

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

In the Matter of:

STUDENT,

Petitioner,

v.

SAN RAMON VALLEY UNIFIED
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080911

DECISION

Administrative Law Judge Debra Huston, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in San Ramon, California, on February 13, 14, 15, 19, and 20, and March 18, 19, 21, and 28, 2008.

Student was represented by Tamara Loughrey and Robert Woelfel, Attorneys at Law. Student's mother (Mother) and father (Father) were present except for very brief absences. The hearing was open to the public on Student's motion.

Respondent San Ramon Valley Unified School District (District) was represented by Sarah Daniel, Attorney at Law. Karen Heilbronner, District Director for Secondary Special Education, was present except for very brief absences.

PROCEDURAL BACKGROUND

Student filed the due process complaint in this matter on August 30, 2007. Student filed a second amended due process complaint on November 21, 2007. On November 29, 2007, OAH granted a continuance. At the close of hearing on March 28, 2008, the parties' request to file written closing arguments was granted. On April 11, 2008, on stipulation of the parties, the date of filing closing briefs was continued to April 14, 2008. Closing briefs were filed on that day, and the matter was submitted.

On April 21, 2008, counsel for Student filed a four-page rebuttal brief. Later that same day, District moved to strike the rebuttal brief or, in the alternative, to allow District to file a rebuttal to Student's closing brief. On April 23, 2008, Student filed an opposition to District's motion to strike Student's rebuttal or to allow district rebuttal to Student's closing brief. On April 23, 2008, OAH granted District's motion to strike Student's rebuttal brief because the closing briefs were 50 pages in length and thoroughly briefed all issues, the parties' stipulation did not provide for rebuttal briefs, and the record was closed when the rebuttal brief was filed. Student's rebuttal brief was not received or reviewed by the hearing judge.

ISSUES¹

1. Did District fail to meet its "child find" obligation to identify, locate, and assess Student as a result of depression and attention deficit/hyperactivity disorder (ADHD), and deficits in speech and language, reading comprehension, and writing, during the 2005-2006 and 2006-2007 school years?
2. Are Student's parents entitled to reimbursement for independent educational evaluations (IEE) obtained between January and March 2007?
3. Did District deny Student FAPE by failing to provide prior written notice that it was denying Student's request that District fund IEEs?
4. Did District's May 9, 2007, individualized education program (IEP) offer deny Student a free appropriate public education (FAPE) from May 9, 2007, through the end of 2006-07 school year, and for the 2007-2008 school year, as follows:
 - a. The IEP did not identify her unique needs in the areas of reading comprehension, writing, speech and language, and word finding?
 - b. The IEP did not include annual goals addressing Student's unique needs in the areas of reading comprehension, writing, speech and language, and word finding?
 - c. The IEP did not offer an individual transition plan (ITP)?
 - d. The IEP did not offer a placement with a small class size?

¹ The issues are those agreed upon during the Prehearing Conference and specified in the February 11, 2008, Order Following Prehearing Conference, although the issues have been reorganized for this Decision.

- e. The IEP did not offer a placement in a remediation program, such as the Lindamood Bell summer program, for remediation in the areas of reading comprehension, writing, speech and language, and word finding?
- f. The IEP did not offer counseling and speech and language therapy as related services?
- g. The IEP did not offer assistive technology (AT), including computer programs, to accommodate Student's reading and writing deficits?

5. Are Student's parents entitled to reimbursement for her attendance at Bayhill High School (Bayhill) during the 2007-2008 school?

PROPOSED REMEDIES

Student seeks the following: Reimbursement for IEEs by Dr. Diane Kusters (\$3,000), Ms. Melissa Jakubowitz (\$500), Dr. Melinda Young,² and Ms. Dimitra Loomos (\$650); reimbursement for placement at Bayhill for the 2007-2008 school year in the amount of \$21,000; prospective placement at Bayhill at District's expense; prospective placement at another appropriate private school if the ALJ is precluded from prospectively placing Student at Bayhill because it is not certified; compensatory education, such as a Lindamood Bell program; speech and language therapy services by Ms. Hilda Mann; reading comprehension, writing, speech and language, and word finding IEP goals; AT such as computer programs for reading and writing; reimbursement for private tutoring provided over the years by Faltz Associates (\$550), Karen Hallyer (\$900), Susana Gorden (\$845), Caroline Skipper (\$1451), and Kathy Fetterman (\$1600); and reimbursement for counseling provided by Dr. Young (\$10,025) and Mr. Peter Rose (\$300). Parents also seek mileage reimbursement for transportation to Bayhill, reimbursement for Dr. Kusters' participation (\$700) and Ms. Jacobowitz's participation (\$50) in the May 9, 2007, IEP team meeting and litigation preparation, and reimbursement for various copying and postage fees in the total amount of (\$352).

CONTENTIONS OF THE PARTIES

Student contends that the District had a child find obligation to assess her as a result of depression and ADHD, and deficits in reading comprehension, writing, and speech and language, during the 2005-2006 and 2006-2007 school years. District disagrees, contending that when it had reason to suspect that Student had a disability and may have needed special education, it assessed Student in all areas of suspected disability in October and November 2006, and the IEP team convened on November 29, 2006, determined she was not eligible

² Student did not establish the cost of Dr. Young's report.

for special education. Thereafter, when District received Student's independent evaluations in the spring of 2007 and had reason to suspect that Student had a disability and may have needed special education services, District convened an IEP meeting on May 9, 2007. At that meeting, the IEP team determined Student was eligible for special education under the category of "other health impairment" (OHI) based on the effect of Student's ADHD.

Student contends that her parents are entitled to reimbursement for the IEEs obtained between January and March 2007 because her parents properly notified District of the request, and District did not pay for the IEE or file a request a due process hearing to defend its assessments. District contends that Student's parents' request did not constitute a request for an IEE. Student also contends District failed to provide prior written notice denying the request for IEEs. District contends that it provided prior written notice denying Student's request regarding IEEs.

Student further contends District's May 9, 2007, IEP offer denied her FAPE because it failed to identify her unique needs in the areas of reading comprehension, writing, speech and language, and word finding; failed to offer annual IEP goals in these areas; failed to offer an ITP; failed to offer a program with a small class size; failed to offer a remediation program in the areas of reading comprehension, writing, speech and language, and word finding, such as a Lindamood Bell summer program; failed to offer counseling and speech services; and failed to offer AT, such as computer programs, to accommodate Student's reading and writing deficits.

District contends Student did not have unique needs in the areas of reading comprehension, writing, speech and language, or word finding, and, therefore, Student did not need annual goals in those areas. District also contends that Student did not have unique needs for either placement in a program with a small class size, or a remediation program. District concedes that it did not offer an ITP or transition services as part of the IEP. However, it contends that the parties agreed at the May 9, 2007, IEP team meeting to complete the ITP later, and that Student did not return to school within District in the fall of 2007. District contends that it attempted to complete an ITP in December 2007 by scheduling an IEP meeting and sending an ITP questionnaire to Student's parents. However, Student's parents did not respond or attend the IEP meeting. District further contends that Student did not have unique needs for counseling services, speech and language therapy services, or AT services.

Finally, Student contends that she is entitled to reimbursement for her placement at Bayhill during the 2007-2008 school year because District failed to offer Student FAPE, parents notified District of their intent to enroll Student in Bayhill, and Bayhill provides educational benefit. District contends that District's May 9, 2007, IEP offer was a FAPE and that Bayhill is not an appropriate placement.

FACTUAL FINDINGS

Background

1. Student is 17 years of age and has resided with Father and Mother within the geographical boundaries of District during all times at issue in this case. Student is currently in the eleventh grade at Bayhill, which is a private school in Oakland.

2. Student entered school within the District in the fourth grade. She had previously attended a private school in another state. Student began experiencing academic difficulties after she started attending school in the District, and was given the help of a Student Success Team (SST) beginning in fourth grade. Student's parents also obtained private tutoring for her.

3. In sixth grade, Student matriculated to District's Diablo Vista Middle School. District assessed her for special education eligibility, at Mother's request, in November 2002, during the sixth grade. It was determined that Student had a performance IQ of 121 and a verbal IQ of 107, which placed her in the high average range. District convened an IEP team meeting for Student on December 12, 2002. The team considered the opinion of Dr. Lawrence Diller, a physician who specializes in ADHD, that Student met the criteria for ADHD, inattentive type. However, the IEP team found Student to be ineligible for special education.

