

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009020240

**DECISION**

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on March 23, 24, and 25, 2009, and on April 13 and 14, 2009, in Poway, California.

Eric B. Freedus, Attorney at Law, represented the Student. Student's father (Father) attended the hearing on March 23, 24, and 25, 2009, and on April 14, 2009. Student's mother (Mother) attended all five days of hearing.

Justin R. Shinnfield, Attorney at Law, represented the Poway Unified School District (District). District representative, Emily Shieh, Assistant Director of Special Education, attended all five days of the hearing, and Wendy Smith-Rogers, Executive Director of Special Education attended a portion of the hearing.

Student's due process hearing request was filed on February 5, 2009. On February 23, 2009, OAH granted a continuance for good cause. On March 26, 2009, after three days of hearing, the matter was further continued to April 13 and April 14, because of illness by District's counsel. On April 14, 2009, at the close of the hearing, the parties were granted permission to file written closing arguments by May 1, 2009. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

**ISSUES**

1. Did District deny Student a free and appropriate public education (FAPE) by failing to offer Student an appropriate placement during the 2007-2008 school year?

2. Did District deny Student a FAPE by failing to offer Student an appropriate placement during the 2008-2009 school year?

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a sixteen-year-old girl, who was born on September 4, 1992. At all relevant times Student resided in the District and was eligible for special education under the category of other health impairment (OHI).

2. Student has multiple physical and mental health problems, including hypercalciuria, which is characterized by high levels of calcium in Student's kidneys, causing kidney stone formation, blood in Student's urine, pain, and gastrointestinal problems, such as gastrointestinal dysmotility. Gastrointestinal dysmotility is a disorder that causes severe pain and constipation and requires management through a gastric tube inserted in the abdomen of Student, as well as a "port-in" for intravenous nutrition and the administration of medication. Student also has Tourette's syndrome, a neurological condition characterized by motor and sound ticks, which becomes very severe in the evening. In addition, Student has obsessive-compulsive disorder (OCD), which is characterized by intrusive thoughts compelling Student to perform certain acts and rituals. These rituals include ideas of having to engage in an act to prevent something bad from happening. Student also suffers from generalized anxiety disorder, which results in the onset of panic attacks. Since 1993, Student's medical disorders have resulted in at least 40 multi-day hospitalizations at Children's Hospital in San Diego.

### *Student's Ninth Grade Year*

3. In August 2006, Student began attending District high school, Westview High School (Westview), as a ninth grader. Previously, Student had been receiving accommodations pursuant to a Section 504 Plan, but on September 28, 2006, an IEP team concluded that Student qualified for special education services under the eligibility category of OHI. Student was enrolled in Spanish 1, Algebra 1, ENS 1, and Learning Strategies,<sup>1</sup> and by October 2006, had earned a "B," an "A," a "B+," and an "A" in those classes, respectively.

4. In October 2006, Student entered the hospital due to complications stemming from her gastrointestinal dysmotility. On November 7, 2006, Student's pediatrician, Dr. Julie Bleha, submitted to District a "Physician's Statement Requesting Home and Hospital Instruction," estimating that Student would be homebound for four months as a result of her

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<sup>1</sup> Learning Strategies is a course designed to provide supportive instruction to supplement the general education program of students who require specialized instruction in specific areas. Learning Strategies will be discussed in more detail below.

“gastro dismotility disorder.” District’s home-hospital program provided educational services to homebound or hospitalized students from one to five hours a week. Pursuant to Dr. Bleha’s request, District placed Student in District’s home-hospital program on November 8, 2006.

5. On January 24, 2007, Dr. Bleha submitted to District a “Physician’s Release From Home and Hospital Instruction,” recommending that Student, effective January 29, 2007, return to Westview on a shortened school day schedule. Specifically, Dr. Bleha recommended that Student attend only three classes a day. Consequently, on January 26, 2007, the IEP team met and noted that Student had been “released to come back to school for 3 classes at Westview.” The IEP team then offered the following: three classes a day for Student, and one 30-minute individual counseling session per week. The team recommended thirty minutes of individual counseling per week because after reviewing a psycho-educational report prepared by school psychologist, Hilary Ward. Ms. Ward, who provided testimony at the hearing, received her bachelor’s degree in psychology in 1987, her master’s degree in counseling in 1988, and her credential in school psychology in 2004. She began working for the District as an instructional assistant in the Resource Specialist Program in 2004, and began working as a school psychologist in 2004. In her capacity as a school psychologist, Ms. Ward delivered psychological services in individual assessments, interventions, and consultations, as well as developed assessment plans and psycho-educational reports. After completing an assessment of Student, Ms. Ward concluded that Student’s medical conditions adversely affected Student’s educational performance, and recommended that Student receive individual counseling to support Student. Student’s parents (Parents) consented to the January 29, 2007 IEP.

6. By January 2007, Student had earned a “B” in Spanish 2, an “A” in Algebra 2, a “B” in ENS 2, and had withdrawn from Learning Strategies. However, on March 5, 2007, Dr. Julie Bleha submitted to District a “Physician’s Statement Requesting Home and Hospital Instruction,” estimating that Student would be homebound until the end of the school year due to complications stemming from Student’s gastrointestinal dismotility disorder, as well as her Tourette’s syndrome. Consequently, the IEP team met on March 8, 2007 and concluded that Student should be placed in the home-hospital program. The IEP team also recommended that Student continue receiving individual counseling of one 30-minute session per week, and recommended specialized academic instruction, on a consultation basis, of 15 minutes per week. Student’s parents consented to the March 8, 2007 IEP.

7. By April 2007, Student received a “NM,” defined as “no mark,” in her classes (i.e., English 1, Spanish 3, and Designated Media 1), because Student had not completed the coursework. Consequently, Student would be required to repeat English 1 and Spanish 3 in her tenth grade year.

8. On May 30, 2007, the IEP team convened to discuss the status of Student’s placement in the home-hospital program, and noted that because of Student’s chronic illnesses and repeated hospitalizations, she had been unable to complete school work through

the home-hospital program. Consequently, the IEP team agreed to drop Student's quarter two and quarter three classes with no penalty, and concluded that Student should remain in the home-hospital program. The IEP team also recommended that Student continue to receive individual counseling of one 30-minute session per week, and specialized academic instruction, on a consultation basis, of 15 minutes per week. Parents consented to the May 30, 2007 IEP.

9. By June 2007, Student received a "NM" in her classes (i.e., English 2, Spanish 4, and Designated Media 2), because Student had not completed the coursework. In addition to English 1 and Spanish 3, Student would be required to repeat English 2 and Spanish 4 in her tenth grade year.

*Student's Tenth Grade Year (2007 – 2008 School Year)*

10. On August 31, 2007, Dr. Bleha submitted to District a "Physician's Release From Home and Hospital Instruction," recommending that Student return to Westview on a shortened school day schedule. Specifically, Dr. Bleha recommended that Student attend only two periods a day. On August 31, 2007, the IEP team convened in anticipation of Student returning to Westview, and agreed, in accordance with Dr. Bleha's recommendation, that Student should attend two periods a day, as well as continue individual counseling of one 30-minute session per week, and specialized academic instruction, on a consultation basis, of 15 minutes per week. Parents consented to the August 31, 2007 IEP.

11. On September 4, 2007, Dr. Julie Bleha submitted to District a "Physician's Statement Requesting Home and Hospital Instruction," estimating that Student would be homebound for one month due to complications stemming from Student's gastrointestinal dismotility disorder, as well as her OCD. On September 6, 2007, the IEP team met and agreed that Student should be placed in the home-hospital program, "due to Student's medical needs." The IEP team also recommended that Student continue to receive individual counseling, but on a consultation basis, for one 15-minute session per week, and recommended that Student continue receiving specialized academic instruction, on a consultation basis, of 15 minutes per week. Parents consented to the IEP.

12. On September 12, 2007, Dr. Bleha submitted to District a "Physician's Release From Home and Hospital Instruction," effective September 17, 2007, recommending that Student return to Westview on a shortened school day schedule. Specifically, Dr. Bleha recommended that Student attend "period 2, lunch, period 3 only."

13. On September 13, 2007, the IEP team convened in anticipation of Student returning to Westview on September 17, 2007. Mother attended the IEP meeting, as well as Student's advocate, Dr. Jessica Maxwell, who attended the meeting by telephone. Student's mother presented the IEP team with Dr. Bleha's release of Student from home-hospital instruction, as well as Dr. Bleha's recommendation that Student attend "period 2, lunch, period 3 only."

14. District determined that, in addition to periods two, three, and lunch, Student should attend “Learning Strategies” in order “to support her educational needs.” Learning Strategies was designed to provide students with specialized academic instruction in their areas of need, as well as teach the students learning strategies to foster the students’ understanding of assignments and projects assigned by their general education teachers. Learning Strategies was offered at periods two, three, and four, and anywhere from two to ten students were enrolled in each Learning Strategies class. Each Learning Strategies class had a teacher and an aide, and the Learning Strategies teacher maintained contact with the general education teachers in order to stay abreast of the class assignments and projects on which the students may need assistance. In Learning Strategies, students also received assistance organizing their backpacks and planners.

