

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2014060126

**DECISION**

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on May 30, 2014, naming Los Angeles Unified School District. The matter was continued for good cause on July 9, 2014.

Administrative Law Judge Eileen Cohn heard this matter in Van Nuys, California, on September 9 and September 10, 2014.

Mother represented Student. Student attended both days of hearing. Susan Winkelman, Attorney at Law, represented District. On behalf of District, Denise Dacles, Due Process Specialist attended the hearing on September 9, 2014, and Tonya Gregory, Coordinator, Due Process, attended the hearing on September 10, 2014.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted for the parties to file written closing arguments, and the record remained open until September 24, 2014. Upon timely receipt of the written closing arguments on September 24, 2014, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

Whether District denied Student a free appropriate public education between May 30, 2012, and May 30, 2014, by failing to:

1. Provide appropriate instruction in reading, writing, and math, or implement the IEP's during the 2012-2013 school year; and
2. Provide appropriate instruction in reading, writing, and math, or implement the IEP's during the 2013-2014 school year.

## SUMMARY OF DECISION

Student is a young adult with a specific learning disability who graduated with a general education diploma from Roosevelt, a District high school, in June 2014 with a 3.79 grade point average, near the top of his class. This case involves Student's individual education programs for his junior through senior years in high school. During these years, District offered Student a variety of accommodations and resource specialist support for general education classes in English-language arts and math, which made him eligible for admission to colleges in the University of California and California State University systems upon graduation. District did not conduct a triennial assessment in preparation for the triennial IEP team meeting of October 2012, and did not change his IEP goals, services or placement, despite his inability to read, write or perform mathematical computations beyond the elementary school level. Although Student also claimed that District failed to implement resource specialist services and accommodations provided in his IEP's, he did not demonstrate that he was denied a FAPE on this basis. However, in the area of math, the evidence showed that District failed to implement Student's functional math goal and that its failure to do so denied him a FAPE during the 2012-2013 school year. For both years, Student demonstrated at hearing that he was denied a FAPE because District failed to provide Student appropriate instruction in reading, writing and math. As a result of District's

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<sup>1</sup> The issues were clarified, but not modified. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) During the hearing, Mother sought to amend the complaint to include a challenge to the appropriateness of District's transition plan. District objected, and Mother's motion to amend was denied for the reasons set forth on the record and that issue is not addressed in this decision. Student's closing brief also argued that Mother had been denied meaningful participation in the decision making process as a result of District's failure to perform a triennial assessment. Student's complaint did not allege District committed any procedural violation of the IDEA. A party who requests a due process hearing may not raise issues at the hearing that were not raised in its request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

failure to provide a FAPE, Student is awarded compensatory education, including reimbursement for educational services obtained.

## FACTUAL FINDINGS

### *Background and Jurisdictional Matters*

1. Student is a 19-year-old young man, who resided in the District with his Mother at all relevant times. Once Student became an adult, all educational decision-making authority vested in him, but Student transferred his educational rights to Mother for her to participate in his educational decision-making, including, but not exclusive to, the matters raised herein.

2. At all relevant times, Student has been eligible for special education and related services under the category of specific learning disability arising from an audiological processing disorder. As consistently acknowledged by District individual education program team members, Student's specific learning disability in the area of auditory processing impeded his progress and involvement in the general education curriculum, as it impaired his ability to retain and access previously learned academic material required to comprehend at grade level (reading), to spell and write at grade level or respond to literature (writing), and to solve linear equations (math).

3. At all relevant times Student's primary language was English, but he was also identified as an English language learner because Spanish was spoken in the home. Student ranked at the highest level of English-language proficiency, but was provided with English-language learner instruction and master plan to advance his English-language listening, speaking, and writing skills. With slight variation, the English-language learner master plan made part of every IEP included an English language learner goal of writing a multi-paragraph essay with 80 percent accuracy 75 percent of the time. His progress on this goal was never measured with any specificity by his high school IEP team.

4. During the 2011-2012, 2012-2013, 2013-2014 school years, Student attended 10th through 12th grades at Roosevelt High School and participated in the general education curriculum with resource specialist push-in and pull out support and accommodations. There were 180 school days in each school year, and Student had a near perfect attendance record. Student also took advantage of after school enrichment programs offered by the District. Student excelled on the track team, becoming team captain of track and field and cross-country, and also performed in the top ranks for his age group in the Los Angeles Marathon. Student embraced running, contributing his time and energy to cancer charity work and middle school presentations where he encouraged students to engage in the sport and strive to be successful. Post-high school, Student planned to apply his talent as a runner to his professional goal of being a school running coach.

*STUDENT'S JUNE 4, 2012 IEP*

5. On June 4, 2012, near the end of Student's 10th grade year of high school, the IEP team, including Student and Mother, met for Student's annual review.

6. Student's present levels of performance in reading, writing and math were determined primarily by teacher reports to the special education resource specialist teacher, Clark Cowen, and results from statewide testing. Mr. Cowen is a qualified special education resource teacher, who clearly cared for Student and developed a strong and admirable commitment to Student's successful participation in grade-level general education and college preparatory courses. Mr. Cowen worked more with Student than any other pupil in his 16 year tenure as a resource specialist. The evidence was undisputed that Mr. Cowen devoted time beyond the required weekly collaborative resource minutes to provide one-on-one assistance, meeting Student at 6:30 a.m. to re-teach classroom lessons and model problem solving for him. Mr. Cowen testified candidly and credibly about the development and implementation of Student's IEP's.

7. Student's reading status was measured primarily by his teacher's opinion of his classroom performance. In the area of reading, as "strengths," Student's teacher reported he performed "exceptionally well" during 2012, receiving all A's for completing assignments even though he could not read at grade level. Student was complimented for his ability to answer questions correctly when passages were read to him, for "sometimes" correcting his mistakes, and for allowing people to assist him with decoding. As reading "needs," Student's reading teacher reported that comprehension was his principle area of need due mostly to his lack of understanding of the meanings of "most" words in a passage. Although his phonemic skills were improving, Student's teacher reported that he was reliant on the initial consonant or vowel sound, and guessed the rest of the word, had difficulty segmenting and blending words to decode them, had low decoding and fluency skills, and overall required more instruction in decoding and phonics to improve his oral reading.

8. Student's writing status was also measured solely by his teacher's reports of his classroom performance. In the area of writing, as reported by his English teacher, Student's strengths included writing a guided five paragraph essay with "most" parts grammatically correct and punctuated, and he could write coherent and easily understandable sentences. Student had become confident as a writer, learning to add detail, and to edit and revise his work, according to this same teacher. His reported writing needs included spelling (weighted as his biggest need) learning, incorporating new vocabulary words, and practicing protocols for the California High School Exit Exam (Exit Exam), required for graduation for general education pupils. Pupils have several opportunities to take the Exit Exam, starting in 10th grade.