4. Student continued to receive accommodations through an SST, such as preferential seating and flexibility in due dates for homework, and began to receive medical treatment for her ADHD. Student continued to have some academic difficulties throughout middle school and continued to receive accommodations through an SST. Student passed her classes and maintained a grade point average of 2.6 during her three years of middle school. She received mostly C grades in her English, language arts, math, and science courses in middle school. However, during her six semesters of middle school, she received five D grades and one B grade in these core classes. In the fall of 2005, Student matriculated to District's Monte Vista High School (Monte Vista).

Child find

5. The Individuals with Disabilities Education Act (IDEA) and corresponding state law impose upon each school district the duty to actively and systematically identify, locate, and assess children with disabilities or exceptional needs who require special education and related services. This statutory obligation is often referred to as the "child find" obligation. A district's child find obligation toward a specific student is triggered when there is reason to suspect a disability, and that special education services may be needed to address that disability.

The 2005-2006 school year

6. Student contends that District, pursuant to its child find obligation, should have suspected a disability during her ninth grade year as a result of depression and ADHD, and deficits in speech and language, reading comprehension, and writing, and that she was in need of special education. Mother testified credibly that although Student experienced academic difficulties in grade school and in middle school, her ninth grade year was her worst school year up to that point. Mother and Father both testified credibly about depressive symptoms that Student began exhibiting during the 2005-2006 school year. Although Student was still “trying” to do well academically in ninth grade, Mother saw that Student was feeling demoralized. Student spent all of her free time in her room that year, according to Student’s parents. She was involved in no sports, in contrast to previous years in which Student had always been active athletically. Mother testified credibly that she took Student to a licensed therapist who counseled Student in ninth grade.

7. According to Mother, while Student could read the words in a book, she did not understand or retain what she read. Mother testified that Student saw only words in her mind when she read a book, and did not see pictures, and she needed hours of tutoring to understand a book. Mother testified that Student could not produce written work or pass her classes without tutoring help, and she would not have been able to pass her ninth grade year without the help of tutors. Mother believed that Student passed tests in her English class based on watching movies in class that were based on the novels the class was reading. In addition, Mother testified that Student had expressive language and word finding difficulties in the ninth grade. For example, according to Mother, Student used simplistic language and could not find the appropriate words to use. Mother believed that Student was given “social promotions” in school, and teachers gave her passing grades because they liked her. Mother had many conversations with Student’s counselor, Ms. Pat Lamson, about Student’s academic difficulties in ninth grade, and Mother testified that District convened many SST meetings regarding Student during ninth grade. It was undisputed that Student failed the overwhelming majority of vocabulary quizzes in her ninth grade English class.

8. The evidence establishes that District was aware that Student was having some academic difficulties in the ninth grade. District was also aware that she had ADHD because Student had been assessed by District in 2002 and because Mother told Ms. Lamson about Student’s ADHD. However, the evidence does not establish that District had reason to suspect that Student had a disability as a result of depression or ADHD, or deficits in speech and language, reading comprehension, or writing, or that she may have required special education services, during ninth grade. Moreover, the evidence does not establish that District had reason to suspect that Student was in need of special education.

9. While Mother and Father were credible regarding Student’s depressive symptoms that they observed at home, they did not see her in class during her ninth grade year. There was no persuasive evidence that Student exhibited signs of depression while at school that would cause District to suspect a disability as a result of depression. To the contrary, Student’s ninth grade science teacher Ms. Tracy Gilchrist, her ninth grade English

teacher Mr. Brendan Nelson, and her ninth grade counselor Ms. Lamson, who all got to know Student well in ninth grade, established through credible testimony that Student was a very happy, polite, attentive, well-liked, typical, and sociable student who had many friends, and was always happy to engage with other students in class. Ms. Gilchrist testified persuasively that Student brightened up the day when she walked into the room, “like the sunrise coming into the classroom.” Ms. Lamson, a school counselor with 31 years of experience, testified persuasively that she is trained to recognize signs of depression in students, and that she prepares referrals for SST meetings as part of her job as school counselor. She made no referral for Student that year because she did not see depressive symptoms in Student, and none of her teachers reported to her that they observed depressive symptoms in Student.

10. Testimony of Ms. Gilchrist and Mr. Nelson established that Student was an average, typical student who was very capable of doing the work required in their classes, keeping up with all of the work, working at the ninth grade level, working independently without difficulty, and completing quality work that met state standards. Student completed the majority of her homework in her English and science classes. In class, she paid attention, volunteered answers to the teacher’s questions, and participated actively in small group discussions, contributing to lively discussion. She was always articulate, showed a good understanding of concepts, and gave thoughtful answers. She was not disruptive, and she never asked for extra time to complete her work

11. Mr. Nelson established that Student read ninth-grade level novels for his English class, that she understood what she read, and that her reading comprehension was in the average range. Mr. Nelson’s testimony was credible because he used a number of assessments in his class to measure his students’ growth over time, including tests, writing portfolios, and oral presentations. Student demonstrated that she understood the main point in novels, including plot and characters, on these assessments, and also by her performance in class. Mr. Nelson established that Student did well on tests on novels, and that Student’s performance on tests showed that she understood novels from reading them, and not from watching movies in Mr. Nelson’s class. Mr. Nelson established that he did not show movies for all novels they read, and that the tests required a level of analysis that a Student could not engage in without having read the novels.

12. Mr. Nelson testified persuasively that Student’s writing skills were in the average range and typical of other students in his ninth grade English class. Student generally wrote adequate essays in response to literature, and earned B and C grades on those essays. Her basic writing skills and ability to write comprehensible sentences were adequate. She was able to organize a composition, present the main idea, find textual examples, and provide analysis in her written work, both on essays completed at home and on those completed in class. Both Ms. Gilchrist’s and Mr. Nelson’s classes required writing by Student, in which she expressed her ideas and knowledge.

13. In addition, the evidence established that Student’s overall grade point average in middle school was 2.6, and that she passed all of her classes in ninth grade. For her

semester grades during ninth grade, Student received all A, B, and C grades, except for a D+ in English and science in her first semester, and a D- in world history in her second semester. Student's ninth grade teachers, Mr. Gilchrist and Mr. Nelson, and her counselor, Ms. Lamson, established that Student's work and fluctuating performance were typical of that of other ninth grade Students. The evidence established that many students have lower grades in their freshman year than in previous years, because in high school there is homework every night and many tests are comprehensive tests. In addition, Student's teachers and counselor established that Student's failure to complete every homework assignment on time did not cause them to suspect that she had a disability for which she may have required special education. Ms. Lamson testified persuasively that Student had a lot of friends, and Student gave much more priority to her social life than to academics. While Student's teachers and counselor may have been aware that Student had a tutor, Monte Vista is a school with a high-achieving student population, and many students at Monte Vista have tutors. The fact that Student had a tutor did not give Student's teachers reason to suspect that Student had a disability.

14. Although Student failed the overwhelming majority of her vocabulary quizzes in English, Mr. Nelson testified persuasively that on quizzes, Student's performance was in the B and C range when she was prepared, and in the D and F range when she was not prepared. He assumed Student did not study for the tests that she did not pass. When Student did not complete her homework, she had difficulty understanding the material. Mr. Nelson's testimony is consistent with Ms. Gilchrist, who testified credibly that when Student did the homework, she understood the material and showed good understanding of concepts.

15. Consistent with Mother's testimony, Ms. Lamson testified credibly that Student came to see her to ask for help at the beginning of the year and that Mother contacted her often. Student was struggling with vocabulary in English, and said there was too much homework and it was too hard for her. Ms. Lamson was aware that Student had ADHD. Ms. Lamson established that she, Student, and Mr. Nelson, Student's English teacher, discussed Student's difficulties. As a result, Mr. Nelson gave Student advice about studying and completing homework. Ms. Lamson established through her testimony that while Mother contacted her regularly that year, District convened no SST meetings for Student because Ms. Lamson did not believe an SST meeting was necessary and she made no referral for an SST meeting that year.