15. Mother expressed her concern about Learning Strategies to the IEP team, as its inclusion would result in a lengthened school day, considerably longer than the one recommended by Dr. Bleha. Periods two, three, and Learning Strategies were 88 minutes long each, and lunch was 34 minutes long, which meant that Student would be required to attend a five hour school day, as opposed to a three and one-half hour school day as Dr. Bleha had recommended. Mother also advised the team that Student had attended Learning Strategies classes as a ninth grader, and had attended two Learning Strategies classes during the current school year, and had not had a positive experience. Specifically, other students in Student’s Learning Strategies class had emotional disturbance issues which resulted in periodic outbursts, causing Student increased anxiety. Consequently, Mother expressed that requiring Student to attend Learning Strategies would result in heightened anxiety and panic attacks in Student.

16. District made an offer of FAPE which required that Student attend two periods of general education five days a week, as well as two sessions of Learning Strategies per week. The offer also included Student’s continued receipt of individual counseling, on a consultation basis, for one 15-minute session per week. Despite her reservations, Mother consented to the September 13, 2007 IEP, because she “felt it was her only option in order for [Student] to continue attending public school.”

17. On September 18, 2007, Student’s advocate, Dr. Jessica Maxwell, sent an email to the District’s Area Administrator, Tina Ziegler, with copies to Mother and to Dr. Brett Johnson, Student’s psychiatrist. The email stated that due to Student’s “present medications and psychiatric symptoms, [Student] need[ed] a reduced day schedule,” and would not be attending Learning Strategies. The email further requested that Learning Strategies be removed from Student’s IEP, and stated that she had asked Dr. Johnson to send a letter to the District advising of Student’s “current mental health status and her not being able to attend the [L]earning [S]trategies class.” This email constituted Parents’ withdrawal of consent to the Learning Strategies component of the IEP.

18. On September 18, 2007, Ms. Ziegler responded to Dr. Maxwell’s email, and advised that she was forwarding the email to the District’s Director of Special Education, Theresa Kurtz. Ms. Ziegler also stated that she did not want to change Student’s schedule

without an IEP meeting. She further stated that she felt that the Learning Strategies class could help Student develop some of those strategies that Student would need to become an independent learner. Ms. Ziegler also expressed that although she wanted Student to have a smooth transition back to school, she felt uncomfortable taking away a special education support from which Student could benefit.

19. On September 18, 2007, Dr. Maxwell, sent an email to Ms. Kurtz, which she again copied to Mother and Dr. Johnson. The email stated, pursuant to a collective request by Student's parents, Dr. Johnson, and Dr. Maxwell, that Student not be required to attend Learning Strategies, as not attending "[was] absolutely critical to her success in her transition back to high school." The email further stated that Student's "psychiatric symptoms [were] exacerbated by changes in routine and adjustments to new people and environments," and that because Student "did not have a positive experience in the [L]earning [S]trategies classroom last year...the thought of returning there at this time has elicited extreme anxiety." The email advised that Student's OCD symptoms had "increased tremendously over the summer and the IEP team may not ... [have been] aware of this." The email also requested that Learning Strategies be removed as a special education service from the IEP, and asked that the service be revisited in a month. Finally, Dr. Maxwell stated in the email that she would be advising Parents "to call in as [Student] being absent at that time each day she has the [L]earning [S]trategies class until it is removed from the IEP."

20. Also on September 18, 2007, District received a letter from Dr. Johnson. Dr. Johnson, a child and adolescent psychiatrist in private practice, and on staff at Children's Hospital, received his bachelor's degree in biology and French literature in 1996 from Emory University, and received his Doctor of Medicine from Vanderbilt University School of Medicine in 2000. Dr. Johnson had formerly been the Assistant Director of the Obsessive-Compulsive Disorders program at Children's Hospital, and had been an assistant clinical professor at the University of California at San Diego. In February 2007, Dr. Johnson received his board certification in general psychiatry by the American Board of Psychiatry and Neurology, and received his board certification in Child and Adolescent Psychiatry in 2008. Dr. Johnson had met Student in 2005, when Student had participated in the Obsessive-Compulsive Disorders Program. Dr. Johnson had become Student's treating psychiatrist in 2006. In that capacity, Dr. Johnson maintained extensive contact with Student's medical team. In addition to the medications prescribed by other members of Student's medical team, Dr. Johnson prescribed high doses of medications, such as Lexapro, valium, and Lyrica, to address Student's "significant" OCD symptoms, "extreme" anxiety, and her "severe" motor ticks from Tourette's syndrome. These medications caused a significant sedation affect in Student, which manifested itself in extreme fatigue.

21. Dr. Johnson had been fully involved with Dr. Bleha and her recommendation that Student attend "period 2, lunch, period 3 only," and had been fully involved with Dr. Bleha's previous recommendations for shortened school day, dated January 24, 2007, August 31, 2007, and September 12, 2007. With respect to Dr. Bleha's September 12, 2007 recommendation that Student attend "period two, lunch, period three only," Dr. Johnson testified that he did not want Student to attend period one because of the significant sedation

issues experienced by Student, and wanted Student's school day to end at the conclusion of period three because, as the day progressed, Student's anxiety routinely increased, as well as Student's level of fatigue.

22. In his September 18, 2007 letter to District, Dr. Johnson stated the following:

While I admire her school's recognition of her need for extra academic assistance, I do not feel that Learning Strategies is the best approach. Her symptoms of OCD and Tourette Syndrome have greatly increased over the last summer. They clearly interfere with her academic performance. Dealing with these symptoms is exhausting for [Student]; furthermore her medications which include Lexapro 50 mg/day and Lyrica 900 mg/day are at very high doses and can thus exacerbate her fatigue. The idea of her attending a full school day or even a day with a late-start until the completion of Learning Strategies is not realistic given her current symptoms. As the situation changes, I am happy to reevaluate my position regarding Learning Strategies.

23. Dr. Johnson's September 18, 2007 letter also addressed the fact that Student was in need of one-on-one tutoring to keep Student from struggling academically. Specifically, it stated the following:

However, I, too, agree with the school that additional support is necessary. I strongly urge her school to provide and pay for one-on-one tutoring for [Student]. This is a direct need of her exhaustion from her diagnoses and her required medical treatment. Without this support, she will most certainly not enjoy academic success as her OCD and Tourette Syndrome prevent her from completely absorbing the information in her classes. We have already tried to have her do her work independently at home and this has met with very limited results; this is due to her OCD, inability to focus on material, and feelings of 'getting stuck' on details. Furthermore, [Student] has a complex medical illness which is clearly exacerbated by psychological distress. If she does not have tutoring and she struggles academically, I fear that her medical illnesses will certainly flare up and might necessitate another hospitalization. Her one-on-one tutoring could certainly be subject to a similar review process (e.g. every one to two months) as we discussed above for Learning Strategies. Her parents have been paying privately for a tutor and this has been very beneficial for [Student].

24. On September 19, 2007, Ms. Kurtz responded to Dr. Maxwell's email and stated that given the significant nature of the request to remove Learning Strategies from Student's IEP, the District would not agree to amend the IEP outside of an IEP meeting.

25. Pursuant to Parents' request, the District convened an IEP meeting on October 4, 2007. The individuals at the IEP meeting consisted of Parents, the family's advocate, Dr.

Maxwell, Student's psychiatrist, Dr. Johnson, Student, as well as District's employees: McKayla LaBorde,<sup>2</sup> Program Specialist; Chip Seiple, school counselor; Hilary Ward, school psychologist; Gayle Cohen, resource nurse; Katherine Sangalang, English teacher; Tina Ziegler, Assistant Principal and Area Administrator; and Andrea Vinson,<sup>3</sup> special education teacher and Student's case manager.

26. Mother expressed her concern about the effects a lengthened school day would have on Student should District require Student to attend Learning Strategies in addition to periods two, three, and lunch. Mother stated that the lengthened school day would negatively impact Student, as Student's physical and psychiatric health had worsened significantly over the last several months, leaving Student more fatigued, and more burdened by sedation issues. Mother also reminded the IEP team that requiring Student to attend Learning Strategies in addition to periods two, three, and lunch, was contraindicated, given the medical recommendation submitted to District by Dr. Bleha in her September 12, 2007 release, as well as in the September 18, 2007 letter submitted by Dr. Johnson.

27. Parents produced a copy of Dr. Johnson's September 18, 2007 letter that he had previously submitted to District. As reflected in the IEP meeting notes, District advised Parents that they had interpreted Dr. Johnson's letter to mean that Dr. Johnson supported Student receiving academic support, but that that support should be implemented by way of one-on-one tutoring as opposed to Learning Strategies classes.

28. The IEP team further advised Parents that Student, who had fallen behind in completing assignments due to Student's chronic illnesses and hospitalizations, could have her needs met by attending the Learning Strategies class, as it would provide the academic support she needed to help her complete the work and master the material. Ms. LaBorde testified that District also needed to have "access to [Student] during the school day to provide specialized academic instruction, and Learning Strategies [was] the right avenue to do so."

29. The District members of the IEP team reminded Parents that Learning Strategies had worked for Student in the past, particularly during the fall semester of 2006 when she had attended Learning Strategies, which resulted in Student earning passing grades in her classes. Also, the team stated that it would be willing to make accommodations for Student to help Student "establish a routine, establish a rapport with the Learning Strategies teacher, and begin to develop independent study strategies." Specifically, the team discussed allowing Student "to come late to decompress or only attending a couple days per week."

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<sup>2</sup>Ms. LaBorde received a Bachelor's degree and a Master's degree in Special Education in 2000 and 2002, respectively. She had been a Program Specialist with the District since 2004, and had previously worked as a special education teacher for the District for one year, as well as for the Palm Springs Unified School District for one year. As a Program Specialist, Ms. LaBorde was responsible for facilitating IEP meetings, and generally serving as an administrative designee at IEP meetings.