9. In the area of math, the IEP team also relied on reports of his ninth grade geometry grade and his math teacher, who based Student's performance on his classroom observations, and testing. Student achieved a grade of "A" in ninth grade geometry A and B. Student was enrolled in 10th grade algebra 2A and 2B. According to his math teacher,

Student's strengths included his ability to perform all basic math operations using a calculator, one of Student's IEP accommodations. Student could solve basic math problems involving angles, polygons and circles. Student could solve problems with variables in his Algebra 2 class. As reported by Student's math teacher, Student relied on help and his needs included mastering basic operation skills such as multiplication of 2 through 12, and addressing his continued struggle with word problems requiring multiple steps.

10. The June 2012 IEP contained a total of three goals, one for reading, writing and math.<sup>2</sup> Student's annual reading goal required that he explain cause and effect from literature with 80 percent accuracy, on 4 of 5 attempts. His incremental goals set for November 2012 and April 2013, were the same as his annual goal. Student's writing goal required that he write a five paragraph essay with appropriate thesis, concrete detail, commentary, and conclusion with 80 percent accuracy, on 4 of 5 attempts. Student's incremental goal for November 2012 was the same, but allowed for 75 percent accuracy, 80 percent accuracy required as part of his April 2013 incremental goal. Student's annual math goal required him to memorize his multiplication table for 2 through 12 with 80 percent accuracy, on 4 of 5 attempts. His incremental goals of November 2012 and April 2013 were the same as his annual goal. Although there might be a slight change in wording, the goals in each of these areas were similar to goals set for Student throughout high school. As evidenced by the absence of reporting on previous goals, these June 2012 goals were unchanged from the previous IEP.

11. District offered Student a wide range of accommodations including, but not exclusive to: extended time; individual teacher or aid assistance; use of writing frames and graphic organizers; optional use of calculators if needed; pre-teaching/re-teaching; shortened/reduced assignments; testing accommodations including extended time, calculator, notes, small group setting in pre-calculus, English and chemistry.

12. District offered Student continued placement in general education with continued resource specialist support. At Mother's urging, District continued to provide 270 minutes weekly to of resource specialist support, not a lesser amount. The resource specialist support was offered as support for his reading and writing goals. The resource specialist support was offered as a collaborative direct service between the resource specialist and the general education teacher, but generally it was Mr. Cowen or his assistant that provided the direct service on a push in basis, and although not required in his IEPs, sometimes on a pull-out basis.

13. The IEP contained a brief reference to an upcoming triennial assessment, due October 14, 2012. Student had not been assessed since 2009, when he was in eighth grade and the last year of middle school. A boilerplate question requested a yes or no response to whether a formal assessment was needed to re-establish eligibility. As they had during the

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<sup>2</sup> In addition, Student's IEP contained an additional writing goal as part of his English-language learner master plan, which was included in each IEP. This goal was virtually identical to Student's other writing goal, and will not be addressed separately.

previous IEP in October 2012, District members recommended against formal assessments on the ground that Student's eligibility was not in question. Relying on District representations, Mother agreed to waive formal assessments.

14. District IEP team members did not consider reducing Student's involvement in the general education curriculum to address his delayed reading, writing, and math skills, or adding additional remedial classes. At hearing there was disagreement between Mother and District as to whether Mother inquired about placing Student in a special day class to address his delays in English and math, during this or any other IEP during within the statutory period. There are no notes contained in this or any IEP, and given Mother's stated reliance on District's representations that Student was doing well, it is uncertain that she pressed for alternative placements.

15. District's offer of FAPE in this IEP, and every succeeding IEP, was intended to timely graduate Student with a general education diploma, by ensuring that he obtained the required course credits for admission to the University of California and California State University systems, which had more stringent requirements than the California Community college system. The IEP team reviewed Student's credits toward graduation and the list of courses required for him to graduate. The IEP also included an individual transition plan which referenced Student's goal of enrolling in college.

16. Student's teachers were uniformly optimistic about Student's progress, and their opinion about his progress was reflected in his positive grade reports. By the IEP team meeting, which was close to the completion of 10th grade, Student had earned A's in English 10A and 10 B, and algebra 2A and 2B.

17. His teachers' optimism was inconsistent with his performance on statewide assessments administered to all pupils to measure their proficiency on general education curriculum standards. In June 2011 Student scored as a sixth grader on general education curriculum standards according to the California Standards Test (Standards Test), a test included in the Standardized Testing and Reporting statewide assessment program. Student performed below basic in English-language arts on the Standards Test. Student did not pass the Exit Exam in English-language arts which also tested Student's proficiency in basic general education high-school level academics. To pass the Exit Exam, Student needed to obtain a score of 350; he obtained a score of 303. Student also performed below basic on the Standards Test in math, and with a score of 335, did not obtain a passing score in math on the Exit Exam.<sup>3</sup>

18. Relying on District's representations that Student was making great progress in all his subjects, Mother signed the IEP.

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<sup>3</sup> The statewide assessments referenced in Student's IEP's and in hearing testimony are described in the web-site of the California Department of Education ([www.cde.ca.gov](http://www.cde.ca.gov)). The descriptions referenced therein are subject to official notice in this Decision. (Gov. Code, § 11515.)

19. Mr. Cowen, as Student's resource teacher, was responsible for recording information about Student's progress at the IEP team meeting. He admitted that his method for assessing Student's progress was anecdotal, and not data based. Student's progress on goals was measured by teacher reports of his classroom performance and their personal observations, as communicated to Mr. Cowen. District teachers and IEP team members did not measure Student's benchmark progress as specified in the IEP. The benchmark measures included in the IEP required District to measure Student's progress over four reporting periods. The place for recording Student's benchmark status was blank. Roosevelt's claimed practice was to include the quarterly benchmark progress in the grade reports that were sent home with Students. There was no evidence that benchmark reports were prepared for Student, or relied upon by Mr. Cowen in measuring Student's annual progress and present levels of performance. Instead, Mr. Cowen spoke to Student's teachers, and based upon his discussions with them filled out a summary sheet contained in the IEP which recorded Student's overall progress on his annual goals. Mr. Cowen recorded that the reading, writing and math goals, and the incremental benchmarks, were achieved if the teachers verbally represented that Student made any progress from the beginning of the school year. Mr. Cowen admitted that he could not be certain how Student's teachers calculated his grades, but conceded that Student's teachers considered his disability and hard work in determining his grades. Mr. Cowen recalled in particular being told by Student's 10th grade English teacher that he improved from the beginning of the year and gave him an "A" because of his extensive effort and hard work.