16. In addition, Ms. Lamson did not believe a referral for assessment was warranted, none of Student's teachers requested that she make a referral for Student, and District conducted no assessment of Student in the 2005-2006 school year. Ms. Gilchrist and Mr. Nelson had Student in their classes for the entire year, and Ms. Lamson was her counselor for the entire year, and none of them suspected that Student had a disability or that she may have required special education.

17. Mother and Father established that Student burned all of her homework, progress reports, and report cards in the fireplace at home that year, so Mother saw little of Student's ninth grade work. In addition, Mother's computer became inoperable, and she had

no record of emails she sent to District that year, and she had no records from Student's ninth grade year that would establish that District had a reason to suspect that Student had a disability. Student's teachers and counselor, who knew her well, did not suspect a disability.

18. Based on the foregoing, District did not have a reason to suspect a disability, or that Student required special education, during her ninth grade year.

The 2006-2007 school year

19. In early September of Student's tenth grade year, Mother requested that District assess Student for special education eligibility, and also that District provide Student with accommodations pursuant to a 504 Plan³ as a result of her ADHD. District convened an SST meeting for Student on September 21, 2006, and prepared an assessment plan on September 27, 2006. The assessment plan provided for a comprehensive academic battery to evaluate Student's academic achievement, standardized cognitive processing measures to assess Student's intellectual development, and vision and hearing screenings. Student's parents signed the assessment plan on October 6, 2006. Mr. Newton testified persuasively that Student was assessed in all areas of suspected disability, based on her parents' concerns, her teachers' concerns, and his concerns. District conducted its assessments of Student in October and November 2006.⁴

20. District convened an IEP team meeting on November 29, 2006. Resource specialist Ms. Kathy Saca, school psychologist Mr. Matt Newton, and District speech and language therapist Mr. Luke Weger, all properly credentialed, presented their assessment reports. The IEP team determined that Student was not eligible for special education. According to Mr. Newton, it was not necessary to determine if she required special education because it was determined that she did not meet the initial criteria.

21. Student's parents did not agree with the eligibility determination. On December 4, 2006, Student's parents provided District a note from Student's psychiatrist, Dr. Melinda Young, which stated that Student is her patient and under her clinical supervision, and that Dr. Young had diagnosed Student with ADHD. Because of this, and also because of teachers' concerns about missing assignments, a Section 504 meeting was held on December 14, 2006, and Student was given a 504 plan to accommodate her needs arising from her ADHD.

22. In early 2007, Student's parents obtained independent assessments from Dr. Diane Kosters, neuropsychologist; Ms. Melissa Jakubowitz, speech and language pathologist, Dr. Melinda Young, physician and psychiatrist specializing in ADHD; and Ms.

³ Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 (1973)) authorizes accommodation plans for students who have a physical or mental impairment that substantially limits one or more of life activities, or have a record of or are regarded as having such an impairment. (*Ibid.*; 34 C.F.R. § 104.3(j) (2004).)

⁴ Student argues in her closing brief that District's assessments conducted in October and November 2006 were inappropriate. However, that was not an issue at the hearing. (See fn. 1, *supra.*)

Dimitra Loomos, audiologist. Based on information contained in those assessment reports, and on Student's declining academic performance, in the spring of 2007, parents requested that District convene another IEP team meeting. On May 2, 2007, District, by letter, requested consent to assess Student.

23. On May 9, 2007, District convened an IEP team meeting for the purpose of reconsidering eligibility. Dr. Kosters and Ms. Jakubowitz presented the results of the assessments. The IEP team determined that interventions had been tried with Student through her 504 plan, yet she failed biology the first semester and was failing classes at the time of the May 9, 2007, IEP meeting. Also, since the November 2006 IEP meeting, Student had tried medication for her ADHD, and it had not made much of a difference. Thus, Student was not responding to the interventions. In addition, the May 9, 2007, IEP team meeting was held six months after the November 2006 meeting, and Dr. Kosters' report, which was provided to District on March 28, 2007, contained empirical evidence that indicated that Student had difficulties in attention processing that had not surfaced in Mr. Newton's testing back in November 2006. Also, Dr. Kosters' report, and Dr. Young's report which was provided to District in early May 2007, revealed symptoms of depression.

24. During the May 9, 2007, IEP team meeting, the IEP team determined that Student was eligible under the eligibility category of OHI related to ADHD, inattentive type. District fulfilled its child find obligation on May 9, 2007, when the IEP team determined Student was eligible for special education. It is necessary, however, to determine whether District failed in its child find obligation prior to May 9, 2007, during the 2006-2007 school year.

Depression

25. Student contends that District should have suspected a disability as a result of depression, and that Student was in need of special education. Student's parents testified that Student became more depressed in tenth grade than she had been in the ninth grade. Meeting notes from the September 21, 2006, SST meeting state that one of Student's tenth grade teachers indicated that Student "appears withdrawn." Father testified credibly that he expressed concern during the November 29, 2006, IEP team meeting about changes in Student, and that he told the IEP team that he was concerned that he was losing his daughter. Father testified credibly that in tenth grade, Student's pain was very noticeable to him and Mother, that her affect worsened, and that she had several physical illnesses that year, the most serious of which was an infection that required hospitalization. Mother testified that Student was seeing Dr. Young for depression beginning in December 2006. In addition, Dr. Kosters concluded, as a result of her evaluation of Student, that Student was depressed and needed special education. On March 28, 2007, Student's parents provided Dr. Kosters' report to District.

26. The evidence does not establish that District had a reason to suspect that Student had a disability as a result of depression or that she was in need of special education prior to March 28, 2007, when it received Dr. Kosters' report. Although the SST meeting

notes from September 21, 2006, state that a teacher reported that Student “appears withdrawn,” District established through credible testimony of Ms. Lamson that the assessment plan was prepared based on concerns at the time of the SST meeting, and depression was not a concern at that time. Therefore, District did not assess Student in the area of social/emotional functioning when it conducted its November 2006 assessment of Student. School psychologist Mr. Newton conducted the psychoeducational evaluation of Student in October and November 2006, pursuant to the September 2006 assessment plan, and he established that he looked for signs of depression and would have seen signs of depression if Student were exhibiting them at school. Mr. Newton spent time with Student, observed her in class, spoke with her teachers, and conducted a complete review of Student’s records as part of his assessment. He did not find any information leading him to conclude that Student had a problem with depression or depressive symptoms at school.

27. In addition, Student’s teachers during tenth grade established that Student was not exhibiting signs of depression at school. Ms. Gilchrist, Ms. Andrea Greco, and Ms. Megan Keefer all testified persuasively that when Student was in the tenth grade, she was happy, had many friends, had a social life at school, and was a joy to have in class. While Ms. Keefer testified credibly that Student seemed frustrated and felt overwhelmed at times, Ms. Keefer opined that feelings of frustration are common among girls Student’s age. Ms. Keefer believed Student’s feelings may have resulted from the fact that she was so far behind as a result of excessive absences during tenth grade. Mother conceded that Student was absent a lot in tenth grade, and that the absences were due to a variety of reasons, including assessment, illness, a hospitalization for an infection in the spring of 2006, an out-of-state family wedding, and trips to Los Angeles for modeling jobs. She was absent two weeks in the first semester and 19 days in the second semester. In addition, Ms. Gilchrist noticed that Student seemed tired at times toward the end of the school year after she had been ill, but Ms. Gilchrist did not suspect depression. There was no credible evidence that Student appeared to be depressed at school.

28. Although Mother testified that Student was being treated by Dr. Young for depression beginning in December 2006, Mr. Newton testified credibly that District did not have this information. Dr. Young’s treatment note, which was provided to District on December 4, 2006, stated she was treating Student for ADHD, and did not mention depression or depressive symptoms. Although Father expressed concern about depression at the November 29, 2006, IEP team meeting, Ms. Lamson, who remained involved in Student’s case during tenth grade and attended the September 2006 SST meeting, established that Student sought counseling from her over time because of stress Student experienced at home as a result of her academic performance. Ms. Lamson believed, based on her conversations with Student, that achieving academically was more important to Student’s parents than to Student. Mr. Newton testified persuasively that he did not suspect depression in Student, and that he did not have a reason to suspect a disability in that area, at any time prior to the time he received Dr. Koster’s report on March 28, 2007. Ms. Newton’s testimony is consistent with Student’s teachers’ testimony.