<sup>3</sup> Ms. Vinson received her Bachelor's degree in Anthropology in 2000, received her Master's degree in Special Education in 2005, and had been a Resource Specialist and Case Manager for Westview since 2007.

30. Dr. Johnson, who, via telephone, had joined the October 4, 2007 IEP meeting after it had already commenced, advised the IEP team that he objected to Student having to attend Learning Strategies, because Learning Strategies would extend Student's day to an unacceptable length of time, taxing her already fatigued body, and heightening Student's anxiety. Dr. Johnson testified that he advised the IEP team that the length of time for Learning Strategies, 88 minutes per class, in addition to her other classes, as well as the sedation affect from Student's medications, would completely "wipe her out," as the mental strain and fatigue would be too much. In addition, when he had spoken previously to Student about the Learning Strategies class, he learned that Learning Strategies was taught in a group setting, which made it difficult for Student to adjust due to her phobias and self-advocacy problems. Learning Strategies also created anxiety-producing situations for Student, when her emotionally disturbed classmates exhibited outbursts and behavioral challenges that alarmed and panicked Student. Dr. Johnson explained to the team, and credibly testified at the hearing, that these factors would undoubtedly produce heightened anxiety in Student, which would create a "domino effect" of increasing the number of panic attacks suffered by Student, as well as increase the number of Tourette's syndrome ticks Student would experience, leaving Student even more exhausted and fatigued.

31. Dr. Johnson testified that he advised the IEP team that even with the accommodations District had proposed, he would not recommend that Student attend any class beyond that listed in Dr. Bleha's release (i.e., "period 2, lunch, period 3 only"), because the resulting fatigue and sedated state, exacerbated by the heightened anxiety and panic attacks, would make it virtually impossible for Student to produce the focused energy she would need to participate in the Learning Strategies class, as well as complete other school and homework assignments. Dr. Johnson further expressed to the IEP team that it was important for District to be mindful that Student's mental health had deteriorated compared to years prior, because the symptoms of her OCD and Tourette's syndrome had gotten significantly worse, as well as her panic attacks; therefore, Student was not in a position, physically or mentally, to handle the lengthened school day that the IEP team had proposed.

32. After Dr. Johnson advised the IEP team of the reasons Student should not attend Learning Strategies, the IEP team members, particularly Ms. LaBorde, Ms. Vinson, and Ms. Ward, repeatedly stated that District could best meet Student's needs by providing specialized academic instruction in a Learning Strategies class. Dr. Johnson testified that he felt like he "was banging his head against the wall," because District kept insisting on having Student attend Learning Strategies, despite how much he had expressed that Student's mental health would suffer by having her attend a lengthened school day. Dr. Johnson credibly testified at the hearing that the IEP notes prepared by Ms. LaBorde did not accurately reflect how vehemently and repeatedly he had opposed District's requirement that Student attend Learning Strategies.

33. After discussing the subject of Learning Strategies, the IEP team briefly discussed the topic of one-on-one tutoring. Dr. Johnson testified that Learning Strategies and one-on-one tutoring were perceived by him to be separate issues, and that they were

discussed as separate issues at the October 4, 2007 IEP meeting. Dr. Johnson further advised that, despite how the District had interpreted his September 18, 2007 letter, he had never in the letter or at the IEP meeting expressed that he wanted one-on-one tutoring in lieu of Learning Strategies. In regard to Student's academic needs, Dr. Johnson had expressed to the team that Student, who had fallen behind academically, had been receiving private one-on-one tutoring, which had proven to be successful in helping Student with her academic needs, as the one-on-one interaction had helped to keep Student, who suffered significantly from OCD and Tourette's syndrome, focused and on-task. Consequently, Dr. Johnson advised the team that District should consider providing one-on-one tutoring for Student to improve Student's chances of reaching her academic goals, instead of having Student's parents continue to pay for private one-on-one tutoring. District's interpretation of Dr. Johnson's letter was unreasonable, given the plain wording of the letter. Although the letter discussed both Learning Strategies, and one-on-one tutoring, there is nothing in the letter that indicates that Dr. Johnson wished for one to be provided in lieu of the other. It is clear from the wording of the letter that Dr. Johnson intended Learning Strategies and one-on-one tutoring to be two separate subjects.

34. Dr. Johnson participated in the October 4, 2007 IEP meeting for approximately 30 to 45 minutes, and then had to hang up prior to the conclusion of the meeting. After Dr. Johnson hung up, District made the same offer of FAPE as it had made in the September 13, 2007 IEP: Student to attend two periods of general education, as well as two sessions of Learning Strategies per week. The offer also included Student's continued receipt of individual counseling, on a consultation basis, for one 15-minute session per week. Ms. LaBorde testified that the District had declined offering Student one-on-one tutoring because District felt that Student could receive better support in a Learning Strategies class.

35. Parents felt that District had ignored Student's mental health issues and that District's offer of FAPE failed to consider parental or medical input concerning Student's physical and psychiatric issues. Consequently, Mother advised the IEP team that she would call in Student as absent from Learning Strategies in order to keep Student from having to endure a lengthened school day that defied the medical advice of Student's doctors. In response, the team advised Parents that if Student failed to attend Learning Strategies, Student would receive a failing grade in the course. At this point, Parents excused themselves from the meeting, without consenting to the October 4, 2007 IEP.

36. Parents advised Dr. Johnson of District's October 4, 2007 offer, and advised Dr. Johnson that if Student did not attend Learning Strategies, Student would receive a failing grade in the class. Both Dr. Johnson and Parents concluded that having Student attend a lengthened school day was not an option at that time, as doing so was contraindicated. They also concluded that Student receiving a failing grade in Learning Specialties was not an option, either. Consequently, Dr. Johnson and Parents reached the ultimate decision to have Student placed back in the home-hospital program.

37. On October 8, 2007, Dr. Johnson submitted to District a "Physician's Statement Requesting Home and Hospital Instruction" form estimating that Student would be

homebound for one year, until approximately October 9, 2008, due to complications stemming from Student's OCD, Tourette's syndrome, and generalized anxiety disorder. At hearing, Dr. Johnson testified that he considered home-hospital instruction as "the lesser evil" than requiring Student to endure a lengthened school day, given her physical and mental health issues.

38. On October 9, 2007, Mother also submitted to the District a "Request for Home and Hospital Instruction." In response to the form's instruction requiring the listing of the reasons for the request for home and hospital instruction, Mother stated, in part, "school's inflexibility."

39. On October 9, 2007, the IEP team met to discuss Dr. Johnson's request to place student in the home-hospital instruction program. Mother testified that she had explained to the IEP team that she and Dr. Johnson felt they had no choice but to have Student placed on home-hospital instruction as opposed to having Student attend a lengthened school day, or risk receiving a failing grade for choosing not to attend Learning Strategies. Mother again asked the IEP team to consider removing Learning Strategies from its previous offer, so that Student could attend a shortened school day, as recommended by both Dr. Johnson and Dr. Bleha. However, the District declined to do so.

40. Pursuant to Dr. Johnson's request, the IEP team recommended that Student be placed in the home-hospital program, with Ms. Vinson consulting with the home-hospital instructor assigned to Student. District recommended that, in addition to home-hospital instruction, that Student should continue to receive individual counseling, on a consultation basis, for one 15-minute session per week, and recommended that Student continue receiving specialized academic instruction, on a consultation basis, for 15 minutes per week. Mother consented to the IEP, but asked that placement be revisited in the future, as Mother was concerned that home-hospital was not be the best placement for Student.

41. On or about October 9, 2007, District assigned Peggy Hamerly as Student's home-hospital instructor. Ms. Hamerly had been Student's home-hospital instructor on previous occasions when Student had been placed in the home-hospital program. The home-hospital program provided for five hours of instruction per week.

42. Ms. Hamerly began providing home hospital instruction to Student on or about October 9, 2007. Student was enrolled in English 1 and Spanish 3, courses she was required to retake as a result of her failure to complete them during her ninth grade year. However, because of Student's illnesses and an inability, due to her OCD issues, to complete her assignments independently, and because of her slow, methodical pace in which she worked, Student had fallen behind in her classes, and feared that she would end up having to repeat English 1 and Spanish 3, once again. Consequently, Student's anxiety had increased, negatively impacting Student's OCD, Tourette's syndrome, and her generalized anxiety disorder.

43. On or about October 17, 2007, Ms. Hamerly asked Student's English 1 and Spanish 3 teachers for modifications of Student's curriculum while she remained in the home-hospital program. These teachers advised Ms. Vinson of Ms. Hamerly's request. In response, on November 2, 2007, Ms. Vinson sent Ms. Hamerly an email denying Ms. Hamerly's request for modifications for Student. Ms. Vinson's email stated, in part, that the assignments were required during home-hospital instruction, because Student could not make up other aspects of the class like class discussions, group assignments, and daily assignments.

44. Beginning November 4, 2007, Student was hospitalized for 21 consecutive days for an infection stemming from her gastric tube. On November 9, 2007, Mother sent Ms. Vinson an email stating that Student was in the hospital, and that she would be in the hospital for "a while more."

45. During Student's period of hospitalization, Student did not receive any academic instruction. However, Ms. Hamerly periodically visited Student in the hospital. On November 19, 2007, Ms. Hamerly sent an email to her supervisor noting that Student was falling further behind, and was repeating the ninth grade again, and was unable to keep pace with the classes at Westview. No action was taken.