20. Student's ability to achieve outstanding grades was also due to the extensive one-on-one assistance provided by Mr. Cowen, in and outside the classroom, and when he was not available by his instructional aide. Mr. Cowen worked with Student on his reading and writing goals, and assisted him with instruction. Mr. Cowen provided support in Student's English and also math classes, although math was not a formal part of the offered resource support. Student's teachers provided the main instruction and Mr. Cowen assisted Student and other pupils within the class. In both subjects, Mr. Cowen would assist by helping Student with homework and test preparation. Mr. Cowen also pulled Student out of class to assist him, although pull-out support was not required by the IEP. Given Student's auditory processing disorder, Mr. Cowen visually showed him how to do problems and classwork, breaking the work down in steps with the anticipation that that Student would do the next problem himself. Mr. Cowen would generally do one problem, step-by-step, and then have Student attempt the next problem, but from his testimony and statements to Mother, the line between modeling problems and doing them for Student was not always clear. In all subjects, Student always received extended time to complete assignments. In English class, Mr. Cowen would pull Student out of class to review basic skills. Mr. Cowen used Student's accommodations to assist him. He used scaffolding and graphic organizers in English to help him start a sentence and provide him with transitional phrases to move through the paragraph organization. In math, Student used his calculator to perform all basic operations, and was allowed to re-take tests, and do extra credit assignments to bring up his grade.

21. Working on functional math skills such as Student's math goal to learn basic multiplication tables, was not part of Roosevelt's mission for its pupils to complete math classes necessary for them to qualify for admission to a four year college. Mr. Cowen was not responsible for working with Student on his math goal of learning multiplication tables, as the goal was not part of the standards for high school math, and not germane to Student's access to his general education high-level math courses. Mr. Cowen considered Student's accommodation to use a calculator sufficient to address basic math calculations, and thought Student could pick up these skills with practice on his own. There is no evidence that anyone worked with Student on this goal.

22. District's offer of placement in general education classes and resource specialist service at this, and the remaining IEP team meetings through Student's graduation, was the same. District did not consider a special day class. According to Mr. Cowen, a more restrictive placement, like a special day class, should be considered at the lower school levels, like middle school, but once pupils are in high school moving them from a less restrictive general education placement to a more restrictive placement was not done. A resource specialist class was available to Student, but was rejected by Mother, because of Student's track schedule. Mother did not recall District offering a resource specialist class, and the IEP does not record any formal offer made by the District, a discussion of any offer, or the content of the class. Regardless of whether a resource specialist class was offered and available, it was not certain from Mr. Cowen's testimony as to whether the class was intended to supplement, or replace, the individual resource hours offered to Student. At hearing, Student confirmed that a resource specialist class would not have been a good option because he works better alone.

23. Mr. Cowen's methods for recording Student's progress were admittedly unscientific. He conceded that Student's tenth grade teachers, particularly his English teacher, graded Student for his effort and that his grades were in large part based on his effort given his disability, not his mastery of his goals or the general education curriculum. Likewise in algebra, the teacher gave Student extra credit, and allowed him to take tests over. Student would not have gotten the grades he did without the teacher's adjustments. Mr. Cowen recorded Student as achieving his goals if his teachers stated he was making progress, but did not measure if he actually made the progress set forth in his goals. There was no evidence that Student's curriculum was modified in any of his classes.

24. Mr. Cowen discounted the significance of Student's performance as a sixth grader on the Standards Test assessment in determining his progress. He considered the Standards Test, a statewide test more significant for contrasting performance between California schools, not individuals, measuring a pupil's performance on a particular day, and demonstrating only that Student's sixth grade level was a "middle" level score, when compared to the 12th grade, top level.

25. At hearing, Roosevelt staff explained that as a practice they do not conduct a triennial assessment for pupils, unless their continuing eligibility for special education was uncertain, or the appropriateness of their placement in question. Ms. Morfin maintained that

triennial academic assessments were not needed to double-check Student's ability, even if he had not progressed beyond the sixth grade level, and was not meeting grade-level academic standards. Ms. Morfin testified candidly about the assessment practices at Roosevelt.

*STUDENT'S 2012-2013 SCHOOL YEAR*

26. On October 8, 2012, Student's 11th grade year, the IEP team, including Mother and Student, and Mr. Cowen, met for Student's triennial IEP. To satisfy the District's obligation to conduct a triennial review, the IEP included a boilerplate form which confirmed the consensus of the IEP team that Student remained eligible for special education under the category of specific learning disability. Based upon his previously identified auditory processing disorder, the IEP team confirmed a discrepancy in all academic areas except oral expression, including listening comprehension, basic reading skills, reading comprehension, written expression, and math.

27. The IEP statements of Student's present levels of performance and unique needs in reading, writing and math, were substantially the same as the previous IEP, with some exceptions, given the eleventh grade curriculum. Mr. Cowen primarily relied upon reports from Student's tenth grade English teacher, and his eleventh grade math teacher, to record Student's needs. In the area of reading, Student's proficiency did not advance from the sixth grade level. His comprehension was earmarked as his greatest need and his decoding skills remained low. To strengthen his reading skills, he was advised to read books of interest after school up to an hour a day and summarize what he read to improve his reading level. In writing, Student could now write a paragraph with his main thoughts and ideas about a topic, and his handwriting was coherent and clear enough to understand. According to his teacher, by the end of 10th grade he could add some limited detail and commentary and was learning to edit and revise. In math, where his 11th grade teacher made a positive note about his willingness to enroll in pre-calculus, and his initial performance in chemistry, he was complimented for his beginning 11th grade hard work in math and in chemistry, where he can apply lessons to lab analysis. At the time of the IEP, Student was achieving a "C" in both courses.

28. Despite Student's hard work in advanced courses, and the optimistic narrative, his teachers portrayed a different and contradictory profile of Student when describing his needs. Contradicting his described strengths, his needs remained substantially the same as before and included all the foundational elements of writing, including punctuation, grammar, spelling, vocabulary (he is limited to simple words), sentence structure (cannot write compound and complex sentences), paragraph construction (supporting sentences to his topic and a conclusion). His teacher described Student as struggling in pre-calculus and chemistry because of his poor basic skills, and his need to spend more time preparing for exams by repeatedly reviewing material, other than homework. Student's needs remained the same: he had not mastered any of the basic operations, including addition, subtraction, multiplication, or division of one digit numbers. He could not calculate percentages, simple square roots, or simple linear equations without a calculator. His teacher recommended extra

work for him to master these basic math skills. There was no evidence that his teacher worked on his math goal.

29. The IEP team carried forward the reading and math goals from the June IEP in substantially the same form, reduced the requirements of the writing goal, and, as it did in the June 2012 meeting, did not record his interim progress throughout the reporting period. His math teacher's recommendation for him to master basic math functions other than multiplication tables was not converted into a goal. Like the previous IEP, instead of charting Student's progress on each previous goal through each reporting period, Mr. Cowen, summarized Student's overall progress since the last IEP, including each objective, on the boilerplate form included in the IEP. Based upon his impressions from speaking with Student's teachers, Mr. Cowen reported that Student met all his goals, and his interim benchmark objectives, although based upon the discussion of Student's ongoing needs in the areas of reading, writing, and math; there was no evidence that Student had made progress on his basic functional skills.

