 parties now seem to agree that the present levels of performance, as

1 well as the goals and objectives, in the IEPs were insufficient, and
2 that plaintiff was therefore denied a FAPE. Likewise, it is not now
3 contested that the transition plans were failures, or that defendants
4 failed to provide for the proper use of assistive technology. Whether
5 or not it was the teacher's fault that these aspects of the IEPs were
6 deficient does not affect the bottom line -- the IEPs were
7 insufficient to meet plaintiff's needs. If an IEP is so poorly
8 drafted that it constitutes a denial of FAPE, then that is what must
9 be addressed -- and what was in fact addressed by the ALJ here.
10 Whether the remedy chosen by the ALJ was sufficient to redress this
11 problem remains to be seen, but there is nothing more to be gained for
12 plaintiff in trying to blame her teacher in particular for the poor
13 drafting. Plaintiff was denied a FAPE because her IEPs were
14 deficient; who contributed to making the IEPs deficient does not
15 change the consequences of that deficiency.

16 Therefore, as to four of the five issues identified by plaintiff,
17 there is already a final, unappealed decision that the IEP failed to
18 provide any educational benefit, and thus failed to provide a FAPE.
19 To the extent Ms. Harris may have been the one who drafted those
20 sections, then, plaintiff may be correct that her actions caused a
21 denial of FAPE. Plaintiff gains nothing from such a finding, however.
22 In essence, she has appealed issues on which she already prevailed
23 below -- in these four areas, her IEPs were deficient, and she was
24 denied a FAPE.

25 To the extent plaintiff may also be arguing that Ms. Harris
26 failed to implement correctly these four areas of the IEP, there is no
27 need to address that argument. As noted above, failure to implement
28 an IEP section not calculated to provide an educational benefit cannot

1 be material. The only potential failure to implement plaintiff has
2 identified that might be material is Ms. Harris' alleged failure to
3 "measure, record, and report Plaintiff's progress." Here, the ALJ
4 found that the IEP did include an appropriate method of measuring
5 progress; thus, failing to measure and/or record plaintiff's progress
6 could be seen as a failure to implement that part of the IEP.
7 However, the ALJ found that plaintiff's progress was, in fact,
8 measured and recorded. (ALJ Decision at 30, ¶ 28.) While continuing
9 to assert that Ms. Harris failed to measure and record plaintiff's
10 progress, plaintiff did not actually appeal the contrary finding by
11 the ALJ. This alone should be the end of the issue, but it would not
12 matter if plaintiff had appealed this finding. The ALJ explicitly
13 referred to Ms. Harris's testimony that plaintiff's progress was
14 measured. (ALJ Decision at 15, ¶ 40.) The ALJ was in a much better
15 position than this Court to evaluate Ms. Harris's credibility.
16 Nothing plaintiff has submitted to this Court suggests that the ALJ's
17 finding was incorrect; certainly nothing plaintiff has submitted is
18 sufficient to overcome her burden of proof. Accordingly, there is no
19 basis to find that Ms. Harris failed to implement the IEP's
20 requirement that plaintiff's progress be measured and recorded.

21 As for the requirement that plaintiff's progress be reported,
22 whether found in the IEP or directly in the IDEA, a student's progress
23 generally must be reported to her parents, so they can participate
24 meaningfully in decisions regarding her education. However, as the
25 ALJ explained here, plaintiff was over 18, and had no conservator or
26 guardian; therefore, she held her own educational rights. Thus,
27 neither Ms. Harris nor anyone else was required to send reports of
28 plaintiff's progress to plaintiff's mother in either of the two school

1 years at issue here. Plaintiff has not appealed this finding; nor
2 would she be successful if she had. The fact that plaintiff's mother
3 did not receive reports therefore cannot have been a material
4 implementation failure, as plaintiff's mother had no right to receive
5 those reports at the time.

6 Accordingly, the ALJ was correct in holding that the lack of a
7 particular certificate, in itself, did not deny plaintiff a FAPE. Nor
8 did plaintiff's teacher fail to implement that section of the IEP
9 which properly required plaintiff's progress to be monitored and
10 recorded; and any failure to report that progress was not material.
11 Finally, and most importantly, those areas of the IEP that plaintiff's
12 teacher may have drafted poorly or inexpertly were already found
13 deficient by the ALJ, and already identified as failures to provide
14 plaintiff with a FAPE. The only real question left to resolve is
15 whether the remedy awarded by the ALJ for these violations was
16 sufficient.