46. Approximately two weeks after Student's release from the hospital, Parents, on December 9, 2007, faxed to District a letter stating that the District had not offered or provided Student a FAPE. The letter also stated that Student's parents intended to withdraw Student from Westview and would be placing her privately. Parents expressed in the letter that they would be seeking reimbursement from the District for the private placement of Student.

47. On December 13, 2007, Ms. LaBorde sent Parents a letter acknowledging District's receipt of Parents' letter of intent to withdraw Student. The letter stated that the District wished to convene an IEP meeting to discuss the reasons Parents had decided to withdraw Student. The letter also indicated that District was "confused" by Parents' notice, given that Student was in the home-hospital program, and the District had not received a release from Student's physician. In response, Mother sent Ms. LaBorde an email on December 17, 2007 requesting District to provide, in writing, any new placement or program it wished for Parents to consider, to which Ms. LaBorde, in a letter dated December 20, 2007, declined. Ms. LaBorde also reiterated in her letter that the District remained "confused," and requested "any new medical information" that indicated that Student could attend a "full day program." In response, on December 21, 2007, Mother sent District a letter expressing that Student's physician never stated that Student could not attend school, and that Parents chose home-hospital instruction only after District advised them that it intended to enroll Student in a class that would extend beyond the time limit imposed by her doctor, and that Student would be given a failing grade if Student elected not to attend.

48. On January 7, 2008, Student began attending Fusion Academy (Fusion), a WASC (Western Association of Schools & Colleges) accredited independent school that provides customized one-on-one instruction for students in grades six through twelve.

49. In January 2008, Ms. Vinson sent Ms. Hamerly an email stating that Ms. Vinson would be writing goals for Student's annual IEP, and requested information concerning Student's goals and progress. On January 10, 2008, Ms. Hamerly sent Ms. Vinson an email stating that she had worked with Student for over a year and had observed that Student, although very bright, worked at a slow and methodical pace that made it difficult for her to keep up. Also, Ms. Hamerly stated that Student would become overwrought with panic attacks and paralyzed with stress when Student felt buried in work, and needed to have someone by her side when completing her homework. Ms. Hamerly also shared that Student's proneness to serious infections had impeded her progress significantly, and that during her hospitalizations, Student was unable to work, which, in turn, would raise her level of stress. Finally, Ms. Hamerly stated that a beneficial accommodation for Student would be to allow Student to complete the semester's work at her own pace, without having to start from "square one" because the work had not been completed according to the normal academic calendar.

50. On January 7, 2008, Ms. LaBorde sent Parents a letter stating that District would be holding an annual IEP meeting concerning Student on January 18, 2008.<sup>4</sup> The letter also stated, "if you have any new medical information that you would like to share with the IEP team that indicates that [Student] can attend a full day program, please contact me."

51. In January 2008, Parents hired Fred Marasco, an educational consultant and a retired school psychologist, to assist in Student's upcoming IEP meeting. Mr. Marasco, who had earned a Bachelor of Arts degree in Psychology in 1964, and a Master's degree in Psychology in 1967, and had received his school psychologist credential in 1969, was a school psychologist for approximately 40 years. After he retired in 2003, Mr. Morasco began working as an educational consultant in 2005, advising parents and school districts as to appropriate interventions for children. Mr. Marasco provided testimony at the hearing.

52. Mr. Marasco requested Ms. Hamerly to complete a "School Performance and Behavioral Profile" (Profile) concerning Student. On January 15, 2008, Ms. Hamerly completed the Profile and stated that Student was "severely impacted by frequent hospitalizations," which have "caused [Student] to fall seriously behind in her work and to be in a situation of having to catch up, often an unattainable goal." Ms. Hamerly stated that she had requested that Student's curriculum be "modified to eliminate unnecessary busy work so that [Student] can meet the academic standards in a less stressful manner." Also, Ms. Hamerly expressed that she had provided instruction and supervised the completion of Student's assignments as Student's tutor, but the "5-hour per week limit sometimes [made] it difficult to complete the volume of work required by Westview High School." Ms. Hamerly also stated that she had never been asked to attend any of Student's IEP meetings.

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<sup>4</sup> The IEP was subsequently scheduled from January 18, 2008 to January 23, 2008.

53. Ms. Hamerly also provided information in the Profile regarding her behavioral observations of Student. Specifically, Ms. Hamerly stated that Student was “a perfectionist” and worked “very slowly and methodically.” Ms. Hamerly stated that Student was “impeded by her physical and emotional challenges, namely her proneness to serious infections.” Ms. Hamerly also expressed that Student had “difficulty keeping pace with the workload required in a regular classroom due to her slow, methodical work style and the disruption caused by frequent, long hospitalizations,” and that Student needed “a modified workload and flexibility in scheduling to accommodate her physical and academic challenges.”

54. Mr. Marasco reviewed the Profile completed by Ms. Hamerly, as well as interviewed Parents, and conducted an evaluation of Student. During Mr. Marasco’s evaluation of Student, which lasted approximately one and one-half hours, Mr. Marasco interviewed and observed Student. Student had gotten overly tired during the evaluation, and had expressed that the thought of attending Learning Strategies caused her significant stress and anxiety.

55. On January 16, 2008, Mr. Marasco sent a letter to Ms. LaBorde advising that he had been retained by Parents to represent them in their efforts to obtain a FAPE for Student, and advised that he would be attending the upcoming IEP meeting scheduled for January 23, 2009. Mr. Marasco also stated that, based on his evaluation, Student felt “extremely anxious in the school environment, to the point of being debilitated by anxiety and panic on occasion.” Mr. Marasco further stated that in his opinion, Student needed “a much more structured environment than that which is currently offered in her IEP program and services at Westview. The school program has, in fact, exacerbated [Student’s] difficulties necessitating the parents making a placement more supportive of her needs.”

56. On January 23, 2008, the IEP team convened for a meeting. Parents, Mr. Marasco, Ms. LaBorde, Ms. Vinson, Ms. Ward, Ms. Cohen (nurse), Ms. Sangalang (English teacher), and Mr. Sieple (counselor) participated in the meeting.

57. Mr. Marasco advised the IEP team that based on his observation of Student, and his interview of Parents, as well as and the Profile completed by Ms. Hamerly, Student required a smaller environment. Mr. Marasco and Parents advised that Parents had placed Student in a small private school. When District requested Mr. Marasco and Parents to reveal the name of the school in which Parents had placed Student, they declined to do so.

58. Ms. LaBorde testified that District was surprised by the fact that Student had been attending a new school, because District “had received no new medical information indicating that Student could attend school.” Also, Parents had not “dis-enrolled” Student from Westview, and the District had been receiving, through Ms. Hamerly, class assignments and homework completed by Student subsequent to her enrollment in private school. Ms.

Sangalang,<sup>5</sup> Student's English teacher, testified that she had been grading work from Student during this time period.

59. Mr. Marasco and Parents explained to the IEP team that Parents were not aware that they had to "dis-enroll" student after sending the District their December 9, 2007 letter indicating that they had decided unilaterally to place Student in a private school. Mr. Marasco explained that Parents had begun paying Ms. Hamerly as a private tutor in December 2007, after they had given District notice of their intent to withdraw Student from the District. Mother testified that she and her husband had hired Ms. Hamerly so that she could help Student complete what she had started so that Student could receive credit for those classes at Westview. It was not reasonable for Parents to believe that Student was no longer enrolled at Westview, especially given their reason for privately hiring Ms. Hamerly was to help Student complete her coursework in order to receive credit at Westview. Implicit was an expectation that Student's work submitted by Ms. Hamerly to Westview's teachers would be graded, so that Student could receive credit. As such, Student was still receiving services from the District after Parents' issuance of their notice of unilateral placement, irrespective of Parents' election to pay privately for services that Student had been receiving for free.

60. Ms. LaBorde asked Mr. Marasco and Parents whether there was any new medical information that they could share that would release Student for a full day program at school, because as it stood, District felt that it was still bound by Dr. Johnson's October 8, 2007 request for home-hospital instruction, which included an estimation that Student would require home-hospital instruction until October of 2008. Mr. Marasco and Parents advised that they had no new information to share, but that Parents had felt that, in October 2007, they had no choice but to have Student's placement changed to home-hospital because District wished to ignore Dr. Bleha's and Dr. Johnson's recommendations that Student have a shortened school day. Mr. Marasco advised the team that Parents would consider other options than home-hospital instruction, to which the team responded that it could not do so without any new medical information indicating that home-hospital instruction was no longer required for Student.

61. The team then made the following offer: placement in the home-hospital program with five (5) hours per week of tutoring, specialized academic instruction of two hours per month, DIS counseling consultation for 15 minutes per week, and extended school year for six weeks in the home-hospital program. Parents dissented to District's offer. Ms. LaBorde testified that the District felt their offer of FAPE was appropriate because there was an adequate amount of service to address Student's needs, based on what District knew from Ms. Hamerly.

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<sup>5</sup> Ms. Sangalang received her Bachelor's degree in English in 2001, and has been a District teacher since 2002. In addition to teaching 9th grade English, and Junior AVID students, Ms. Sangalang taught various subjects, one-on-one, as a home-hospital instructor.