30. In the area of reading, instead of identifying "cause and effect" as a goal, in this IEP District specified that Student identify, plot, conflict, and conclusion with 80 percent accuracy, modifying the first benchmark of May 2013, to require 75 percent accuracy. In the area of writing, Student's goal was simplified from requiring five paragraphs with correct grammar and punctuation, to one paragraph with 80 percent accuracy, 4 of 5 attempts, with a benchmark of 75 percent accuracy. The math goal to recite the 2-12 multiplication tables from memory was modified to increase accuracy to 90 percent, 4 of 5 trials, with a benchmark of 85 percent accuracy.

31. As his resource specialist, Mr. Cowen remained responsible for working with Student on his reading and writing goal, but not his math goal.

32. Mother was particularly vigilant about District's implementation of Student's accommodations which were carried forward from the June 2012 IEP with Mother's endorsement. From her discussions with his teachers at the beginning of the school year, which started before this IEP, she was surprised to learn that not all his teachers were aware he had an IEP, and that teachers had not received his IEP. At the IEP team meeting she emphasized that all the teachers should follow the accommodations so that Student could succeed, and thanked the teachers who followed and implemented the accommodations because they helped her son become self-assured, self-motivated and increased his self-esteem.

33. District offered continued placement in general education with Student working toward completion of course requirements for graduation and for admission into the University of California and California State University system, 270 minutes of resource specialist support to support his reading and writing goals, in collaborative push-in and pull-out model between Student's general education teachers and Mr. Cowen.

34. Mr. Cowen's interaction with Student during the 2012-2013 continued as it had before, but was tailored to his 11th grade general education English class, math and chemistry classes. In addition to supporting his IEP writing and reading goals for Student's English class, Mr. Cowen also worked with Student in his math class, and provided extensive one-on-one support for Student to succeed in his math and chemistry courses, often meeting Student at 6:30 a.m. During the 2012-2013 school year Student enrolled in a two semester pre-calculus math course, referred to as trigonometry math A and B. Mr. Cowen's one-on-one interventions were particularly intensive and included re-teaching Student's classroom lessons by not only modeling problems and having Student follow the steps modeled to solve the next problem, but doing each step of the problem with Student when he could not perform the operations himself.

35. Student could not successfully complete pre-calculus problems and his homework without one-on-one assistance from Mr. Cowen. Mr. Cowen also administered pre-tests to Student that contained work that would be covered on the classroom tests. Mother understood from Mr. Cowen that he was doing the work for Student, but Mr. Cowen disagreed. Regardless of what Mr. Cowen communicated to Mother, the evidence clearly established that Student was dependent on ongoing intensive intervention to complete pre-calculus assignments and to perform on tests.

36. As with the previous IEP, there was no evidence that anyone at Roosevelt, including Mr. Cowen, worked with Student on his functional math multiplication goal, or on any other basic math operations.

37. Relying as she had before on Roosevelt staff's representations of Student's successful performance, Mother signed the IEP.

38. Student's grades during the 2012-2013, continued to propel him to the top ranks of Roosevelt's pupils. Student obtained grades of "C" and "B," respectively in pre-calculus A and B, and the same grades in chemistry. Student obtained a "B" in American literature, and an "A" in contemporary composition.

39. Student worked extremely hard in each class and received 270 minutes of resource specialist support, as well as additional one-on-one resource specialist support, and accommodations. Student's grades, as they had in the previous year, reflected the weight his teachers gave to Student's disability and hard effort. Overall, Student's grades were not a reliable measure of Student's progress on his basic functional performance in English language arts and math. During the 2012-2013 school year, Student continued to struggle with basic skills in English language arts, in both his general education class, and his English language learner class, and made minimal, mostly fleeting, progress. Student made no progress on his functional math skills.

*2013-2014 SCHOOL YEAR*

40. At the start of Student's 2013-2014 12th grade school year, around September 2013, Mother spoke to Student's general education teachers and discovered that they were not aware of Student's IEP or had not received copies of the IEP. She provided them copies of the operative IEP. Mr. Cowen conceded that he was aware that Student's U.S. History teacher did not receive Student's IEP, but was unaware that any other teacher did not have the relevant portions of the IEP. Mr. Cowen's practice was to speak directly with all Student's teachers and provide them the portions of the IEP relevant to their class, and the list of accommodations. Regardless of who provided the IEP's to Student's teachers, it was clear from the testimony that his teachers were made aware of his accommodations shortly after the start of the school year, but no later than after the IEP team meeting.

41. On October 11, 2013, the IEP team met for Student's annual review, including Mother, Student, Mr. Cowen, Ms. Morfin and Student's English teacher, Rebecca Pellman, who also testified at hearing. Like the previous two IEP's, progress reports utilizing the form for quarterly progress were not made. As it had in the previous year, Student's progress was not measured with any precision as required by his goals, but by the teacher's perception from his classroom work that he had improved from the beginning of the year. Mr. Cowen reported that Student achieved his math goal, although there was no evidence that he had. Unlike the previous two IEP's, however, Mr. Cowen reported no progress on Student's writing and reading IEP goals.

42. Student's strengths and needs were described with slight differences from the previous IEP's, but the substance remained the same. In the area of reading, his strengths were reported to be his "A" and "B" grades from his last 11th grade semester of English classes. His greatest need remained comprehension and fluency, with deficits in identifying plot, characters and conflict. By the time of the IEP Student had attempted the Exit Exam again, and although his score in English language arts increased to 320, it was not a passing score. In the area of writing, Student was complimented for his improvement in his ability to describe a picture, understand a thesis statement, and write a paragraph with some descriptive detail. Consistent with this IEP report, Student's 11th grade teacher reported that he worked hard and that by the end of the year she had an easier time understanding his thought process by the way he attempted to organize his ideas and structure his paragraphs. Despite the positive description, his status remained unchanged, with persistent challenges in punctuation, grammar, and spelling (albeit "marginal" improvements), inability to write compound and complex sentences, or build a paragraph with sentences supporting the topic sentence, and writing a conclusion. In the area of math, the IEP was silent.

43. At the start of the 2013-2014 school year, as reflected in the IEP, Student's baseline reading was also measured by a new statewide assessment instituted at Roosevelt, called Achieve 3000, which was considered a valid tool for measuring reading progress at year end, and tracking pupils' competence to handle college level work. This was the first year of the new system and it supplemented or replaced the California Standards which was a part of the statewide STAR assessment that Roosevelt teachers, including Ms. Pellman, were

more comfortable using to measure a Student's baseline and yearly progress. Ms. Pellman had been teaching for 12 years and using STAR for 10 of those years. The data generated by the Achieve 3000 test was designed to show college readiness based upon grade-specific questions based upon general education core academic standards in the English language arts.