29. Dr. Kusters' report, provided to District on March 28, 2007, and Dr. Young's May 4, 2007, report, provided to District in early May 2007, indicate that Student was depressed. Dr. Kusters testified persuasively that Student did not reveal her depression easily, she hid it well, and Dr. Kusters did not find it until she probed. Dr. Kusters testified persuasively that because Student would not admit that she felt depressed, her depression would not be revealed through the rating scales typically used by school psychologists, and she advised Mr. Newton that administering the rating scales to Student would not be worthwhile for that reason. However, Dr. Kusters recommended a trial of antidepressant medication, and that District consider whether Student qualified for special education based on the negative impact her depression had been having on her educational performance. By letter of May 2, 2007, District requested consent to assess Student in the area of social/emotional and for permission to contact Dr. Young and Dr. Kusters. District again requested consent to assess Student at the May 9, 2007, IEP meeting. This was, in effect, a referral for assessment.

ADHD

30. Student's parents established that Student spent many hours outside of school studying during tenth grade, and her parents provided Student many hours of tutoring so that Student could attempt to keep up with her homework, yet Student's performance declined that year. This is corroborated by the notes from the September 21, 2006, SST meeting, which state Ms. Gilchrist was concerned that Student had a hard time understanding concepts, and Ms. Keefer was concerned about Student's reading comprehension. Mother provided a Connors Rating Scale to District during that SST meeting and also during the November 29, 2006, IEP meeting, which Student completed in September 2006, showing Student had very high ratings indicative of ADHD. Thereafter, on December 4, 2006, Mother provided District with a note from Dr. Young, as described in Factual Finding 28, stating she was treating Student for ADHD. Student's second quarter progress report, dated December 8, 2006, showed that Student was receiving an F in Spanish, and F in biology, and a D+ in English. Although Student had a 504 plan beginning on December 14, 2006, Student dropped her geometry class late in the first semester to avoid receiving a failing or bad grade in that class. Student received incompletes in her English and biology classes at the end of the first semester in January 2007. She never made up the work in biology, and she received an F for the first semester in that class. Mother and Dr. Kusters established that Dr. Kusters assessed Student in January 2007, and diagnosed Student with ADHD and recommended special education for Student. As part of her assessment, Dr. Kusters administered the Brown Adolescent ADD Scales to Student, and the Behavior Rating Inventory of Executive Functioning to Student and to Mother, both of which showed that Student had ADHD. Mother and Father established that they provided Dr. Kusters' report to District on March 28, 2007.

31. Mr. Newton established through his testimony that District assessed Student for special education eligibility in October and November 2006, and that assessment included assessment in the area of attention, and the IEP team determined on November 29, 2006, that Student did not qualify for special education. Therefore, District fulfilled its child

find obligation at that time. Moreover, the evidence does not establish that District had reason to suspect Student had a disability based on ADHD prior to the time that it received Dr. Kusters' report on March 28, 2007. Three of Student's tenth grade teachers testified credibly that they did not suspect that Student had a disability as a result of ADHD, or that she may need special education services. They testified persuasively that Student was capable of doing the class work at grade level. Mr. Newton had determined in his assessment that Student scored within the average range on all tests administered to her as part of his assessment. Thus, her academic performance was consistent with her ability.

32. Student contends that the evidence demonstrates that Student failed to turn in some homework and to complete some assignments, which are symptoms of ADHD, and which should have triggered further assessment. However, Student's teachers established through their credible testimony, and Mother conceded as determined in Factual Finding 27, that Student was out of school two weeks in the first semester, and 19 days in the second semester, and she had not done a lot of the reading or the work. Student's teachers established that this one reason she fell behind. In addition, Mr. Newton testified credibly that while IQ is one measure of ability and one predictor of academic performance, motivation and priorities are also big factors. Mr. Newton saw Student as a sociable person who gave higher priority to her social life than to school. Consistent with Mr. Newton's testimony, Ms. Keefer testified persuasively that Student was capable of completing the work, and that she did not complete the work because she lacked interest in it, and that Student's time in the classroom was social time for her. In addition, Ms. Lamson testified credibly that geometry is a difficult class for many students in general, and it is not at all unusual that it was difficult for Student, and that biology is one of the most challenging subjects in high school. Student was taking both of those courses in tenth grade and, in addition, was absent a lot. In addition, Student's counselor and teachers established that it is common for students to receive lower grades on progress reports than on report cards, as Student did, because teachers want to motivate students to complete work.

33. On May 2, 2007, within five weeks after receiving Dr. Kusters' report, District requested consent to assess Student, and convened an IEP meeting on May 9, 2007.

Speech and language

34. Student contends, based on Mother's testimony, that Student had a deficit in speech and language because of reading and writing difficulties. Student also relies on Dr. Kusters' and Dr. Jakubowitz's reports from the spring of 2007 that stated that Student had a disability in the area of word finding, higher order language, and complex language. Finally, Student relies on Mr. Nelson's testimony that Student failed nearly all of her vocabulary quizzes that year in English.

35. District assessed Student in the area of speech and language in October and November 2006 as a result of Student's parents' September 2006 request for assessment. After testing Student, Mr. Weger determined, based on his testing and on Mr. Newton's testing, based on how Student was doing in general education, and based on whether she was

accessing the curriculum, that Student did not need speech and language services. Therefore, District did not fail to meet its child find obligation prior to the November 29, 2006, IEP meeting. Thus, the relevant time period for child find with respect to speech and language commences after District completed its assessment on November 29, 2006. Student's three tenth grade teachers who testified established that they did not suspect a disability in the area of speech and language, or that Student may have needed special education services in that area. Student's teachers established that Student performed in the average range academically, and fell behind in school because of absences and failing to complete work. Therefore, District had no reason to suspect a disability in the area of speech and language, or that Student may need special education in that area after the November 29, 2006, IEP team meeting.

36. Subsequent to Mr. Weger's assessment of Student, Student was assessed by Ms. Jakubowitz and Dr. Kosters, both of whom identified speech and language needs, and these reports were provided to District on March 28, 2008. On May 2, 2007, District requested consent to assess Student and convened an IEP team meeting on May 9, 2007.

Reading comprehension

37. Student contends, based on Mother's testimony, that Student could not comprehend what she read. Mother also testified that Student received over 30 hours of tutoring on reading one particular book in order to comprehend it. In addition, reading comprehension was listed as a "concern" expressed by Student's English teacher, Ms. Keefer, on the September 21, 2006, SST meeting summary. Student also contends that Ms. Saca, who conducted the academic assessment of Student in the fall of 2006, noted in her report that as the material becomes more advanced and abstract, Student needs to apply additional strategies to ensure that she understands it. Ms. Saca noted in her report that reading comprehension and writing were areas of concern stated by Student's tenth grade English teacher. Thereafter, on March 28, 2007, District received Dr. Kosters' and Ms. Jakubowitz's reports, which Student contends gave District a reason to suspect a disability in the area of reading comprehension or that Student may have required special education. Specifically, Dr. Kosters determined that Student had deficits in reading comprehension.

38. Ms. Saca and Mr. Newton established through their testimony that District assessed Student in the area of reading comprehension in October and November 2006. Ms. Saca, a credentialed resource specialist of 10 years, administered reading comprehension assessments, including the Wechsler Individual Achievement Test Second Edition (WIAT-II) and the Woodcock Johnson III reading subtests (WJ-III), to Student as part of District's assessment, and Mr. Newton also administered the comprehension subtest of the verbal portion of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). Therefore, District did not fail to meet its child find obligation prior to the time that assessment was completed and the November 29, 2006, IEP meeting.

39. Student's tenth grade English teacher, Ms. Keefer, established through her credible testimony that Student was capable of comprehending what she read, her reading

comprehension was in the average range. Ms. Keefer established that Student participated in class discussions and in discussions regarding books they were reading, and that her comments demonstrated that she understood the books. While Student struggled with poetic, dense, and dry reading, and science terminology in certain books, many other students also struggled. Ms. Keefer testified persuasively that she can tell when a student is struggling in her class and needs to be referred for extra help, and Ms. Keefer never suspected that Student needed special education support to access reading in class. Moreover, Student met state standards in Ms. Keefer's class, or she would not have passed.