62. On January 31, 2008, Ms. LaBorde wrote a letter to Parents which set forth the offer of FAPE made during the January 23, 2008 IEP meeting, and stated the District “had a written statement from a Physician stating [Student] could not attend school,” that Parents had not offered any new medical information to clear Student to attend school, and that Parents had not revealed the name of Student’s private placement. Ms. LaBorde’s letter also indicated that the District wished to conduct supplementary assessments of Student and enclosed an evaluation plan. In response, on January 31, 2008, Parents sent Ms. LaBorde a letter stating that Ms. LaBorde’s letter “border[ed] on the disingenuous,” because “it create[d] the impression that the district was not previously advised that [Student] would be placed privately.” Also, Parents stated they did not interpret Ms. LaBorde’s “broad” inquiry about “new medical information” to be implicitly suggesting that Student, in the past, had not been able to attend school. Finally, in reference to their decision not to reveal the name of Student’s private placement, Parents stated they were delaying giving that information based on their advocate’s advice, as districts sometime contact the private schools without advising the parents. Parents expressed that, given Student’s fragile state, they wanted to be involved in the process to protect Student’s well-being.

*Student’s Eleventh Grade Year (2008 – 2009 School Year)*

63. In approximately spring 2008, District received a request from Fusion concerning Student’s records. It was at this time when District learned the name of school Student had been attending since January 2008. On June 4, 2008, Emily Shieh, Assistant Director of Special Education, sent Fusion a letter indicating that Parents had unilaterally placed Student at Fusion, and that Parents had proposed that Student’s placement at Fusion be publicly financed. Ms. Shieh then requested Fusion to give District an opportunity to observe Student at Fusion. On October 28, 2008, Ms. LaBorde and Ms. Ward observed Student at Fusion.

64. On July 7, 2008, Ms. Kurtz sent Parents two letters. One letter stated that it was important that District perform an assessment of Student’s mental health as soon as possible, and the District had not received Parents’ written consent for District to proceed with the assessment. The second letter stated that because of Student’s “physical inability to maintain regular attendance at Westview High School during the past two years,” District would need to conduct a comprehensive review of Student’s functional levels and baselines in order to determine an appropriate placement, program, and goals for Student for the coming school year.

65. On October 29, 2008, Mother sent Ms. Ward and Ms. Vinson an email stating that an assessment of Student would have to be postponed, as Student had not been doing well in the past month and her health had worsened. On November 18, 2008, Mother forwarded to District a November 18, 2008 letter from Dr. Johnson, addressed to Ms. LaBorde, stating that Student’s current health was poor, and that she was having multiple issues related to gastro-intestinal bleeding and iron-deficiency. Dr. Johnson also stated that Student’s level of anxiety and panic were the worst that he had ever seen, and requested that District delay testing until Student was “more medically and psychiatrically stable. Finally,

Dr. Johnson questioned the validity of psychoeducational tests which would be performed when Student was not at her best, as they may seriously underestimate Student's intellectual and academic potential.

66. On January 14, 2009, District nurse, G. Cohen, prepared a health history update concerning Student. Ms. Cohen received all of the information concerning Student's current health from Mother. According to health history update, Student attended classes at Fusion from 10:30 a.m. to 2:00 p.m. Thereafter, Student would remain at school until 4:30 p.m., or 5:00 p.m., in order to receive additional one-on-one support to complete her homework. On January 14, 2009, Ms. Ward also prepared a report. Ms. Ward used information provided in Achenbach questionnaires she had received from Student's guitar and U.S. History teachers at Fusion. Neither Ms. Cohen nor Ms. Ward had been able to assess Student directly.

67. On January 14, 2009, the IEP team convened for a meeting. Mother, Mr. Marasco, Katrina Neal from Fusion, Ms. Shieh, Ms. LaBorde, Ms. Vinson, Ms. Ward, Ms. Sangalang, and Mr. Sieple participated in the meeting.

68. Student's assessments were reviewed, which only included the partial assessments conducted by Ms. Cohen and Ms. Ward. The IEP team also developed goals for Student, and discussed a continuum of placements, including dialogue about Student staying at Fusion. Ms. Neal from Fusion had advised the team that Student had benefited from one-on-one instruction. However, the team concluded that the Resource Specialist Program at Westview was a more appropriate placement, because the goals could be met in a less restrictive environment. Also, the team concluded that a one-on-one instructional aide for Student would be beneficial for Student, given the fact that Student had been receiving one-on-one instruction at Fusion. Because an instructional aide would serve as overall support for Student, the instructional aide would be able to take notes, and assist Student in keeping up with projects and assignments during those periods when Student needed to miss school.

69. District then made the following offer: placement of Student in the Resource Program at Westview, full-time one-on-one instructional aide support, specialized academic instruction of 88 minutes per day, five days a week, with instructional aide (supervised by Resource Specialist); specialized academic instruction, on consultation basis, one time per week for 30 minutes, DIS individual counseling of one time per week with the school psychologist, and extended school year 2009 for six weeks with full time instructional aide support.

70. After District made its offer of FAPE, the team engaged in some discussion about how to transition Student from Fusion back to Westview. The team recommended a January 21, 2009 start date for Student, and suggested that prior to returning to Westview, Student should schedule a campus visit to the school. Thereafter, Student should begin attending one general education class and a one-on-one instructional assistance class per day for a period of two weeks. After two weeks, Student should attend two general education classes, a one-on-one instructional assistance class, lunch, and break. The team suggested

that the weekly consultation period could be used to review her progress during the transition period, and to make revisions, if necessary. Parents did not consent to the District's offer.

71. At hearing, Mr. Marasco expressed his belief that the transition plan to move Student from Fusion to Westview "had not been thought out," that it "was uncertain and unclear," and that "it did not address how to take a vulnerable child in a protective environment into a very unprotected environment." Mr. Marasco testified that timelines for transitioning Student from Fusion to Westview were discussed, but "not the clear substance." Also, with respect to the one-on-one aide District had offered, Mr. Marasco testified that a one-on-one aide was not the same as a one-on-one teacher. Mr. Marasco emphasized that Student had thrived under one-on-one teaching, and that an aide would not be able to do much for her academically, nor would an aide be useful in addressing Student's emotional issues. Moreover, Mr. Marasco, as well as Dr. Johnson, testified that an aide would have been socially disadvantageous for Student, because Student would have felt very shunned and ostracized by having an aide present.

72. Mr. Marasco was a knowledgeable and credible witness with extensive expertise as a former school psychologist. Mr. Marasco had attended approximately 8,000 IEP meetings during the course of his career, and possessed considerable knowledge concerning the substance and practice of IEP meetings. However, Mr. Marasco's opinion that the transition plan was "unclear and uncertain" was not persuasive, as the proposed transition plan on its face set reasonable and specific guidelines to transition Student. In addition, the transition plan incorporated a method by which to check Student's progress, as well as to make modifications, if necessary.

73. Similarly, Mr. Marasco's opinion that a one-on-one aide would not be able to do much for Student academically was not persuasive, because it was not supported by any evidence in that regard. Because an instructional aide would be able to take notes and assist Student with projects and assignments, particularly during those periods when Student missed school, a one-on-one aide would, more likely than not, provide an educational benefit to Student.

74. At hearing, Dr. Johnson expressed his belief that Westview was not appropriate. Dr. Johnson visited Westview in March 2009, pursuant to the request of Parents. The purpose of the visit was to see the placement District had proposed in its January 14, 2009 IEP. Dr. Johnson had many concerns about the placement at Westview. Dr. Johnson felt Westview was too big, and populated by too many students, which would cause Student significant anxiety. In addition, Dr. Johnson had concerns about Student having ticks around the other Westview students, which, in the past, had caused Student to feel embarrassed and stigmatized, which worsened her anxiety. Moreover, Westview did not have an adequate place for Student to decompress, causing Student even more anxiety. Furthermore, Dr. Johnson observed the period of time between classes when students were passing from one class to the next and noted that Student would have a difficult time adjusting to the noise and other stimuli, which would be very anxiety provoking for Student.

Consequently, Dr. Johnson concluded that Westview would not be an appropriate placement for Student, as the intense anxiety would have a very harmful impact on Student.

75. At hearing, Dr. Johnson offered his opinion of Fusion. Dr. Johnson was familiar with Fusion's program, as he had a client who had attended Fusion, and he, himself, had visited Fusion twice. The first time was after Student had already begun attending Fusion, where he received an overview of the program from Ms. Gilman. The second visit occurred in approximately February 2008, when he provided an in-service to the teachers at Fusion. Dr. Johnson concluded that Fusion would be a better placement for Student because Fusion had one-on-one instruction, a model under which Student seemed to thrive. Also, the school was small and intimate, the teachers knew her well, and Student had made progress advocating for herself. In addition, Fusion was very flexible, so it accommodated her sedation and exhaustion issues by modifying the start time for Student or delaying lessons for later on in the week, if necessary. Consequently, Student's anxiety had diminished since attending Fusion. Dr. Johnson expressed that although the sedation issues would impact Student whether she was at Westview or Fusion, Student had returned home from Fusion less tired and more interactive, because she had not been expending energy trying to suppress ticks like she had while attending school at Westview. Also, because of Fusion's flexibility, it kept Student from feeling as though she was falling behind when she was unable to attend school due to illness and/or hospitalization, thereby eliminating a major source of anxiety. Finally, Student had also made social improvements at Fusion, because she had made friends.