17 **B. ALJ Jones's Compensatory Education Award Was Sufficient to**
18 **Compensate Plaintiff for the Denial of a FAPE in Two School**
19 **Years**

20 As noted above, ALJ Jones found that defendants denied plaintiff
21 a FAPE in four ways, over two school years: (1) By failing to provide
22 an appropriate statement of plaintiff's present levels of educational
23 performance in either IEP; (2) by failing to develop appropriate
24 annual goals and objectives for plaintiff; (3) by failing to provide
25 necessary assistive technology devices and services to plaintiff; and
26 (4) by failing to develop an appropriate transition plan. No party
27 challenges these findings here; the only question remaining is whether
28 the ALJ imposed the correct remedy for these violations. Both parties

1 now agree that it was correct to award compensatory education, but
2 plaintiff contends the amount awarded should have been much higher:
3 1800 minutes (or 30 hours) per week of special education, and 40
4 minutes per week of adaptive physical education (Compl. ¶ 10), as
5 opposed to the 120 minutes per week of instruction ordered by the
6 ALJ.¹⁸ Thus, the amount of compensatory education requested by
7 plaintiff would provide at least a one-to-one replacement for the
8 entire time plaintiff spent at Rialto High School.¹⁹ In addition,
9 plaintiff wants a "complete and accurate statement of her present
10 levels of educational performance," "goals and objectives," and "an
11 appropriate ITP." (Pl.'s Reply, at 2-4.) In essence, plaintiff wants
12 to start the clock over, conduct a new triennial assessment,
13 reformulate her IEPs, and "re-do" her last two years of school.

14 There is no doubt that compensatory education "can be awarded as
15 appropriate equitable relief." Park, 464 F.3d at 1033. However,
16 "courts have discretion on how to craft the relief and '[t]here is no
17 obligation to provide a day-for-day compensation for time missed.'" Id.
18 (quoting Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d
19 1489, 1497 (9th Cir. 1994)). Compensatory education "is not a
20 contractual remedy," Parents of Student W., 31 F.3d at 1497, and
21 students never have any absolute right to receive any particular

23 ¹⁸ Plaintiff does not specify in her complaint how many weeks'
24 worth of compensatory education she thinks would be needed, but in her
25 Opening Brief she notes that she should receive 1800 minutes per week
26 for two school years. (Pl.'s Opening Brief at 10, ¶ 1.) Defendant
27 argues that plaintiff's failure to specify a time limit in her
28 Complaint should now bar her from asking for two years. However, the
Court has broad discretion to award appropriate relief in IDEA cases.

¹⁹ If not more, as plaintiff did not enroll at Rialto at the
very beginning of the 2004-2005 school year.

1 amount of compensatory education, even if they received no benefit
2 from the challenged placement at all. Rather, it is within the
3 Court's broad discretion to fashion an appropriate remedy -- which may
4 well include some compensatory education -- under general principles
5 of equity. School Comm. of Town of Burlington v. Department of Educ.,
6 471 U.S. 359, 369 (1985); Forest Grove Sch. Dist. v. T.A., 523 F.3d
7 1078, 1081 (9th Cir. 2008); Parents of Student W., 31 F.3d at 1497.

8 In applying those principles, it is appropriate to consider the
9 extent of any violation for which compensatory education may be
10 awarded. The fact that a student was denied a FAPE -- i.e., an
11 "appropriate" education -- does not necessarily mean that the student
12 was denied all education. It is possible for certain aspects of a
13 program to be deficient while other aspects are working. Of course,
14 that does not mean that the student should not be compensated for the
15 deficiencies, but the fact that the student received some benefit from
16 the placement is relevant to the decision of what remedy should be
17 granted to compensate for the failures that were experienced.