44. Student was given 90 minutes to complete the test and upon completion, Student obtained a score consistent with a fifth grade reading level, far below what was needed for college or career readiness for a 12th grader.

45. The IEP continued the same goal for reading and writing, set forth in the previous IEP. No goal was offered for math, and no mention was made of the previous goal, except for the boilerplate summary form where Mr. Cowen reported that he had met his previous math goal even though there was no evidence that anyone worked with him on this goal, or that he met this goal on his own.

46. Student's placement and supports and accommodations remained substantially the same, with general education placement accompanied by 270 minutes of classroom resource specialist support for his writing and reading goals in the classroom.

47. Roosevelt IEP team members continued to praise Student's progress and based upon their representations Mother signed the IEP.

#### *MAY 30, 2014 IEP TEAM MEETING*

48. The IEP team met May 30, 2014 IEP, six days before Student completed his last term in high school on June 5, 2014, and graduated. The IEP was held as an exit IEP, and not intended as an offer of FAPE as District's obligation to provide Student special education and related services ended shortly after the IEP team meeting, when he graduated.

49. The May 30, 2014 exit IEP was almost identical to his October 2013 IEP. As with all previous IEP's, this last IEP did not track his progress during the 2013-2014 school year on his reading and writing goal. According to District witnesses, due to Student's graduation District was not obligated to make an offer of FAPE. District witnesses also maintained that its computer program for the IEP, referred to as Welligent, would not allow Roosevelt staff to modify or add any information from the last IEP because it was not an annual IEP. Regardless of District's reasoning, the IEP did not contain reports from his teachers establishing that Student progressed on his goals. Student's needs in reading, and writing were the same. Student continued to struggle in reading, needed to work harder to improve his comprehension by reading up to an hour a day, and had great difficulty identifying characters, plot, and conflict in literary pieces. As for his writing, Student still faced the same challenges in sentence and paragraph construction, with his basic skill in punctuation, grammar and spelling, weak. He still could not write compound and complex sentences or build a paragraph with sentences supporting his topic, or write a conclusion.

50. The IEP team spent much of the time discussing Student's prospects in college, the difficulties he would face given his skill level in the English language arts and math, and his need for continued services in college.

51. Despite his persistent functional academic deficits, District IEP members were excited about Student's accomplishments and commended him for his hard work and persistence. At the time of the May 2014 IEP it was known that Student would graduate near the top of his class, 14 of 477 pupils, with a grade point average of 3.79. Student fulfilled the course requirements for admission to the University of California, California State University system, which were much more stringent than the entrance requirements for the California Community College system. Student was admitted to California State Dominguez Hills based upon his grades in A-G courses.

52. At the same time Student was congratulated for his dedication, District team members cautioned Mother and Student that he would have great difficulty succeeding in college given his deficits and the amount of support he required. At hearing, Mother and Mr. Cowen disagreed with the wording Mr. Cowen used to caution Student, claiming that he said that Student could never succeed in college, but their disagreement over Mr. Cowen's choice of words was immaterial as they both agreed that essentially District staff warned Mother and Student that success at college would be extremely difficult for Student.

53. District waived passage of the Exit Exam, the prerequisite to graduating with a general education diploma for Student.

54. At hearing, Ms. Pellman elaborated on Student's performance in her English-language arts classes, and his reading and writing goals during the 2013-2014 school year, with classroom assistance from Mr. Cowen, provided instruction related to Student's reading and writing goals in his general education class. Ms. Pellman taught both the general education class and the English-language learner class, where another resource specialist aide assisted Student. Ms. Pellman's general education class was not literature-driven but focused instead on sentence and paragraph construction relying mostly on short passages, and training in referencing text to develop a research-based essay. The grade-level of her class was uncertain, with Student required to do basic tasks like describe a picture. Ms. Pellman used the accommodations specified in the IEP such as graphic organizers or writing frames which provide the beginning of the sentence and, and transitional phrases to move the text along. With research projects, Student would use the writing frames to fill in the blank after the sentence starters or transitional phrases. Student received extra time for every assignment, the opportunity to revise all his work, which he did on average of five times per assignment, and to re-take quizzes and tests after reviewing the concepts and vocabulary tested. There was no evidence that Ms. Pellman tracked his progress as required on the IEP, e.g., that Student could accomplish his goals 80 percent of the time, on 4 of 5 trials.

55. Ms. Pellman insisted that Student made progress writing multiple paragraphs and following a basic organizational pattern with the assistance of accommodations, but conceded that, as in the past, he had difficulty organizing his writing, and required extensive

feedback to produce a research-based project, where he performed at the lower end of the grading rubric. As he did throughout high school, Student worked extremely hard in Ms. Pellman's class. Student was provided the same curriculum as other pupils, but given his deficits, his grades were modified to reflect his hard work. Ms. Pellman testified, that based upon his performance level, Student would not be able to perform at the college level, and would struggle.

56. Ms. Pellman's testimony of Student's progress was inconsistent with Student's performance on the Achieve 3000 near the end of the school year. Ms. Pellman could not attest to the validity of the test results because the testing conditions were different. She insisted that his scores throughout the year on practice reading tests showed improvement. At the end of the school year, Student was provided with 55 minutes to complete the test in contrast to the 90 minutes he was provided at the beginning of the school year which Ms. Pellman said could have affected the results and the validity of the test. Based upon Ms. Pellman's testimony, either the test was invalid due to the changed testing conditions, or there was no appreciable difference between his scores, and no basis from this test to claim Student made progress, or performed beyond an elementary school level, the same level Student performed during the last two years.

57. At hearing, when pressed about the absence of a math IEP goal during Student's senior year, Mr. Cowen insisted that there was no need for the goal because he had already satisfied his math requirements for graduation, and was not going to be taking any math courses during his senior year.

58. Student graduated with honors from Roosevelt with a general education diploma the first week of June 2014.

59. Student did not attend California State Dominguez Hills, for reasons which were not clearly presented at hearing, but from Mother's testimony appeared to be related to Student's poor performance on admission screening tests required by the college.

60. At hearing, Mother testified about Student's continuing deficits in his basic skills. She observed that Student could not function independently in a store or restaurant as he could not make change. Mother also regretted trusting Roosevelt members of the IEP team when they assured her that Student was doing well, only to find that his deficits persisted after their obligation to help him ended at his high school graduation. She was frustrated by the exit IEP which did not provide current information required by local colleges and outside agencies so that Student could get accommodations and other supports. She felt that Roosevelt abandoned Student at the last IEP, and mocked her when she asked about available resources from other agencies.