#### *Student's Education at Fusion*

76. As discussed above, Student has attended Fusion from January 7, 2008 to the present. At Fusion, all teachers have bachelor's degrees, but 21 of the 27 teachers at Fusion do not have California teaching credentials. Fusion provides instruction for both disabled and non-disabled children, as well as for highly intelligent students that "regular schools are not equipped to handle." Of the 44 students enrolled in Fusion, approximately half of them have been diagnosed with Attention Deficit-Hyperactivity Disorder or with learning disabilities. Fusion is a non-certified, year-round school that offers courses that meet the California high school graduation requirements. At Fusion, each student begins and ends on his or her own schedule, at his or her own pace, and there are no formal dates in which semesters begin and end. Each Fusion student is assigned a "lead" teacher who is responsible for assisting and guiding students, as well as providing parents with information concerning the progress of their child. With the exception of Physical Education and Chemistry labs, all classes are taught on a one-on-one basis. To ensure opportunities for social interaction with other students, Fusion holds weekly meetings with the entire student body to discuss issues and school related activities. In addition, Fusion encourages students to interact with each other during lunch breaks. Also, Fusion requires each student to attend a daily "Homework Café" session, which is 50 minute teacher-supervised period, held in a group setting where, on average, six to seven students gather to complete their homework

assignments.<sup>6</sup> All Students are required to complete their homework assignments before leaving school for the day.

77. Michelle Gilman, the founder and Head of School of Fusion, provided testimony at the hearing. Ms. Gilman received a Bachelor of Science degree in Special Education from the University of South Florida, has not received any credentials from the State of California, but holds certification from another state in Special Education with a concentration in emotional handicaps for students in kindergarten through 12th grade. Ms. Gilman has approximately 20 years experience teaching emotionally disturbed and learning disabled students, and has coordinated a special education treatment center. Ms. Gilman has also created social skills training and self-esteem workshops for children of all ages, and has authored a number of books: *Your Child's Self-Esteem: A Parent's Guide*, *Hamburger Writing*, *ACT for Dummies 4th Edition*, *Pre-Calculus Workbook for Dummies*, *AP Biology for Dummies*, *Chemistry Workbook for Dummies*, *AP Chemistry for Dummies*, and *GRE for Dummies 6th edition*.

78. Since enrolling at Fusion in January 2008, Student, a full-time student, has taken<sup>7</sup> the following courses: Biography, Geometry, Art, English, World History, Poetry, Spanish 2, Algebra 2, Chemistry,<sup>8</sup> Recording Arts, Spanish 3, and U.S. History. Fusion had a “rotating block” schedule, which meant that the students attended up to three 50 minute classes on days designated as “A Days”, and up to three other 50-minute classes on days designated as “B Days,” alternating on a daily basis. Student currently has four classes, four one-on-one teachers, and one tutor.

79. Ms. Gilman oversees all of the full-time students at Fusion, including Student, observing Student virtually every day Student attends school. Ms. Gilman testified that Fusion has a “very tolerant, compassionate environment, where all the kids, disabled or not, know each others’ story, so Student feels very accepted there.” When Student first began attending Fusion, she was “shut down,” and took a long time to “open up and trust the staff.” In addition to her personal observations of Student, Ms. Gilman also receives feedback from Student’s teachers. Student’s emotional problems affected her progress, particularly when Student’s anxiety level would get so high, Student would “get stuck,” too anxious to begin assignments and tests. Consequently, Student’s one-on-one teachers would alter daily, if necessary, their respective programs for Student to help reduce Student’s anxiety level. Similarly, during Homework Café when Student felt anxious, the teacher would sit with Student as she completed her homework. The teachers at Fusion understood that Student worked best when someone was sitting right next to Student when she was doing her homework, and they recognized that Student required more supervision than the other students in Homework Café.

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<sup>6</sup> The space designated for Homework Café could accommodate up to 15 students at one time.

<sup>7</sup> With the exception of Spanish 3 and U.S. History, the record is unclear whether Student has actually completed these courses.

<sup>8</sup> Student has also taken chemistry labs in connection with the chemistry course.

80. Whenever Student was absent from school due to illness or hospitalization, Student's teachers would exercise scheduling modifications so that Student would not miss any content. Specifically, Student's classes would be placed "on hold" until Student could return to school.<sup>9</sup> There were, and still are, a couple of times a week when Student's teachers would have to deal with a medical or emotional issue concerning Student. However, as Ms. Gilman testified, even at Student's current pace, Student will graduate at approximately the same time as a child in a traditional high school, although at a much slower pace than other Fusion students. This is because Fusion is a year-round school, which affords Student more time and opportunity to complete her courses. Also, the one-on-one teaching Student receives permits her to receive an instructor's undivided attention for 50 minutes per class, resulting in the coverage of more content than in traditional classroom settings.

81. Ms. Gilman testified that socially, Student had made significant progress at Fusion. When Student first began attending Fusion, she was very withdrawn and "painfully shy." Although Student is still very quiet and shy, she has made friends, and has started to self-advocate, speaking up to have her needs met. In addition, Student socializes with other Fusion students during lunch, student weekly meetings, and sometimes during Homework Café. Also, Student and another Student had planned and participated in a Halloween party at school, which Ms. Gilman expressed, was a monumental step for Student.

82. As all students at Fusion, Student has a lead teacher who communicates regularly with Parents about Student's progress, issues, and concerns. In addition to Student's lead teacher, Ms. Gilman, as well as Student's one-on-one teachers, routinely interact with Parents, exchanging information concerning Student's academic progress, as well as information concerning Student's physical and mental health status. Fusion staff also interacts with each other to help develop strategies to best address Student's needs. Fusion will also require Student, as it does all students, to take "Life Skills," which is a course designed and customized to help students develop skills to assist them with their post-graduation goals, such as college plans, career plans, and interview skills.

83. Student attended Fusion 122 times in 2008<sup>10</sup>, and 28 times from January 5, 2009 to February 26, 2009.<sup>11</sup> As of March 2009, Parents have paid Fusion a total of \$47,015, \$37,560 in 2008, and \$9,455.<sup>12</sup>

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<sup>9</sup> This is a service Fusion provides to all of its students, whether a student misses school for illnesses, vacations, or any other event.

<sup>10</sup> From January through June 2008, Student attended Fusion 74 times, and from August through December 2008, Student attended Fusion 48 times.

<sup>11</sup> From January 5, 2009 to February 26, 2009, Student attended Fusion on January 5 – 8, 12 – 15, 20 – 22, 26 – 29, 2009, and on February 2 – 5, 9 – 11, 17 – 19, and 23 – 26, 2009.

<sup>12</sup> Parents paid Fusion \$4,125.00 in January 2009, and \$5,330 in March 2009.

84. The distance between Student's home and Fusion was 15.47 miles,<sup>13</sup> therefore, a round-trip between Student's home and Fusion was 30.94 miles. The IRS business mileage rate was \$.505 per mile for January through June 2008, \$.585 per mile after July 1, 2008, and \$.550 per mile beginning in January 2009. Parents, therefore, had mileage expenses of \$1,156.22 for January through June 2008, \$868.80 for July through December 2008, and \$476.48 from January through February 2009.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The Petitioner in a special education due process hearing has the burden to prove his or contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528].) As the petitioning party, Student has the burden of proof on all issues.

### *Issue One: FAPE in the 2007-2008 School Year*

2. Student contends that District failed to provide her a FAPE during the 2007-2008 school year by failing to offer Student an appropriate placement in the least restrictive environment. Specifically, Student contends that District's offer of placement in its September 13, 2007 IEP included a requirement that Student attend a special education program, Learning Strategies, that exceeded the length of Student's school day beyond that recommended by members of Student's medical team, as well as exceeded the medical and psychiatric limitations caused by Student's disabilities. In addition, Student contends that District failed to address the inappropriateness of the home-hospital program, as set forth in Student's October 9, 2007 IEP, despite notice to District from Student's home-hospital instructor that the home-hospital program had not been working for Student.<sup>14</sup> Finally, Student contends that District's offer of placement in Student's January 23, 2008 IEP was not in the least restrictive environment, because it required Student to remain in the home-hospital instruction program, despite clear indications to District that Student was not

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<sup>13</sup> Pursuant to Stipulation reached between the parties, parties adopted Mapquest to determine the distance between Student's home and Fusion.

<sup>14</sup> Student also contends that District failed to honor Parents' revocation of consent of the Learning Strategies component of the September 13, 2007 IEP, evidenced by the fact that District had made the same offer of FAPE in the October 4, 2007 IEP, as it had offered in the September 13, 2007 IEP, and contends District should have convened an IEP meeting after receiving notice that Student had been hospitalized for a three-week period in November 2007 to consider revising Student's IEP. However, these issues were not included in Student's due process complaint, and were first raised at hearing and in Student's closing argument. Student's post-hearing revision of the issues is governed by the rule that "the party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [Complaint], unless the party agrees otherwise." (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At no time did Student seek to amend the complaint to add procedural arguments. Accordingly, consistent with the IDEA's notice requirements, the ALJ determines that the procedural arguments made by Student at hearing and in her closing brief are outside the scope of the hearing, and on that basis are denied.

homebound and was capable of attending school on a shortened day schedule. District disagrees, claiming that with the information it had available to it at the time of the development of the September 13, 2007, October 4, 2007, October 9, 2007, and January 23, 2008 IEPs, District made offers that were designed to meet Student's unique needs and were supported by services that were necessary to permit Student to benefit from the instructional program. As discussed below, Student has met her burden of demonstrating by a preponderance of the evidence that District denied Student a FAPE during the 2007-2008 school year.

3. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code §56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031. "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) *Rowley* expressly states that as long as a child is offered a FAPE as defined above, questions of educational methodology are left to the discretion of the state and local educational agencies. (*Id.* at p. 208.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.)

5. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p.1149,

citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 93 F.2d 1031, 1041.) Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*)

6. 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, 1314.) 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 education services to a disabled pupil to constitute a FAPE under the IDEA, 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 be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

7. In determining the educational placement of a child with a disability, a school district must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and considers the requirement that children be educated in the least restrictive environment (LRE). (34 C.F.R. § 300.116.) In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs, and the child with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

8. In order to provide the LRE, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and the severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) "the educational benefits of placement full-time in a regular class," (2) "the non-academic benefits of such placement," (3) "the effect [the student] had on the teacher and children in the regular class," and (4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1948-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has

been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra.*, 874 F.2d at p. 1050.)

9. Placement in the home is one of the most restrictive placement options. The continuum of the program options includes, but is not limited to, regular education, resource specialist programs, designated instruction and services, special classes, nonpublic, nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) Special education and related services provided in the home or hospital are limited to eligible students for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) Before placing a student on home instruction, the IEP team must be assured that a student has a medical or psychological condition that prevents the student from receiving special education and related services in a less restrictive environment. When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the student from attending a less restrictive placement. The report shall include a projected calendar date for the student's return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

10. For students with exceptional needs with a medical condition such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness, the IEP team shall review, and revise, if appropriate, the IEP whenever there is a significant change in the student's current medical condition. (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).)

11. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).) If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. The description shall indicate the nature of each activity, and the time spent on the activity each day or each week. (Ed. Code, § 56345, subd. (b)(4).)

12. If a district denies a pupil a FAPE and the parents are required to spend money to remedy the situation, the parents may be entitled to reimbursement of those expenses. (*School Committee of the Town Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].) A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at the due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and that the private school was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c).) In *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13 [113 S.Ct. 361], the Supreme Court specifically exempted parents from having to meet certain requirements of the IDEA in their unilateral placements. For example, parents are not required to conform their unilateral placement to the content of the student's IEP or provide a placement where the instructors hold state-credentials. (*Ibid.*) The Court has established that the parents' placement need not meet a standard as high as school districts must meet; however, the parents' placement must still substantially comply with the IDEA, such as providing a placement that addresses the student's needs and provides the student educational benefit. (*Ibid.*)

13. Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school by written notice ten business days prior to the removal of the child from the public school. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).) Reimbursement may also be denied or reduced upon a judicial finding of unreasonableness with respect to actions taken by the parents. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(1).)

#### *Analysis of Issue One*

14. The preponderance of the evidence showed that District denied Student a FAPE for the 2007-2008 school year. The evidence established that Student suffered multiple illnesses requiring frequent hospitalizations. As a result, during her ninth grade year in the 2006-2007 school year, Student twice required lengthy home-hospital instruction placements. Each time Student returned to school after a period of home-hospital instruction, District's offers of FAPE followed closely the medical recommendations set forth in the release submitted by Student's physician.

#### *A. September 13, 2007 IEP*

15. However, beginning with the September 13, 2007 IEP, when Student was scheduled to return to school after a period of home-hospital instruction, the District's offer of FAPE disregarded the recommendation of Student's physician. Specifically, the offer required Student to attend Learning Strategies in addition to attending periods two, three, and lunch, thereby creating a five hour school day for Student, as opposed to the three and one-half hour school day that Dr. Bleha had recommended. Dr. Johnson convincingly testified that he and Dr. Bleha had communicated prior to the issuance of Dr. Bleha's recommendation, and that he had been in agreement with the necessity of Student attending a shortened school day at that time, due to the side effects of Student's medications (i.e.,

sedation), as well as the fragile state of Student's psychiatric health. Consequently, Dr. Johnson wanted Student to begin school later in the morning, and leave school in the early afternoon, so that Student could better manage the symptoms of her OCD, anxiety disorder, and Tourette's syndrome, which seemed to worsen when Student was fatigued. Neither Ms. LaBorde, Ms. Ward, nor any other District witness satisfactorily explained why requiring Student to remain at school for a lengthened school day in order to attend Learning Strategies was more important than adhering to the medical recommendations issued by her physician. The District also failed to consider the negative impact the lengthened school day would have on Student's health, despite Mother expressing at the IEP meeting that a lengthened school day would result in heightened anxiety and panic attacks in Student. For the reasons outlined above, the District's September 13, 2007 offer was objectively unreasonable at the time, despite Mother's initial consent to the IEP. Thus, District denied Student a FAPE.

*B. October 4, 2007 IEP*

16. District's offer set forth in the October 4, 2007 IEP was also unreasonable, as it was identical to the one offered in the September 13, 2007 IEP. Such action was especially unreasonable, given District's failure to appropriately consider the health ramifications, as explained by Dr. Johnson during his participation in the October 4, 2007 IEP meeting, as well as in his September 18, 2007 letter submitted to the District. Dr. Johnson credibly testified that he had repeatedly explained to the IEP team that requiring Student to attend a lengthened school day would exacerbate Student's sedation and fatigue issues, as well as negatively impact on her psychiatric issues, as Student had significant anxiety about returning to Learning Strategies. Despite Dr. Johnson's concerns, the District insisted that Student be required to attend Learning Strategies, and advised the parents that Student would receive a failing grade in the class if Student failed to attend. District's failure to give appropriate weight to the contraindicated nature of its offer was objectively unreasonable, and therefore denied Student a FAPE.

*C. October 9, 2007 IEP*

17. On October 8, 2007, Dr. Johnson submitted to the District a request for home-hospital instruction, which prompted the convening of the October 9, 2009 IEP meeting. At that meeting, the team offered Student placement in the home-hospital instruction program, to which Mother consented. However, the credible testimony of both Mother and Dr. Johnson indicated they felt they had no choice but to have Student placed on home-hospital instruction as opposed to having Student attend a lengthened school day, or risk receiving a failing grade for choosing not to comply with the Learning Strategies component of the IEP. Mother expressed this sentiment during the October 9, 2007 IEP meeting. Also, Mother's October 9, 2007 request for home-hospital instruction cited the District's "inflexibility" as the reason for the home-hospital request. Thus, in addition to the submission of Dr. Johnson's request for home-hospital instruction, District's "snapshot" of information at the time of the October 9, 2009 IEP meeting included the following: (1) Student had multiple medical issues, compounded by Student's difficulties with OCD, Tourette's syndrome, and anxiety disorder, that adversely affected Student's educational performance; (2) Dr.

Johnson's repeated attempts, just five days prior, to explain to the IEP team that Student could attend a shortened school day, but could not attend a lengthened school day because it was contraindicated; (3) Mother's explanation to the team on October 9, 2007 that the home-hospital request had become necessary only after the District had continued to insist that Student attend a lengthened school day that included Learning Strategies; (4) Mother's request at the October 9, 2007 IEP meeting that Student be permitted to attend school on a shortened day schedule; and (5) Mother's reference to the District's "inflexibility" as the reason she had requested home-hospital instruction. Based on these factors, it was obvious that the only reason for Dr. Johnson's request for home-hospital instruction was in response to the District's unreasonable offer to require Student to attend a lengthened school day that was contraindicated. District should have considered this, and offered Student a placement in a less restrictive environment, i.e., in school with a shortened school day. District's failure to do so constituted a denial of FAPE.

*D. January 23, 2008 IEP*

18. By the time of the January 23, 2008 IEP meeting, District's "snapshot" of information had expanded to include the following: (1) Student's October 9, 2007 home-hospital placement that provided five hours per week of instruction had not been adequate to help Student progress and stay current with her course assignments. Specifically, the evidence established that the District had received notice from Ms. Hamerly that, almost immediately, Student had begun encountering significant difficulty in the home-hospital program as a result of Student's illnesses and an inability, due to her OCD issues, to complete her assignments independently, which caused Student to fall behind in her classes; (2) Parents had, a month prior, given notice of their intent to withdraw Student from the District and unilaterally place her in a private school; and (3) during the January 23, 2008 IEP meeting, Mr. Marasco and Parents had advised District that Student had begun attending a private school. Although District claimed to be "surprised" that Student had been placed in a private placement, because Parents had not officially "dis-enrolled" Student from Westview, and because Student's teachers had been receiving coursework completed by Student, the fact remained that District had sufficient information that Student was not homebound. Also, the credible testimony of Mr. Marasco and Mother indicated that Parents were prepared to consider placements outside of the home. Despite this, District's January 23, 2008 offer required Student to remain in the home-hospital instruction program, because, as Ms. LaBorde had testified, the District believed it was bound by Dr. Johnson's October 8, 2007 request for home-hospital instruction, and because it had not received any new medical information that would support anything other than home-hospital instruction. However, the mere fact that Student had been attending school outside of the home was sufficient evidence that Student no longer required educational services in the home. Also, there is no IDEA statute that supports the proposition that Districts are bound by home-hospital requests submitted by physicians, particularly to the exclusion of all other relevant factors. The IDEA charges districts with the responsibility of placing eligible students in an appropriate placement in the least restrictive environment.