18 Further, in determining whether a student received some
19 educational benefit from a placement, the standard of comparison is
20 not perfection, or even a best case scenario. School districts are
21 not required to provide the "absolutely best" possible education in
22 order to provide an appropriate education for a disabled student.
23 Gregory K., 811 F.3d at 1314. Rather, the IDEA only requires a school
24 district to provide a "'basic floor of opportunity' . . . consist[ing]
25 of access to specialized instruction and related services which are
26 individually designed to provide educational benefit to the
27 handicapped child." Rowley, 458 U.S. at 201. It does not require
28 States to "maximize the potential of handicapped children." Id. at

1 189. "[T]he intent of the Act was more to open the door of public
2 education to handicapped children on appropriate terms than to
3 guarantee any particular level of education once inside." Id. at 192.
4 Thus the possibility that plaintiff could have had a better teacher or
5 received more educational benefit than she did is not sufficient to
6 prove that she received no educational benefit from her time at
7 Rialto.

8 The goal in crafting a remedy for a violation of IDEA is not to
9 start over, as if the allegedly deficient education never occurred,
10 but to provide "appropriate relief" -- that is, "relief designed to
11 ensure that the student is appropriately educated within the meaning"
12 of the IDEA. Park, 464 F.3d at 1033 (internal quotations omitted).
13 plaintiff argues that the relief awarded here was not "appropriate"
14 because it was directed to only one of the FAPE violations found by
15 the ALJ, and failed to address the other three violations. (Pl.'s
16 Opening Brief at 6-7, ¶ 3 ("The ALJ only addressed Defendants' failure
17 to provide assistive technology services to Student in her
18 compensatory education award which does not provide for
19 appropriate relief . . . because the award fails to address material
20 violations of the IDEA.")) On the contrary, however, providing
21 appropriate relief is exactly what the ALJ's award was designed to do.
22 It is obvious from plaintiff's mother's testimony, and that of Robin
23 Moody, that the ability to communicate is key to plaintiff's happiness
24 in the future. Both of them stressed the importance to plaintiff of
25 her assistive communication devices. Ms. Tapie stated of these
26 devices that "her communication, I think, for a child like Callie is
27 key. It's her only way to express what she knows. She can't write.
28 She can't speak." (AR, Vol. 2, Ex. HH, at CT-402.) "Since Callie was

1 five years old, she has been recommended to have communication therapy
2 and trained in a communication device because that is her only way to
3 communicate what she knows and her ability to learn." (AR, Vol. 2,
4 Ex. HH, at CT-404.)

5 Ms. Moody stated that plaintiff "is, unfortunately, in a very
6 restrictive body, but her communication board is her voice." (AR,
7 Vol. 3, Ex. II, at CT-470.) "Her communication board is a lot to her.
8 This is her only voice." (AR, Vol. 3, Ex. II, at CT-468, CT-469.)
9 "Her communication board is major in helping her control her
10 environment because it's the only way she can speak." (AR, Vol. 3,
11 Ex. II, at CT-474.) "She saved her money and purchased this [Touch
12 Talker] with her low incidents [sic] funding because you can't take
13 somebody's voice away from them, that this is their only voice. So,
14 that was my cry, as a parent, going you can't do that." (AR, Vol. 3,
15 Ex. II, at CT-490.) Further, in evaluating plaintiff's Rialto IEPs,
16 Ms. Moody repeatedly testified that use of the communications board
17 and/or the Intellikeys system would have been helpful, and should have
18 been specifically incorporated into the IEP. (AR, Vol. 3, Ex. II, at
19 CT-467, CT-468, CT-474, CT-475.)

20 Every facet of plaintiff's daily life is impacted by her
21 communication difficulties, and the single most important step that
22 could be taken to improve plaintiff's life lies in improving her
23 communication skills. When Ms. Tapie was asked whether she saw any
24 type of further education in plaintiff's future, she responded "that
25 with introducing more language to Callie and increasing her
26 communication skills, I believe it'll open her up to those areas that
27 we spoke about that I'd like to see her in the community. I think
28 . . . it'll encourage her to get out there and be proud of herself and

1 hold her head up high. Give her a dignity." (AR, Vol. 2, Ex. HH, at
2 CT-430.) Even when asked to envision other types of education in
3 plaintiff's future, "aside from language and communication skills,"
4 Ms. Tapie added that "the only area that I could see that Callie could
5 benefit from any other education would be because these devices like
6 computers are obsolete within a year that possibly in the future they
7 may come up with something better for her, and to keep her doing the
8 best she can with what's out there." (AR, Vol. 2, Ex. HH, at CT-430
9 to CT-431.)