40. Student did not read all of the books assigned in Ms. Keefer's class, and she had a variety of explanations as to why she did not read them all. As determined in Factual Findings 27 and 32, Student was absent a lot in tenth grade. She missed 19 days of school in the second semester, and failed English the second semester because she did not turn in the work she completed. Ms. Keefer testified persuasively that Student could have passed the class if she had turned in the work she completed. Consistent with Ms. Keefer's testimony, Student scored in the proficient range, and close to the advanced range on the California Standards Tests (STAR) in the area of English/language arts in the spring of ninth grade. Mr. Weger testified persuasively that if a student has a history of struggling with reading comprehension and language arts and required 30 hours of tutoring to complete a book report, it is not necessarily true that the student has a reading comprehension problem. According to Mr. Weger, many factors go into reading comprehension, including lack of interest in reading. This testimony is consistent with the factual determinations in Factual Findings 27 and 32 that Student performed in the average range in the area of reading comprehension, and fell behind because of absences and failing to complete work.

41. On May 2, 2007, District requested consent to assess Student and convened an IEP team meeting on May 9, 2007.

Writing

42. Student contends that District should have suspected a disability based on her deficits in writing, and that she needed special education, in tenth grade. Mother testified that Student could not complete written work without the help of a tutor, and that her written work was far below grade level. In addition, Student contends that as of March 28, 2007, when District received Dr. Koster's report, it should have suspected a disability in the area of writing and that Student required special education to address that disability because Dr. Koster identified deficits in writing and recommended special education. Student also bases her contention on the fact that Ms. Keefer commented during the May 9, 2007, IEP meeting that Student's writing was below average compared to other students at Monte Vista.

43. Ms. Saca and Mr. Newton established through their testimony that District assessed Student in the area of writing in October and November 2006. Ms. Saca administered WIAT-II to assess Student's writing, and also reviewed a writing sample. Ms. Saca determined that Student was in the average range in writing. Therefore, District did not fail to meet its child find obligation prior to the time that assessment was completed.

44. Student's tenth grade English teacher, Ms. Keefer, testified persuasively that Student was able to do her class work. While Ms. Keefer stated during an IEP meeting that Student's writing was below average compared to other students at Monte Vista, Monte Vista has a high achieving student population. Ms. Keefer clarified in her testimony that Student was not "below average" in writing. Ms. Keefer established that Student wrote an autobiographical essay that was adequate and Ms. Keefer thought it was charming and enjoyed it. Ms. Keefer established that the only reason Student failed the second semester of English is that she did not turn in the work she completed at the end of the school year. Ms. Keefer never suspected that Student needed special education support to access writing in class.

45. Student's tenth grade history teacher, Ms. Greco, testified persuasively that Student had relative difficulty with providing four to five sentence answers to questions in the fall of 2006. However, this is typical of her students. Student always got the subject information together and always did average work on the short answer questions in comparison to the rest of the class. Student generally earned Bs or Cs on tests, her homework was always completed, and she was able to complete work independently in class. Student passed both semesters. Ms. Greco established that Student performs in the average range as a student, and she met the state standards in Ms. Greco's class.

46. On March 28, 2007, District received Dr. Kusters' report, in which Dr. Kusters determined that Student had a disability in the area of writing because Student would not use complex sentences and wrote as though she were five to seven years younger. At that time, District had a reason to suspect that Student had a disability. District requested consent to assess Student on May 2, 2007.

47. Based on the foregoing, including the determinations in Factual Findings 5 to 46, District satisfied its child find obligation in tenth grade. District assessed Student in the fall of 2006, in all areas of suspected disability, pursuant to Student's parents' September 2006 request for assessment. That assessment was completed on November 29, 2006. Thereafter, District did not have reason to suspect a disability as a result of depression or ADHD, or deficits in speech and language, reading comprehension, or writing, or that Student may need special education services, until District received Dr. Kusters' report on March 28, 2007. On May 2, 2007, District requested consent to assess Student, and it convened an IEP meeting on May 9, 2007, to reconsider eligibility. Student was found to be eligible under the category of OHI based on her ADHD on that day. District's requesting to assess Student and convening an IEP meeting within approximately a month of receiving Dr. Kusters' report was not unreasonable.

Independent educational evaluations

48. A parent has the right to obtain an IEE of a child at public expense if the parent disagrees with the assessment obtained by the school district. When a parent requests an IEE, the school district must either provide it, or initiate a due process hearing to show that its assessment was appropriate. A school district may not impose conditions or timelines

relating to an independent educational evaluation at public expense that are not otherwise authorized by law.

49. Student's parents contend that they are entitled to reimbursement for the IEEs conducted between January and March 2007 by Dr. Kusters, Dr. Young, Ms. Jakubowitz, and Ms. Loomos because parents notified District of their disagreement with District's assessments, they requested an IEE, and District did not respond.

50. Evidence adduced at hearing establishes that Student's parents disagreed with the assessments conducted by District in October and November of 2006. Mother testified persuasively that she disagreed with the District's assessment results, and that she did not believe that District had done a full and complete battery of tests in 2006, because the assessment did not identify Student's unique needs. Student's parents felt strongly that that District had not found the problem in their assessments because Student had been receiving SST assistance for six years, and she was still struggling academically at the time of the November 2006, IEP meeting.

51. Also, Student's parents were concerned that District had not administered ADHD rating scales to Student's parents or to Student as part of District's October and November 2006 assessment. District had administered ADHD rating scales only to teachers, and the teachers rated Student as being only in the "at-risk" range for ADHD. Student's therapist had administered an ADHD rating scale to Student in September 2006, and that scale yielded results that were indicative of severe ADHD. Although Mother had provided District with a copy of Student's ADHD rating scale during the September 21, 2006, SST meeting, she saw that Mr. Newton had not included that scale in his assessment report of Student. Mother provided another copy of that rating scale to District at the November 29, 2006, IEP team meeting. Mother was concerned that District had not considered the rating scale. Mother and Father expressed their concerns to District at the November 29, 2006, IEP meeting.

52. In addition, Mother told the IEP team during the November 29, 2006, IEP team meeting that she would like outside testing of Student. Student's parents presented to the IEP team a signed parent statement in which they clearly indicated their belief that Student had not been properly tested, and stated they had arranged for outside testing to be conducted in the first week of January 2007. This document also stated that they would seek reimbursement for the outside assessments if the results indicated that Student qualified for special education under the category of specific learning disability (SLD) or OHI.

53. District contends that Student's parents did not request an IEE from District. Rather, District contends, Student's parents informed District that they were obtaining private assessments and, depending on the outcome of the evaluations, they might later seek reimbursement. District is correct that Student's parents did not expressly request "an independent educational evaluation at public expense." However, the statement of procedural safeguards that District provided to parents did not state that the request had to be phrased in any particular language. District also contends that if Student's parents had

requested an IEE, the parents would have been asked to follow District IEE policies and procedures, which require selecting an appropriate assessor based on certain qualifications. The procedural safeguards given to parents did not state that this was a requirement.

54. Student's parents communicated their disagreement with District's assessment and requested independent assessments. They established that District was aware that they requested an IEE. District did not provide IEEs at public expense, did not provide Student's parents with information about where to obtain an IEE, and did not file for a due process hearing. Thereafter, in January, February, and March 2006, Student was privately assessed by Dr. Kosters, Ms. Jakubowitz, Dr. Young, and Ms. Loomos. The assessments were provided to District prior to the May 9, 2007, IEP meeting and were considered by District at that IEP team meeting.

55. Student established through testimony of Dr. Kosters, Ms. Jakubowitz, Mother, and Father that Dr. Kosters and Ms. Jakubowitz were qualified examiners who were not employed by the public agency responsible for the education of the child in question, and that the reports were for educational purposes. Student did not, however, establish that Dr. Young and Ms. Loomos were qualified examiners not employed by the public agency responsible for the education of Student. Neither Dr. Young nor Ms. Loomos testified at the hearing. There was no evidence at hearing regarding Ms. Loomos's qualifications, and although Mother and Dr. Kosters testified that Dr. Young is a physician, they did not establish either the cost of Dr. Young's May 4, 2007, report, or that Dr. Young was treating Student for school-related, as opposed to medical, purposes.