19. Overall, a determination of whether a district has placed Student in the least restrictive environment involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. Regarding the first element, educational benefits, the evidence demonstrated that Student could have accessed the general education curriculum, although not necessarily on a full-time basis. However, on balance, Student certainly would have received more hours of instruction on a part-time basis in a regular class than the five hours per week she would have received in the home-hospital instruction program. Additionally, Student had not been progressing academically in her home-hospital instruction program. With respect to the second element, non-academic benefits, Student would have benefited from interacting with other students and building her social skills, instead of being educated in isolation. Student's impact on her classmates and her teacher, the third element in the LRE analysis, would have been more positive than not. The credible testimony of Ms. Gilman established that Student was pleasant and shy. The only possible disruption could have been Student's ticks stemming from her Tourette's syndrome. However, there was no evidence to suggest that Student's ticks had been disruptive during Student's prior attendance at Westview. Also, Student's physicians had been administering medications to Student in an effort to limit these ticks. Finally, in regard to the element concerning additional costs, neither party introduced any evidence demonstrating that the cost to educate Student at school would have been prohibitive. Therefore, the evidence established that, at the time, the least restrictive environment for Student would have been at Westview, because Student would have received more educational and non-academic benefits than she would have received in the home-hospital instruction program. For the reasons set forth above, Student was denied a FAPE during the 2007-2008 school year. (Factual Findings 1-2, 10-62; Legal Conclusions 1-11, 14-19.)

*Issue Two: FAPE in the 2008-2009 School Year*

20. Student contends that District failed to provide Student a FAPE during the 2008-2009 school year, by failing to offer Student an appropriate placement in the least restrictive environment. Specifically, Student contends District's offer, as set forth in the January 14, 2009 IEP, was insufficient to address Student's unique needs. Finally, Student contends that District failed to provide an adequate plan to transition Student from Fusion back to Westview. The District disagrees, claiming that with the information it had available to it at the time of the development of the January 14, 2009 IEP, the District made an offer that was designed to meet Student's unique needs and was supported by services that were necessary to permit Student to benefit from the instructional program. As discussed below, Student has met her burden of demonstrating by a preponderance of the evidence that District had denied Student a FAPE during the first half of the 2008-2009 school year, but Student has not met her burden of demonstrating by the preponderance of the evidence that District had denied Student a FAPE during the second half of the 2008-2009 school year.

21. As discussed above, for a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, 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 be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*See* Legal Conclusions 3-11, incorporated by reference.)

*Analysis of Issue Two*

*A. First Half of 2008-2009 School Year*

22. Prior to the commencement of the 2008-2009 school year, District's last IEP offer was on January 23, 2008, when District had inappropriately offered Student continued placement in the home-hospital instruction program, when it should have offered Student placement in a less restrictive environment. District had made no further offers during the first half of the 2008-2009 school year, leaving, as the operative IEP, the January 23, 2008 IEP. Because no changes had occurred in Student's circumstances during the first half of the 2008-2009 school year that would have supported a placement in the home-hospital instruction program, District's offer remained inappropriate. As such, District denied Student a FAPE for the first half of the 2008-2009 school year. (Factual Findings 1-2, 56, and 61; Legal Conclusions 1, 3-11, 20-22.)

*B. Second Half of 2008-2009 School Year*

23. District's January 14, 2009 IEP offer (i.e., placement of Student in the Resource Program at Westview, full-time one-on-one instructional aide support, specialized academic instruction of 88 minutes per day, five days a week, with instructional aide (supervised by Resource Specialist), specialized academic instruction, on consultation basis, one time per week for 30 minutes, DIS individual counseling of one time per week with the school psychologist, and an extended school year 2009 for six weeks with full time instructional aide support) was an offer of FAPE, as it was designed to meet Student's unique needs and was supported by services that were necessary to permit Student to benefit from the instructional program. Even though District had limited information concerning Student's current psycho-educational status, as District was unable to conduct a full assessment of Student prior to the January 14, 2009 IEP meeting, Student presented no persuasive evidence that District's offer was objectively unreasonable. Student argues that the one-on-one aide would not have been adequate to meet Student's needs. However, this argument was not persuasive, as Student failed to show that Student would not receive any educational benefit from the aide's presence. On the contrary, the evidence showed that because an instructional aide would have been able to take notes and assist Student with projects and assignments, particularly during those periods when Student missed school, a one-on-one aide would have, more likely than not, provided an educational benefit to Student. Also, Student's argument concerning the adequacy of the plan to transition Student from Fusion to Westview was equally unpersuasive. According to the Education Code, school districts are required to provide transition plans for students moving from a nonpublic, nonsectarian school to a regular class in a public school. The Code does not require school districts to provide transition plans for students moving from private schools like Fusion.

Thus, District was not required to develop a transition plan, because Fusion was not a nonpublic school. However, the District met its duty to provide Student with a FAPE by addressing the transition from Fusion to Westview in the January 14, 2009 IEP. The evidence showed that the proposed transition plan developed by District set reasonable and specific guidelines in which to acclimate Student. Finally, the evidence showed that Student had been attending classes at Fusion from 10:30 a.m. to 2:00 p.m., and then remaining at Fusion until 4:30 p.m. or 5:00 p.m. in order to receive additional one-on-one support to complete her homework. Therefore, Student was no longer limited to attend only two periods a day, as she had been during the previous school year.

24. Student presented testimony from Dr. Johnson that Dr. Johnson had concluded that Fusion would be a better placement for Student because (1) Fusion had one-on-one instruction, a model under which Student seemed to thrive; (2) Fusion was small and intimate; (3) Student had made progress advocating for herself; (4) Fusion accommodated Student's sedation and exhaustion issues by modifying the start time for Student or delaying lessons for later on in the week, if necessary; (5) Student's anxiety had diminished since attending Fusion; (6) Student had made social improvements at Fusion. However, school districts are only required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs. A school district is not required to place a student in a program preferred by the parent, even if that program will result in greater educational benefit to the student. Given the "snapshot" of information available to the District, including the fact that Student was no longer limited to attending school for only two period of day, District's January 14, 2009 IEP offer was reasonably calculated to provide Student with some educational benefit in the least restrictive environment. Thus, District's January 14, 2009 offer was an offer of FAPE. (Factual Findings 1-2, 63-75; Legal Conclusions 1, 3-11, 21, 23-24.)

### *Reimbursement*

25. Because of District's failure to offer Student a FAPE in the 2007-2008 school year, which continued through the first half of the 2008-2009 school year, Parents placed Student in Fusion, which was an appropriate placement, given the academic, social, and emotional progress Student made there, as well as Fusion's success in meeting Student's special needs. Despite not being a California certified school, which California does not require, Fusion offered courses that met the California high school graduation requirements, and provided Student with significantly more contact with other students than District's home-hospital instruction program. Consequently, Student is entitled to tuition and transportation reimbursement from January 2008 to January 16, 2009.<sup>15</sup>

26. District argues that reimbursement should be reduced based upon the unreasonableness of actions taken by the parents. From January 7, 2008, the date on which

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<sup>15</sup> The projected start-date in which Student was to begin Westview, pursuant to the January 14, 2009 IEP, was January 17, 2009. Therefore, Parents are entitled to reimbursement up to and including January 16, 2009.

Student began attending Fusion, to January 23, 2008, the date on which Parents advised District that they had privately placed Student, Student had been receiving home-hospital services from Ms. Hamerly. Parents should have advised District immediately upon their enrollment of Student in a new school, so that District could cease all home-hospital services. Parents' failure to do so resulted in Student receiving home-hospital instruction for 12 additional school days.<sup>16</sup> As such, Parents reimbursement shall be reduced by \$6,318.60, which represents twelve school days in which tuition (\$6,131.16)<sup>17</sup> or mileage expenses (\$187.44)<sup>18</sup> will not be awarded.

27. District also argues that the decision of Parents and Dr. Johnson to have Student placed on home-hospital instruction, based on a "false request", was unreasonable, because their reason for doing so was to avoid the Learning Strategies class. District further asserts that Dr. Johnson's request to place Student on home-hospital instruction was unreasonable, "because [Student] could have attended a school program." However, this fact was not hidden from District, as Mother had explained at the October 9, 2008 IEP meeting that the reason for the home-hospital request was because District had insisted on Student attending a lengthened school day, despite recommendations from Student's physicians that Student attend a shortened school day. In addition, Mother again requested the October 9, 2008 IEP team to offer Student a placement that would not require Student to attend a lengthened school day, to which the team declined. Based on these factors, Parents felt they had no choice but to have Student placed in the home-hospital instruction program, as opposed to have Student attend a lengthened school day against the advice of her doctors. Consequently, Parents actions were not unreasonable.

28. District also argues that reimbursement should be reduced based on Parents' decision not to reveal to District what private school Student had been placed. However, Parents advised District in a February 5, 2008 letter that based on the advice of the family's advocate, they were delaying in giving District the requested information because "districts sometime contact private schools without advising the parents, and given Student's fragile state, [they] want[ed] to be involved in the process to protect her well-being." Parents' action was not reasonable, especially given that Parents had advised the District that they were going to be seeking reimbursement for the unilateral placement. District had a right to know the name of the placement so that it could make certain determinations regarding Student's program. However, District learned as early as spring 2008 that Student had been attending Fusion. Yet, District did not observe Student in that setting until October 2008. It therefore appears that District had not been prejudiced by Parents' decision to withhold the name of Student's private placement. Thus, reimbursement will not be reduced on that basis.

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<sup>16</sup> This total does not include the Martin Luther King, Jr. holiday.

<sup>17</sup> In January 2008, Parents paid Fusion \$8,175 for Student's tuition. Fusion held session 16 times in January 2008, which amounted to \$510.93 per day. Twelve days in January 2008 amounted to \$6,131.16.

<sup>18</sup> Round-trip from Student's home to Fusion was 30.94. The IRS business mileage rate was \$.505 in January 2008. Twelve round-trips totaled \$187.44.