10 In reviewing the testimony as a whole, it is obvious the focus of
11 the hearing was on plaintiff's communication skills, and the need for
12 assistive devices to help her with those skills. The importance of
13 assistive technology devices to plaintiff is no doubt why defendants'
14 failure to incorporate those devices in her IEPs is so frustrating to
15 her family and friends. Plaintiff's only realistic hope for improving
16 her expressive communication skills lies with these devices. The idea
17 that the ALJ, in focusing her award of compensatory education on
18 plaintiff's need for training with these devices, ignored the other
19 FAPE violations, misses the point. All aspects of plaintiff's
20 education and life are affected by her lack of expressive
21 communication skills. And to the extent the ALJ found violations in
22 the IEP other than the explicit failure to provide for the use of
23 assistive technology, her decision suggests that those other
24 violations were linked to the same lack of technology. For instance,
25 the ALJ found plaintiff's transition plan deficient, in part, because
26 it did not "address Student's use of her touch talker and Intellikeys
27 device." (ALJ Decision at 14, ¶ 37.) Further, the ALJ stated that
28 defendants

1 denied Student a FAPE during the school years
2 2004-2005 and 2005-2006, primarily because
3 Student's educational program, both as written in
4 her IEPs and as implemented in her classroom,
5 failed to provide specific and consistent
6 instruction with respect to Student's touch talker
7 and her Intellikeys device. . . . Use of the touch
8 talker enhanced Student's ability to communicate,
9 and both devices provided Student opportunities to
10 learn communication and math skills. Expert
11 testimony with respect to the touch talker
12 established that Student currently requires
13 training on the touch talker to ensure that
14 Student understands and can differentiate the
15 icons, and is able to communicate her needs with
16 the touch talker throughout all of her
17 environments. The failure of her IEPs to
18 specifically provide for Student's consistent use
19 of these devices, and the expansion of her skills
20 on these devices, deprived Student of educational
21 benefits for two consecutive school years.
22 Compensatory education is therefore appropriate,
23 to offset this deprivation.

24 (ALJ Decision at 23, ¶ 75.)

25 Undoubtedly, plaintiff's mother is not happy with the quality of
26 the education plaintiff received at Rialto, and is dissatisfied with
27 plaintiff's teacher. However, the evidence does not support a finding
28 that plaintiff received no educational benefit at all from her time at
Rialto. Her receptive communication skills are stronger than her
expressive skills, allowing her to receive some benefit from her
education even if her most important need was not being met.

It does appear from the record that plaintiff was performing
somewhat better in her previous placement than after her transfer to
Rialto, and it is understandable that her mother would be upset by
what seems to be a decline in plaintiff's abilities. But there are
many reasons why this might have occurred that have little to do with
defendants or plaintiff's teacher. Plaintiff was moved to a new home,
away from the people and places she had known for half her life, only
to have no further contact with the foster mother who had taken

1 primary care of her for nine years. Further, moving out of Ms.
2 Moody's home meant losing Ms. Moody's abilities as an advocate for
3 plaintiff, both in the IEP process and more generally in interfacing
4 with plaintiff's teachers and school, a role Ms. Moody seems to have
5 filled admirably and effectively. In addition, Ms. Moody appears to
6 have provided supplemental educational assistance to plaintiff, both
7 by hiring a communication specialist to work with plaintiff twice a
8 month outside of school, for 90 minutes per session (AR, Vol. 3, Ex.
9 II, at CT-457, CT-483, CT-484), and by conscientiously working with
10 plaintiff on her communication skills every day (AR, Vol. 3, Ex. II,
11 at CT-481, CT-484). Losing Ms. Moody's assistance would thus no doubt
12 have caused a set back in plaintiff's development and abilities in
13 itself, but the timing was even more unfortunate, coinciding with a
14 period in which plaintiff's mother was seriously ill, and unable to
15 step immediately into the role of advocate and participate in
16 decisions regarding plaintiff's education. (AR, Vol. 2, Ex. HH, at
17 CT-383.) Suddenly, plaintiff's care and education was left entirely
18 to people who had no previous experience with her, and no knowledge of
19 her skills, abilities, or personality. Regardless of good intentions,
20 or of what may have been recorded in plaintiff's files, there is no
21 substitute for personal involvement and experience in determining a
22 student's "unique needs" and abilities.