56. Based on the foregoing, Student's parents are entitled to reimbursement for the IEEs of Dr. Kosters and Ms. Jakubowitz. Father established that Dr. Kosters' assessment cost \$3,000. and that Ms. Jakubowitz's assessment cost \$500.

Prior written notice

57. A school district is required to provide prior written notice whenever it proposes to change, or refuses to initiate or change, the evaluation or educational placement of the child. The notice is required to include a description of the proposed or refused action; an explanation for the proposed or refused action; a description of each evaluation assessment, a record or report used as a basis for the proposed or refused action; a statement that the parents have received procedural safeguards; the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the proposed or refused action. A procedural violation requires a remedy only where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits.

58. Student contends that District failed to give prior written notice of its refusal to provide an IEE at public expense. Ms. Heilbronner testified that District sent a letter to parents on December 11, 2006, which stated that “[t]he District denies the request for reimbursement for assessments obtained privately,” and that it was sent by someone else at District. Mother testified persuasively that she never received this letter, and her testimony was credible. However, even assuming Student’s parents did not receive the notice, Student’s parents are awarded reimbursement for Dr. Kusters’ and Ms. Jakubowitz’s reports in this Decision. Those reports were provided to District on March 28, 2007, and considered by the IEP team on May 9, 2007. The May 9, 2007, IEP team meeting was held within a reasonable time after District received the IEEs. Student was determined to be eligible for special education on that day. Therefore, the procedural violation did not impede Student’s right to a FAPE, significantly impede the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or cause a deprivation of educational benefits

Denial of FAPE

59. A school district’s offer to a child with a disability constitutes an offer of a FAPE if the program or placement is designed to address the child’s unique educational needs and is reasonably calculated to provide some educational benefit in the least restrictive environment, and the services provided comport with the IEP.

60. The IEP team convened on May 9, 2007, determined that Student was eligible under the category of OHI based on her ADHD. District offered Student an IEP with goals in the areas of organization, study skills, note taking, and test taking. District also offered Student one period per day of pull-out resource services to enable Student to reach her goals. Student’s parents signed the IEP, but wrote a parent statement, which they attached to the IEP, stating that they disagreed with District’s determination that a reading goal, a writing goal, and a remediation program were unnecessary.

61. Student asserts that District’s May 9, 2007, IEP offer denied her FAPE because it failed to identify her unique needs in the areas of reading comprehension, writing, word finding, and speech and language; failed to offer IEP goals in the areas of reading comprehension and writing; failed to offer an Individual Transition Plan (ITP); failed to offer a program with a small class size; failed to offer a remediation program, such as a Lindamood Bell summer program, for remediation in the areas of reading comprehension, writing, word finding, and speech and language; failed to offer counseling and speech services as related services; and failed to offer assistive technology, such as computer programs, to accommodate Student’s reading and writing deficits.

Unique needs

62. A school district is required to identify the student’s unique needs, and to provide specially designed instruction and related services that meet his or her unique needs

and are necessary to assist in benefiting from his or her education. To that end, the district must identify the student's unique educational needs.

63. The parties do not dispute that Student has unique needs in the area of attention, organizational skills, study skills, note taking, and test taking. However, based on all of the assessments and the discussions at the May 9, 2007, IEP team meeting, the team determined that Student demonstrated no academic needs and, therefore, no annual goals were written for academic areas. Student contends that she has additional unique needs in the areas of reading comprehension, writing, speech and language, and word finding, as identified by Student's experts, and that District failed to identify these needs at the May 9, 2007, IEP team meeting, thereby denying her a FAPE.

Reading comprehension

64. Dr. Kusters' report indicated that Student had unique needs in the area of reading comprehension because Student could not comprehend what she read. Dr. Kusters testified that Student's scores on the Gray Oral Reading Tests – Fourth Edition (GORT-4) establish that while Student could read a story fluently, when she was given multiple choice questions to answer, she repeatedly gave incorrect answers—particularly to questions involving inferences. Dr. Kusters' opinion was further based on results Student obtained on Dr. Kusters' administration of portions of the WISC-IV, which Mr. Newton had administered in November 2006. While Dr. Kusters conceded that Student's reading comprehension scores on the comprehension subtest of the verbal portion of the WISC-IV administered by District in November in 2006 and by Dr. Kusters in January 2007, were in the average range, Dr. Kusters opined that Student's scaled score on the comprehension test went up significantly when the test was a multiple choice test. According to Dr. Kusters, this indicated that Student knew more than she could express and that language issues were getting in the way. In addition, Dr. Kusters questioned the efficacy of reading comprehension subtests of the WJ-III and WIAT-II administered by District because, for these tests, Student was required to read only small passages, which did not reveal her difficulty with reading a book, and because the instructions to the WJ-III and the WIAT-II allow a student to re-read passages to get an answer. Therefore, according to Dr. Kusters, a student can miss all of the questions having to do with inferences and still get an average score because most of the questions have to do with details, while on the GORT-4, administered by Dr. Kusters, a student may not re-read for comprehension.

65. However, Dr. Kusters' testimony did not establish that Student had unique needs in the area of reading comprehension for a number of reasons. Student's full scale IQ score was at the mid-point of the average range based on both Dr. Koster's and Mr. Newton's administration of the WISC-IV. Dr. Kusters conceded that Student's GORT-4 scores were also in the average range, that Dr. Kusters' observation regarding inferences was a qualitative one, and that there is no subtest for inferences on the GORT-4. In addition, Dr. Kusters conceded that the WISC-IV, which was administered by District and administered in part by Dr. Kusters, is normed with multiple choice answers. Therefore, the fact that the WISC-IV contains multiple choice questions does not invalidate the results. In addition, Ms.

Saca testified persuasively that the WJ-III and the WIAT-II that she administered are reliable testing instruments, and that these instruments give an indication of vocabulary ability and ability to glean comprehension from text, which can be applied to novel reading; that these tests were renormed recently; and that the questions on these tests are developed and updated, based on documentation, by reading experts. Moreover, Ms. Saca spoke with Student's English teacher and discussed Student's ability to read novels in class, and the information she received was consistent with Student's scores on the tests Ms. Saca administered. Dr. Kusters had not spoken with Student's teachers or anyone from Monte Vista. In addition, Dr. Kusters was not aware that Student had passed the high school exit exam in the fall of 2006, or that her STAR testing results from the spring of 2006, which was the ninth grade, showed that she earned a 387 in English-language arts in ninth grade, which is at the top of the proficient range.

66. Conversely, District established that Student does not have a unique need in the area of reading comprehension. Ms. Saca's credible testimony established that Student received a standard score of 105 for Reading Comprehension on the WIAT-II, which placed her in the 63rd percentile, which was approximately a year ahead of Student's grade level. In assessing Student, Ms. Saca wanted to be sure that she assessed in the area of reading comprehension using a tool in addition to the WIAT-II. For that reason, she also administered the WCJ-III, and Student received a standard score of 121 in Broad Reading, which placed her in the 92nd percentile. The Broad Reading portion is a composite of three subtests, one of which is Passage Comprehension. Student received a standard score of 99 on this portion, which placed her in the 48th percentile. This score for reading comprehension is within the average range. Student received a standard score of 131 on the Reading Fluency subtest, which placed her in the 98th percentile. Although Student was somewhat weaker in reading comprehension than in decoding, her reading comprehension scores were all within the average range. Mr. Newton testified credibly that he administered the WISC-IV to Student, as part of his psychoeducational assessment in November 2006, and Student scored within the average range on all areas assessed, including the comprehension subtest of the verbal portion of the WISC-IV. Her full-scale IQ also fell in mid-point of the average range, which was lower than in the previous testing from 2002, but within in the average range. As determined in Factual Findings 37 to 41, Student's teachers established that Student's reading comprehension was within the average range, and that Student did not have a unique need in that area.

67. Thus, at the time of the May 9, 2007, IEP team, the information available to the IEP team established that Student's reading comprehension skills were in the average range, as was her full scale IQ. District established through credible evidence that Student did not have unique educational needs in the area of reading comprehension.