61. At hearing, Student testified credibly and sincerely about his struggle to move forward with his goal of becoming a track coach, his experience raising awareness of the transformative aspects of his sport to middle school pupils, and his dedication to his sport as a vehicle for raising funds for charity in memory of his late high school teacher who lost her

life to cancer. He spoke of his aspiration to rise above the troubling history of his relatives and his own disabilities. Student's frustration was plain. He worked extremely hard on all his courses to graduate, and yet he still struggled with basic skills.

62. Mother secured an educational therapist for Student, Anna Zorin, of Zorin Educational Therapy, to assist him with his basic skills and to navigate his way through the enrollment process at Valley Community College, where Student currently attends. Mother was advised that an educational therapist, unlike a tutor, was trained to provide intensive educational interventions. She secured Ms. Zorin on the advice of acquaintances in the community, who also retained Ms. Zorin's services for their children, and considered her competent and her interventions successful. With Ms. Zorin's guidance, Student selected basic skills math and reading courses at Valley, which she supplements with one-on-one instruction. Although Ms. Zorin was not credentialed in special education or educational therapy in California, Mother had been advised that the educational therapist had received the requisite teacher training in her home country. At hearing, Student maintained that he benefitted from Ms. Zorin's one-on-one instruction and support. Mother retained Ms. Zorin for 40 hours, at a cost of 90 dollars an hour, for a total of \$3,600 dollars, which she paid in advance and in cash. Ms. Zorin's services include 15 hours for reading comprehension, 15 hours for writing, and 10 hours for consumer math. Ms. Zorin provided Mother a receipt specifying her services, hourly rate, and total bill.

63. At the time of hearing, Student was waiting for Valley Community College to assess him for classroom accommodations. Although Mother used the term assessment, it is unknown what the college meant by an assessment. He was also in the process of obtaining dual enrollment in Los Angeles City College where he could participate in track and receive college credit.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA*

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;<sup>4</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed Code, § 56000, subd. (a).)

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<sup>4</sup> Unless otherwise stated, all references are to the 2006 edition of the Code of Federal Regulations.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In California, related services are also sometimes called designated instruction and services ("DIS services"). In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or

had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student filed the complaint and therefore has the burden of proof.

5. When a student who has been receiving special education services reaches the age of 18, all educational rights are transferred to the student. (Ed. Code, § 56041.5) Here, Student was present at his IEP team meetings, and participated in the due process hearing, or otherwise authorized his Mother to act on his behalf, by filing the complaint, participating in the mediation, prehearing conference, and representing him at hearing.

*ISSUE: DENIAL OF A FAPE BECAUSE OF INAPPROPRIATE INSTRUCTION, OR FAILURE TO IMPLEMENT THE IEP IN THE AREA OF READING, WRITING AND MATH, FROM MAY 30, 2012, THROUGH MAY 30, 2014.*

6. Student contends that during the statutory period District failed to provide him with a FAPE in reading, writing and math, either by failing to make appropriate IEP offers, or failing to implement the IEP's offered. As a result of District's failure to provide Student a FAPE, at the time Student graduated from Roosevelt with a regular high school diploma, Student still functioned at the elementary school level, in the area of reading and writing, had not progressed on his goals, and could not perform basic math operations required to function in the community. District disagrees, maintaining that it met its obligations under the IDEA, by providing appropriate offers and implementing the IEP's, because Student progressed consistent with his specific learning disability by completing a full complement of general education courses, and advancing from grade to grade in the least restrictive environment.

7. An IEP team meeting must be held at least annually to review the pupil's progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).)

8. School districts have an obligation to assess and reassess pupils for special education eligibility at least once every three years, (the triennial reevaluation), unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The purpose of the triennial evaluation is to examine whether the pupil continues to have a disability, the pupil's present level of performance and educational needs, whether the pupil continues to need special education and related services, whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2)(D).)

9. In developing an IEP, the team must consider the following factors: (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the most recent evaluations of the child; and (4) the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a); Ed. Code, § 56341.1, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) The IEP shall provide a description of the manner in which the progress of the pupil toward meeting the annual goals is measured and when periodic reports will be made, such as through use of the quarterly or periodic reports concurrent with the issuance of report cards. (Ed. Code, § 56345, subd. (a).)

10 An IEP is evaluated in light of 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 *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. To determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

12. School districts are required to provide each special education pupil with a program in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).) A child with a disability must be, to the maximum extent appropriate, educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b).) In addition, a child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Ibid.*) In meeting their obligation to provide the least restrictive environment, school districts are required to provide a continuum of program options from the least restrictive to the most restrictive, including, but not limited to, regular education; resource specialist programs, designated instruction and services, and instruction in settings outside of the regular classroom. (34 C.F.R. § 300.115; Ed. Code §§ 56360, 56361.)

13. Eligibility for special education and related services terminates when a special education pupil graduates from high school with a regular high school diploma. (34 C.F.R. § 300.102(a)(3)(i)); Ed. Code, 56026.1. subd. (a).) A regular high school diploma is

conferred on pupils who have met all local and state high school graduation requirements. (Ed. Code, 56026.1, subd. (b).)

14. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was “material,” which means that the services provided to a disabled child fall “significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) “There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” (*Id.* at p. 821.)

#### *2012-2013 SCHOOL YEAR*

15. Student met his burden of proof that District did not provide him with a FAPE for the 2012-2013 school year because of inadequate instruction in the areas of reading, writing and math. Student also met his burden of proof that he was denied a FAPE in the area of math because his IEP goal was not implemented, but did not meet his burden of demonstrating that he was denied a FAPE in the areas of reading and writing, or math, because his resource specialist support and accommodations were not implemented. The statutory period for Student’s claims begins at the end of Student’s 10th grade year, but primarily addresses Student’s 11th grade and 12th grade school level.

16. As an initial matter, Student partially prevailed on his claim that District denied him a FAPE during the 2012-2013 school year by failing to implement his IEP in the area of math. Student proved by a preponderance of the evidence that District denied him a FAPE by failing to implement his functional math multiplication goal, and that its failure to implement his math goal was material. The evidence showed that his functional math deficits, including his deficit in multiplication, were considered a unique need. The evidence showed that Roosevelt ignored this need as reflected in the goal by failing to implement the goal with classroom teacher or resource support. As Mr. Cowen admitted, Student’s basic math deficits were not the focus of his high school general education academic instruction or resource support. Mr. Cowen maintained that Student’s deficits could be mitigated in high school by his accommodation of a calculator, but Student’s accommodation ignored the basic purpose of the goal to progress Student’s math skills beyond an elementary school level.