23 Even with Ms. Moody's help, however, it is questionable how much
24 academic progress plaintiff might have been capable of. When
25 plaintiff was evaluated in September 2006, it was noted that plaintiff
26 "did not appear to display any measurable academic skills." (AR, Vol.
27 1, Ex. A, at CT-035.) While it "was reported by the parent that
28 Callie had been able to engage in some reading or spelling activities

1 at one time . . . those skills were not observed at this time." (Id.)
2 At the age of 22, after a lifetime of special education, it would seem
3 that some measurable skills should have been detectable, if plaintiff
4 were capable of significant progress in these areas. In any event,
5 her class at Rialto was offered a "functional skills curriculum,"
6 emphasizing daily life skills, not one designed around traditional
7 academic skills. (AR, Vol. 4, Ex. JJ, at CT-663 to CT-664.) Further,
8 although plaintiff's mother testified plaintiff had previously been
9 capable of skills she no longer possessed, her points of comparison
10 were for the most part not to the time immediately prior to
11 plaintiff's enrollment at Rialto. In fact, according to Ms. Tapie,
12 plaintiff regressed after leaving Orange County at the age of 8, and
13 in some respects has never quite recovered. (AR, Vol. 2, Ex. HH, at
14 CT-378 to CT-379; CT-395 to CT-396; CT-398.)

15 Given the evident importance of her communication needs,
16 plaintiff might have tried to argue that the ALJ's award was correct
17 in focus -- i.e., that it was appropriate to concentrate on
18 plaintiff's ability to use communication devices, rather than a wide
19 spectrum of rudimentary academic skills -- but that additional time
20 should have been awarded to enable plaintiff to recover from
21 defendants' lack of attention to her assistive technology needs during
22 her two years at Rialto. However, plaintiff makes no such argument,
23 simply asserting that the equivalent of two more full years of school
24 are required. In fact, the bulk of plaintiff's argument is directed
25 not to attacking the amount of time awarded by the ALJ, but to
26 criticizing defendants' attempts to carry out the ALJ's order. (See,
27 e.g., Pl.'s Opening Brief at 7, ¶ 4; id. at 7-8, ¶ 5; id. at 9, ¶ 7.)
28 Of course, as the parties stipulated to exclude everything postdating

1 the due process hearing, there is no evidence before the Court as to
2 what may have happened when (or even if) defendants tried to provide
3 the compensatory education ordered by the ALJ. From plaintiff's
4 argument, it appears that she was not at all happy with defendants'
5 conduct in implementing the award, but this is completely irrelevant
6 to whether the amount of education awarded was sufficient.

7 Plaintiff offers no real explanation for why the amount of time
8 she seeks now would be justified. She points to no evidence in the
9 record as specific factual support for why two full years of
10 compensatory education is required. Defendants raised this point in
11 their opposition brief, but plaintiff still failed to address the
12 question sufficiently in her Reply, asserting simply that 1840 minutes
13 per week was required because that is how many minutes per week were
14 provided for in her IEPs. (Pl.'s Reply at 11, ¶ 1.) Again, this
15 presupposes that plaintiff received no benefit from a single minute of
16 her time at Rialto, which the evidence does not support. Further,
17 plaintiff's analysis of why the ALJ's award is insufficient, such as
18 it is, does not address the issue of amount, but rather focuses on the
19 argument that the relief awarded was "inappropriate" because it

20 allows Defendants to be free to carry out the
21 ALJ's order without any of the checks and balances
22 established under the IDEA to ensure that Callie
23 receives services that are appropriate within the
24 meaning of the IDEA. As the order currently
25 stands, defendants do not have to base services on
26 Callie's present levels of performance. As such,
27 defendants to date have not shown that
28 compensatory services have been based on Student's

1 unique needs and abilities. They have been free
2 to provide the services in whatever manner they
3 choose, whether within the purposes of the IDEA or
4 not. This is in direct opposition to Callie's
5 right to relief that is 'appropriate' in light of
6 the purposes of the IDEA.