68. At hearing and in her closing brief, Student relied on testimony of Ms. Hilda Mann, a licensed speech and language pathologist with 25 years of experience who has been in private practice for at least the last 16 years, who testified that Student cannot comprehend the basic plot of a book, and that she is reading books at the fifth grade level at Bayhill. However, the IEP team did not have any information from Ms. Mann at the time it

determined Student's unique needs on May 9, 2007. Ms. Mann did not meet Student until the fall of 2007 after Student began attending Bayhill. However, even if the IEP team had the information provided by Ms. Mann, the evidence establishes that the IEP team's determination regarding Student's reading comprehension would not have been different for a number of reasons. For example, Ms. Mann has done no formal assessments of Student in areas of need and had no idea how Student would perform on normed tests in areas of need. Ms. Mann conceded that she has not received training as a reading teacher, and she has not been trained to assess reading skills. Ms. Mann was not aware that Student had passed the high school exit exam or that she placed near the top of the proficient range in English/language arts during the spring 2005 administration of the STAR. In addition, Ms. Mann had not seen the psychoeducational report or the resource specialist report prepared by District in 2006, or Dr. Kusters' neuropsychological evaluation prepared in January 2007. While Ms. Mann testified that she had reviewed Student's file and testing results, and that she had reviewed Mr. Weger's assessment report, when shown Mr. Weger's report, she did not recognize it. In addition, Ms. Mann conceded that providing services on a private basis is different from a school providing services, and she provided services to Student based on parent referral. For these reasons, Ms. Mann's testimony is not persuasive in establishing that Student had unique needs in the area of reading comprehension on May 9, 2007.

Writing

69. Dr. Kusters determined that Student had a disability in the area of writing because Student would not use complex sentences and wrote as though she were five to seven years younger. According to Dr. Kusters, Student needed help with organizing her ideas on paper. Dr. Kusters based her opinion in part on a report from Student's tutor, Ms. Kathy Federman, who indicated to Dr. Kusters that Student had good ideas but had difficulty expressing them in writing.

70. However, Dr. Kusters' testimony was of limited weight, and it was not persuasive for purposes of establishing that Student had a unique needs in the area of writing. Ms. Saca had thoroughly assessed Student in the area of writing in November 2006. She administered WIAT-II to assess Student's writing, and Student received a standard score of 105 for Writing, which placed her in the 63rd percentile, which was approximately a year ahead of Student's grade level. The Writing subtest of the WIAT-II contains five sections, three of which were administered to Student. Student scored in the average range on all. The Word Fluency subtest requires the student to write as many words as the student can spontaneously generate in one minute based on a prompt. Student was able to generate nine words. The Sentence Combination subtest requires the student to combine two separate sentences into one complete sentence, to combine three to four sentences into a complete sentence, and to write a complete sentence based on a picture, using correct spelling, punctuation, and structure. On the Essay Writing subtest, the student is asked to write more extended thoughts on a given topic as a "letter to the editor" within 15 minutes. Student wrote a five-paragraph letter that followed the guidelines given and appeared to be well organized. In addition, Ms. Saca took a written language sample from Student's tenth grade English class because writing was an area of concern for Student's parents. Student's

writing sample showed that she had the ability to organize her thoughts, and that she was an enthusiastic writer with good ideas. Although Student had structural flaws in her writing, her scores were all within the average range. As determined in Factual Findings 44 and 45, Student's teachers established that she performed in the average range in writing, and did not have unique needs in that area. As determined in Factual Findings 27 and 32, Student fell behind because of absences and failing to complete work.

71. As determined in Factual Findings 66 and 70, at the time of the IEP meeting, on May 9, 2007, the evidence established that Student's writing skills were in the average range, as was her full scale IQ, as determined in Factual Finding 65. District established through credible evidence that Student did not have unique educational needs in the area of writing.

72. Although Ms. Mann also testified that Student had unique needs in the area of writing, her testimony was not persuasive. Specifically, Ms. Mann testified that she worked with Student on writing, that written organization is a problem for Student, that Student struggled to organize thoughts into paragraphs and wrote as if she were talking, jumping from one idea to another, and that Student used very simple sentences, very few complex sentences, very few transitions, very basic vocabulary, and very little elaboration in her writing. According to Ms. Mann, Student has basic, fundamental writing skills, but she cannot write at the eleventh grade level. However, as determined in Factual Finding 68, Ms. Mann's testimony is not persuasive in establishing that Student had unique needs in the area of writing on May 9, 2007, in light of District's credible assessment results and credible witness testimony to the contrary.

Speech and language

73. Student contends that she has unique needs in the area of speech and language based on Dr. Kusters' and Ms. Jakubowitz's evaluation of Student, and on Ms. Mann's testimony. Both Ms. Jakubowitz and Dr. Kusters identified speech and language needs, and these reports were provided to District on March 28, 2008. However, the findings of Dr. Kusters and Ms. Jakubowitz that Student had speech and language needs was not persuasive for several reasons.

74. Specifically, Student contends, based on the testimony of Dr. Kusters, Ms. Jakubowitz, and Ms. Mann, that Student had unique needs in the area of complex language issues and higher order language issues. According to Ms. Jakubowitz, and based on her administration of the OWLS, Student did not use complex sentence structures, her answers were simplistic, and she was not at the level of high school students. However, Ms. Jakubowitz conceded that the test instructions for the OWLS prohibited Ms. Jakubowitz from encouraging Student to use more complex sentence structure in her answers. Ms. Jakubowitz did not follow up with any further testing to determine if Student's sentence structure was simplistic. In addition, Student received an average score on the OWLS, an age-normed test, and Ms. Jakubowitz acknowledged that her opinion that Student had a unique need in the area of using complex sentences was not reflected in standardized test

scores. Moreover, Ms. Jakubowitz testified that she usually does not make decisions based on assessment alone, and that although there should be confirmation through portfolio analysis or a formal language sample, Ms. Jakubowitz reviewed neither in Student's case. Regarding Dr. Kusters' opinion, Dr. Kusters testified that she believed that Student had "subtle signs" of higher order language issues. However, Mr. Weger testified credibly that Dr. Kusters' testing did not show higher order language issues, and that Dr. Kusters was inferring a problem beyond what the empirical evidence showed. In addition, as determined in Factual Finding 68, Ms. Mann's testimony is not persuasive in establishing that Student had unique needs in the area of speech and language on May 9, 2007, in light of District's credible assessment results and credible witness testimony to the contrary.

75. Conversely, Mr. Weger established through his testimony that he administered speech and language assessments to Student as part of District's assessment, and that Student did not have unique needs in the area of speech and language. Mr. Weger's general findings were that Student was in the average range in all areas tested, with the exception of expressive vocabulary, which was in the ninth percentile and in the below average range. Student scored significantly higher than that in the rest of the areas tested, including receptive vocabulary, in which she scored at the 55th percentile. Although Student was in the low average range on some subtests administered by Mr. Weger, such as on the Grammaticality Judge, Pragmatic Judgment, Idiomatic Language, and Ambiguous Sentences subtests of the Comprehensive Assessment of Spoken Language (CASL), these scores were all within the overall average range. After testing Student, Mr. Weger determined, based on his testing and on Mr. Newton's testing, based on how Student was doing in general education, and based on whether she was accessing the curriculum, that Student did not need speech and language services. This determination was credible. In addition, Student's three tenth grade teachers who testified established that they did not have unique needs in the area of speech and language, or that Student needed special education services in that area.

Word finding

76. Student contends that she has unique needs in the area of word finding based on Dr. Kusters' and Ms. Jakubowitz's evaluation of Student and testimony, and on Ms. Mann's testimony. Both Ms. Jakubowitz and Dr. Kusters identified word finding needs, and their reports were provided to District on March 28, 2008. Ms. Mann, who began seeing Student in September 2007, testified that Student had word finding needs. Ms. Jakubowitz and Dr. Kusters established that a word finding deficit means that the student cannot access words he or she wants or needs to use, which will hinder the Student's progress in speaking and in writing. However, the findings of Ms. Jakubowitz and Dr. Kusters and the testimony of Ms. Mann that Student had word finding needs was not persuasive for several reasons. For example, Ms. Jakubowitz administered the Oral and Written Language Scales (OWLS), which contains three subtests in the area of word finding, because she suspected that Student had a word finding problem. Student's scores on the OWLS were within grade level expectations. Ms. Jakubowitz still suspected that Student had a word finding problem and, therefore, she administered the Test of Word Finding-2 (TWF). Student's performance on the TWF, according to Ms. Jakubowitz, showed that Student had difficulty coming up with

words, such as the name of a holiday, and that Student was functioning at the fifth or sixth grade level in word finding skills. However, Mr. Weger established, and Ms. Jakobowitz conceded, that the TWF was normed for much younger students than Student. Therefore, the results were not valid. While Ms. Jakobowicz could have administered the same test for adolescents, she did not. Ms. Jakobowitz conceded that her opinion that Student had a word finding problem was based on her clinical judgment, and not on standardized test scores. Mr. Weger and Ms. Heilbronner established that there were no empirical data on which Ms. Jakobowitz could support her conclusion regarding a word finding problem.