17. In the area of reading, writing and math, Student did not prove by a preponderance of the evidence that District failed to implement the resource specialist support and accommodations contemplated by his IEP. As to Student’s resource services, contrary to Student’s contention that Mr. Cowen failed to provide all the resource support offered, there was no evidence that Mr. Cowen, or another instructional aide, did not provide the collaborative resource support offered in the area of reading and writing. The IEP’s at issue did not provide for resource support in functional math. As to Student’s accommodations, the evidence showed that Student was provided accommodations by his general education teachers and Mr. Cowen, in reading, writing and math. Thus, Student was not denied a FAPE on this basis that District failed to provide the resource specialist services

it offered in the area of reading and writing, and the accommodations it offered in the area of reading, writing and math.

18. The evidence showed that the program District did implement was inadequate to provide a FAPE. The evidence showed that District continued with Student's services and placement without obtaining an accurate measure of Student's progress on his goals, or his ability to progress in the general education program, with his services, placements, and accommodations, while addressing his unique needs in reading, writing and math. As made plain by teachers' reports in the June 2012 and October 2012 IEP's, and Mr. Cowen's testimony, Student's passage of his classes was not an accurate measurement of Student's ability to progress in grade-level general education and obtain an educational benefit from his placement. Teachers' grades were inflated with consideration given to his disability and his hard work. Mr. Cowen insisted that his classroom curriculum was not modified for him; however, his persistent challenges with reading comprehension make it doubtful that he was able to access high-school level literature many years beyond his elementary school level reading competency. Further, there was uncontradicted evidence that his modified grades did not reflect the performance required of a general education pupil. Despite teachers' positive comments on Student's work product during the 2011-2012 and early 2012-2013 school years, their description of his needs demonstrated that Student had persistent and profound deficits that prevented him from moving beyond an elementary school level with his current program, in the area of reading, writing and math, and accessing grade-level general education curriculum.

19. At the time of the October 2012 IEP, from Student's performance during the 2011-2012 and early 2012-2013 school years, Student had made little or no progress on his goals. Although Student's IEP included goals and objectives in the area of reading, and writing, District failed to measure Student's progress with reference to the objective criteria set forth in the goals, such as measuring Student's progress by percentages and according to trials. As such, when reading teachers' statements of Student's strengths against their declarations of his profound deficits, there is insufficient evidence that he made progress in reading and writing, and a preponderance of evidence that he did not.

20. In math, the evidence showed Student made no progress on his functional goal of learning the multiplication tables, as Mr. Cowen did not think it was at all necessary to address his basic math needs when he could rely on a calculator as an accommodation. There was substantial evidence that Student could not perform most elementary calculations for which a goal was not created. Student's present levels of performance were stagnant: he had not mastered any of the basic operations, including addition, subtraction, multiplication, or division of one digit numbers. He could not calculate percentages, simple square roots, or simple linear equations without a calculator. His teacher recommended extra work for him to master these basic math skills but it appears that his recommendations were not considered and incorporated into his IEP resource services. Notwithstanding Mr. Cowen's dismissiveness of Student's sixth grade performance on the Standards Test, which measures a pupil's performance against general education academic standards, the weight of the evidence of Student's extreme divergence between his general education grade level, and his

actual grade level performance, demonstrated by a preponderance of the evidence that Student was not receiving an educational benefit regarding math from his placement and services.

21. At the time of the October 2012 IEP, it was clear that the resource specialist support provided to Student, was not enough for him to progress in his basic reading, writing, and math skills as reflected in his goals and teacher reports. District had not conducted any recent assessment, particularly, a triennial assessment, such that District devised the IEP without current information about Student's baseline cognitive ability and academic achievement, and also, given Student's lack of measurable progress, the adequacy of the current services and placement. As to his resource specialist support, Mr. Cowen's stated offer of a one period resource class was not mentioned in any IEP document, and it was unclear how this class would advance Student's goals, or whether it would substitute, instead of supplement, the 270 minutes of weekly resource specialist classroom support Student received at Mother's urging, and Mr. Cowen's extra one-on-one support. As to placement, Mr. Cowen's testimony established that District did not consider other placement options primarily because it did not serve District's directive for Roosevelt pupils to complete general education, coursework and apply to a four year college. According to Mr. Cowen, changing Student's placement from general education to a more restrictive placement at the high school level was inappropriate. Mr. Cowen's resources services and dedication to Student by providing extra one-on-one support in math and chemistry, however laudable, was directly aimed at securing passing grades to general education coursework that also fulfilled the requirements of California's public four year colleges. Mr. Cowen's disregard of Student's basic math goal confirmed that Student's basic functional deficits were not a priority distinct from course credit. There was nothing in the IEP's that offered Student the extra intensive support he needed to move forward and make measurable progress on his basic skills.

22. In sum, Student demonstrated by the preponderance of the evidence that the IEP was ineffective to allow him to make progress on his unique deficits and goals by the end of the 2012-2013 school year. Mr. Cowen devoted considerable time to Student, and despite his protestations, had to model each step of classroom pre-calculus problems for Student, and practice tests, so that he was practically, if not actually, doing Student's work. Despite his efforts to get Student to complete the required college preparation general education pre-calculus and chemistry courses, Student ended his 11th grade year without being able to do basic multiplication tables, and other basic math functions, which were not addressed by his goal. Mother's testimony that Student could not navigate in the community with his deficient math skills underscores District's failure to address his functional academic needs. In the area of reading and writing, Student's profound deficits in reading comprehension and basic writing skills remained unabated, despite credit for college preparatory English-language courses. Thus, despite Student's IEP being implemented as written during the 2012-2013 school year in the area of resource specialist support and accommodations, Student was denied a FAPE during this school year due to inadequate instruction.

*2013-2014 SCHOOL YEAR*

23. Student also met his burden of proof that District failed to provide him a FAPE for the 2013-2014 school year by not providing him appropriate instruction in reading, writing and math.

24. As an initial matter, unlike the 2012-2013 school year, Student did not meet his burden of proving by a preponderance of the evidence that District materially failed to implement the IEP in any respect. In the area of math, Student's October 2013 IEP did not include a math goal. Like the 2012-2013 school year, the evidence showed that the resource specialist services and accommodations in Student's IEP's were implemented as written. Mr. Cowen, or his aide, provided resource specialist services as required by the IEP, and Student's accommodations were implemented in reading, writing and math

25. However, also like the 2012-2013 school year, the evidence showed that the IEP placement and services were inappropriate because the IEP failed to address his unique needs in reading, writing and math. At the time of the October 2013 IEP meeting, despite teachers' positive reports of Students' hard work, there was no measurable progress on his goals in reading, writing and math. Unlike his previous IEP's, and consistent with Student's continued and well documented deficits in reading and writing, Mr. Cowen reported that Student had not met his reading and writing goals. Also, unlike his previous IEP's, District abandoned the math goal because, according to Mr. Cowen, Student did not have a math class in 12th grade, again confirming the priority District placed on securing Student's graduation credits, where, as here, Student's known inability to perform basic math operations was unabated. Clearly, Student had not accomplished his math goal, and still could not perform the range of basic math operations identified by his math teacher in his earlier IEPs. As established by his statewide assessment, Achieve 3000, Student started the year with fifth grade elementary school English language art skills, demonstrating that his progress was stagnant.