7 (Pl.'s Reply at 8, ¶ 2.) This brings us back to the fact that
8 plaintiff is evidently unhappy with what happened after the due
9 process hearing, but this simply has no bearing on whether the amount
10 of compensatory education awarded was sufficient.

11 In the end, the record is clear that any award of compensatory
12 education should focus on plaintiff's need for additional training in
13 the use of her communication devices. Plaintiff has made no showing
14 that the ALJ's award of 120 minutes per week was incorrect, thus
15 failing to meet the burden that rests on plaintiff as the party
16 seeking review of that decision. Further, given that appropriate
17 relief rests within the Court's equitable discretion, the ALJ's award
18 appears fair and appropriate.

19 **IV. CONCLUSION AND RELIEF**

20 Based on the foregoing, the Court affirms the ALJ Decision on all
21 points challenged by plaintiff. The ALJ ordered defendants to provide
22 120 minutes of training per week, for 52 weeks, to be completed within
23 14 consecutive months. At most, therefore, the ALJ contemplated that
24 no more than two months would elapse between sessions. It is possible
25 (although, the Court suspects, unlikely) that the entire amount of
26 training ordered has been completed. If not, however, and more than
27 two months has elapsed since the last session, then the entire 52-week
28 sequence should start again, in accordance with the ALJ's original

1 order. In the future, however, if plaintiff's mother, attorney, or
2 other guardian chooses to make plaintiff unavailable for scheduled
3 sessions, that will not cause the clock to restart again. Should
4 plaintiff feel that the ALJ's order is not being carried out in good
5 faith, she should seek relief in the first instance under the due
6 process hearing provision of the IDEA, 20 U.S.C. § 1415(f). The award
7 of compensatory education here was designed to redress defendants'
8 failure to provide plaintiff with a FAPE initially, and any failure to
9 provide the award should not be excluded from the remedies available
10 for violation of a FAPE in the first place.

11 Plaintiff also claims attorneys' fees and costs in bringing this
12 challenge. "[T]he court, in its discretion, may award reasonable
13 attorneys' fees as part of the costs to a prevailing party who is the
14 parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B). "A
15 prevailing party is one who 'succeed[s] on any significant issue in
16 litigation which achieves some of the benefit the parties sought in
17 bringing the suit.'" Van Duyn, 502 F.3d at 825 (quoting Parents of
18 Student W., 31 F.3d at 1498). "The success must materially alter the
19 parties' legal relationship, cannot be de minimis and must be causally
20 linked to the litigation brought." Id. The court should award
21 reasonable attorneys' fees that take into account that a student
22 prevailed on some, but not all, the issues raised at the
23 administrative hearing. See id. at 825-26 ("[T]he court has
24 discretion to consider that Van Duyn prevailed on one issue at the
25 administrative hearing but lost on all the others.").

26 Unquestionably, plaintiff was a prevailing party in the
27 administrative hearing below. It is true plaintiff did not prevail on
28 every issue below, but the core question was undoubtedly resolved in

1 plaintiff's favor -- the ALJ found that, in two school years,
2 plaintiff's IEPs were deficient in several respects, resulting in the
3 denial of a FAPE to plaintiff. Further, the ALJ ordered defendants to
4 provide compensatory education to plaintiff, altering the parties'
5 legal relationship by requiring defendants to provide services they
6 would otherwise have been under no obligation to provide. However,
7 plaintiff has not prevailed here, as this Court is upholding the ALJ
8 in all respects. The Court therefore **ORDERS** defendants to pay
9 plaintiff's reasonable attorneys' fees and costs incurred during the
10 proceedings before ALJ Jones.

11 Because the evidence is insufficient to determine the amount of
12 attorneys' fees and costs plaintiff incurred, plaintiff may file, no
13 later than fourteen days after the entry of this Order, evidence of
14 the attorneys' fees and costs incurred in connection with the
15 administrative due process hearing before ALJ Jones. The District may
16 file objections thereto no later than ten days after plaintiff's
17 filing. The Court will thereafter take the matter under submission
18 and issue an appropriate Order.

19 Defendants are instructed to lodge a proposed judgment for the
20 Court's consideration.

21 **IT IS SO ORDERED.**

22 DATED: June 18, 2008



23
24 STEPHEN G. LARSON
25 UNITED STATES DISTRICT JUDGE
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28