26. District's claim that Student ultimately made progress during the 2013-2014 school year fails for the same reasons it did for the 2012-2013 school year. By the end of Student's final high school year, Student's academic status was unchanged, and given the admitted practice of grading Student for his disability and effort, his sterling grades did not show evidence that he made progress. Although Ms. Pellman was undoubtedly a skilled teacher and worked closely with Student using his accommodations, as did Mr. Cowen, Student's claimed progress was not supported by her final assessment using Achieve 3000. The mere fact that Student completed his English language arts coursework and achieved course credit, is not sufficient to establish that he made progress. Mr. Cowen and Ms. Pellman's admission that Student was not prepared for college level work was confirmation of his lack of progress in the general education curriculum the IEP team chose for him. In sum, the preponderance of the evidence showed that for the 2013-2014 school year, Student's IEP was inadequate to enable him to progress in the general education curriculum, as demonstrated by his lack of progress and inability to perform at anywhere near high school level in reading, writing and math. Thus, despite Student's IEP being implemented as

written during the 2013-2014 school year in the area of resource specialist support and accommodations, Student was denied a FAPE during this school year due to inadequate instruction.

## REMEDIES

1. As a remedy for District not providing appropriate instruction and supports in reading, writing and math, Student requests compensatory education in the amount of 720 hours, with 240 hours designated for intensive academic instruction in functional consumer math, and 480 hours for English language arts instruction, in reading comprehension and writing. Student's calculations are derived from multiplying District's 180 yearly instructional days by the two years at issue, and providing one hour a day of math and one hour a day of English-language arts for 360 days. Student also asks for reimbursement of the 40 hours of intensive academic instruction services, referred to as educational therapy, she paid to Ms. Zorin in the amount of \$3,600 dollars. District contends that Student is not entitled to compensatory education because it provided Student a FAPE, or reimbursement for Ms. Zorin's services because Student failed to show that Ms. Zorin's services were devoted to instruction, not navigating the community college process.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

3. Here, equitable relief is appropriate. District's obligation to provide a FAPE ended with Student's graduation in June 2014, but Student met his burden of proof that District did not provide him a FAPE during the two school years before graduation. District IEP members never doubted Student's hard work or his ability to progress, and as such, this is not a case where Student's unwillingness to work or contribute to his advancement is a mitigating factor in awarding compensatory relief.

4. Consistent with the ALJ's discretion to award compensatory relief that is based upon individual assessments of Student's needs, and given that the facts showed that District was not adequately tracking Student's progress and that District did not update its assessments, District is ordered to fund an independent educational evaluation by a qualified

school psychologist, which focuses on Student's cognitive abilities, including his processing abilities, and academic achievement. The purpose of this assessment is to provide updated information on Student's deficits and his cognitive abilities and to provide recommendations and guidance for appropriate compensatory services in the areas of reading, writing and math skills.

5. In addition to an assessment, an award of compensatory education services is appropriate. The ALJ is not required to award day for day compensatory education, and the hours requested do not account for Student's age and the goal for him to work independently based upon the intensive instruction provided. Although impliedly promised to Student by Roosevelt's policy of moving its pupils through general education with credits qualifying them for four year colleges, under the governing law, a school district is not required to ensure college entry or success for its pupils. As such, the purpose of the compensatory education awarded is to address functional reading comprehension, writing and math skills, not to assist him with obtaining college course credits. Ideally, with guidance from the assessment report, an educational therapist or special education teacher can decide how to use the compensatory hours awarded in the areas of reading comprehension, writing and math. The evidence shows that District remained optimistic about Student's ability to progress, but did not provide appropriate services required for him to progress beyond elementary school in the area of functional reading, writing and math. District's 270 minutes of resource support weekly, or approximately 54 minutes daily, was provided in the classroom on a collaborative basis so it is unknown how much individual support pupil received. Pupil received some pullout services not specified in the IEP and extra one-on-one support for him to pass his classes, but it was not enough to address his basic skills. In math, his functional deficits were ignored. For these reasons, Student is awarded a total of 360 hours in compensatory education in the form of intensive academic instruction from an educational therapist special education teacher, certified or licensed by the State of California. The intensive academic instruction can be provided by a qualified educational therapist or special education teacher, individually, or working through a nonpublic agency. These hours may be used at any time, and are not tied to District school calendar, but shall be used by December 31, 2016, or forfeited.

6. Finally, Student is also awarded reimbursement for Ms. Zorin in the amount of \$3,600 dollars, as both Student and Mother's testimony supported that she was experienced and her work was helpful in the areas of his deficits.

## ORDER

1. District shall directly contract with and fund an independent psychoeducational assessment of Student's cognitive and processing abilities, academic achievement, and learning deficits, by an assessor who is credentialed or licensed by the State of California as a school psychologist. Within 20 days of the date of this Decision, District shall provide Student the names of three independent assessors who are under

contract with District. Within 15 days after being provided the list of independent assessors, Student shall provide District notice in writing of Student's selection.

2. The assessor shall prepare a report with the assessment results and recommendations for educational services in the area of reading comprehension, writing and math, which shall be provided to Student and District. As part of the assessment, based upon his or her own expertise in special education services, interventions, or accommodations, or through consultation with an educational consultant, the assessor shall make detailed recommendations for educational services, including teaching methodologies and programs, and accommodations, to address Student's unique needs in reading comprehension, writing and math, and to guide Student's compensatory education instruction.

3. District shall directly contract with and fund 360 hours of compensatory intensive academic instruction, in the area of reading comprehension and writing, and basic math, with an independent educational therapist, special education teacher, certified or licensed by the State of California, working individually or through a nonpublic agency. District shall provide Student with a list of three providers within 20 days of this Decision. Within 15 days after being provided the list of people or agencies who can provide intensive academic instruction, Student shall provide District notice in writing of Student's selection. Student may use these hours at any time mutually agreed with the provider, but shall have until December 31, 2016, to complete the intensive academic instruction, and at that time, any unused hours shall be forfeited.

4. District shall reimburse Mother in the amount of \$3,600 for the services of Ana Zorin within 30 days of the date of this Decision.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on the issue of whether he was denied a FAPE during the 2012-2013 and 2013-2014 school years due to inadequate instruction. Student and District each partially prevailed on the issue of whether Student was denied a FAPE during the 2012-2013 school year due to District's failure to implement the IEP: Student prevailed in the area of implementing Student's math goal; and District prevailed in the area of implementing resource specialist support and accommodations. District prevailed on the issue of whether Student was denied a FAPE during the 2013-2014 school year due to its failure to implement the IEP.