77. Dr. Kusters testified that the results from the Test of Adolescent and Adult Language – Third Edition (TOAL-3) indicate that Student is struggling in grammar and vocabulary, that her testing indicated word finding difficulties, and that Student demonstrated word finding problems throughout testing. For example, Student could not access the word “evolution,” among other words, when she wanted to. However, Dr. Kusters’ testimony is of limited weight because Dr. Kusters conceded that her conclusions were not based on scores that fell outside the average range. Rather, they were based on inferences which were based on a qualitative analysis of Student’s scores. In addition, Dr. Kusters did not speak with any of Student’s teachers, did not visit Student’s school to observe Student, and did not see Student’s cumulative folder. She obtained her anecdotal information regarding Student’s difficulty accessing vocabulary from Student’s tutor, Ms. Federman. The evidence showed that Student worked with a number of tutors, and worked with Ms. Federman only in September and October 2006.

78. Although Ms. Mann testified that Student has difficulties in word finding, using descriptive language, forming complex sentences, and word retrieval, the IEP team did not have this information on May 9, 2007, and, as determined in Factual Finding 68, Ms. Mann’s testimony was not persuasive in establishing that Student had unique needs in speech and language and word finding on May 9, 2007.

79. Conversely, District evidence established that Student does not have unique needs in the area of word finding. Mr. Weger, during his assessment, was initially concerned about the difference between the scores that Student received in expressive and receptive vocabulary, as determined in Factual Finding 75. For that reason, Mr. Weger administered supplementary subtests in antonyms and sentence completion to further assess Student in the area of expressive vocabulary. The sentence completion test also correlates with word finding because on that test the student is required to spontaneously generate language, and is not given choices. In other words, it is not a multiple choice test. The results from that test indicated that Student’s word finding ability is in the average range. This subtest was nationally normed for Student’s age group and is reliable. The antonyms and sentence completion subtests also tested expressive vocabulary, and Student scored in the average range on both and, therefore, Mr. Weger determined that expressive vocabulary was not an area of weakness that he first thought it would be. Also, Mr. Newton testified credibly that Student achieved a standard score of 11 on the vocabulary subtest of the WISC-IV, which is the highest score within the average range. After testing Student, Mr. Weger determined, based on his testing and on Mr. Newton’s testing, based on how Student was doing in general

education, and based on whether she was accessing the curriculum, that Student did not need speech and language services in any area, including word finding. This determination was credible. In addition, Student's three tenth grade teachers who testified established that Student did not have a unique need in the area of word finding, or that Student needed special education services in that area.

80. Based on the foregoing, the evidence established that, at the time of the May 9, 2007, IEP team meeting, Student's word finding skills were in the average range, as was her IQ, as determined in Factual Finding 65. District established through credible evidence that Student did not have unique educational needs in the area of word finding.

Annual goals

81. State and federal law require that an IEP include measurable academic and functional goals designed to meet all of the child's unique needs that result from his or her disability so that the child may progress in the general curriculum.

82. Student's May 9, 2007, IEP contains a goal relating to organization. However, Student contends that she also needed goals to meet her unique needs in the areas of reading comprehension, writing, speech and language, and word finding, and that District's failure to provide those denied her a FAPE.

83. As determined in Factual Findings 62 to 80, Student did not have unique needs in the areas of reading comprehension, writing, speech and language, or word finding. Therefore, Student did not need IEP goals in those areas.

Individual transition plan

84. State and federal law require that beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must include a statement of transition services to be provided to the student. The statement must contain appropriate postsecondary goals that are based upon age appropriate transition assessments. The goals should relate to training, education, employment, and, where appropriate, independent living skills for a student after high school. The statement of transition services assumes greater importance as a student nears graduation and post-secondary life.

85. Student contends that the District did not provide an ITP as part of her May 9, 2007, IEP, and the failure to do so deprived her of FAPE.

86. It is undisputed that Student was 16 years of age at the time of the May 9, 2007, IEP meeting. While the necessity of an ITP was discussed at that IEP team meeting, Ms. Saca stated at the meeting the ITP could not be completed that day because Student was not at the meeting. Mr. Tom Anderson, the special education coordinator, said at the IEP meeting that the ITP could be developed by Student and the resource teacher after the IEP

was signed. Student's parents signed the IEP that day. It is undisputed that resource specialist Ms. Nicole Messian was given Student's file, and that it was her responsibility to complete the ITP with Student after the IEP team meeting.

87. However, the ITP was never completed. Ms. Messian began providing resource services to Student on May 14, 2007, in her resource class. Student attended Ms. Messian's resource class 15 days, and school ended June 6, 2007. Ms. Messian spent a lot of time with Student in the resource class—usually about half of the class period. In addition, Ms. Messian gave Student extra time during lunch and also during third and fourth periods on occasion. Ms. Messian testified persuasively that it took only minutes to gather from a Student the information necessary to complete an ITP and to complete the ITP, yet Ms. Messian did not collect the information from Student. Her reason for not doing so was that she considered other things, such as Student catching up on her work in English and science, to be a priority, so Ms. Messian made the choice to work on those things and not on an ITP. Ms. Messian testified that she thought the ITP could be completed the following year. Ms. Messian did not complete the ITP or give the ITP questionnaire to Student or her parents over the summer, and Ms. Messian forgot about the ITP in the fall of 2007 because Student did not return to Monte Vista in the fall. Ms. Messian did not attempt to develop an ITP until December 2007, several months after Student began attending Bayhill and a month after Student filed her first amended due process complaint alleging District's failure to provide an ITP. On December 3, 2007, Messian sent to Student's parents notice of an IEP meeting, to be held on December 13, 2007, to complete the ITP. Ms. Messian included a copy of her ITP questionnaire. Parents did not respond and did not attend the meeting. Mother testified that Student began attending Bayhill in September 2007, so Mother did not respond.

88. District's failure to complete an ITP for Student was error because the evidence demonstrates that Student lost educational benefit as the result of the failure to complete the ITP. It was undisputed that Student wanted to go to college after high school. Ms. Messian, Mr. Newton, and Mother all testified credibly that Student wanted to go to college after high school. While Mr. Newton could not recall if Student wanted to go to a community college or a university, Mother established that Student wanted to go to a university. At the time of Mr. Newton's assessment in November 2006, Student was on track to earn a high school diploma and complete the courses she needed to meet the admission requirements of universities. By the end of her sophomore year in June 2006, however, Student was no longer on track to graduate from high school or be admitted to a four-year college, because she had failed one semester of biology and one semester of English during tenth grade. The District members of the IEP team who met on May 9, 2007, and Ms. Messian were aware that Student was failing classes she would need to graduate from high school. In addition, Ms. Messian and Mr. Newton were aware that for Student to get into a university, she needed at least C grades in all of her core classes.

89. Ms. Messian testified persuasively that other schools within District offered college preparatory science classes that Student could have taken pursuant to an ITP to improve her biology grade, and Monte Vista offered college preparatory English during the summer that Student could have taken since she failed to complete college preparatory

English. However, Ms. Messian did not talk with Student about taking those classes during the summer. Because there was no ITP, there was no offer of any assistance that District might give to Student to achieve her goal of attending college, and no outline of what Student needed to do to prepare herself to be admitted to a four-year college.

90. Because of Student's ADHD and organizational difficulties, she needed assistance in preparing herself to graduate from high school and meet her post-secondary goals. Student had only two school years until graduation at the time of the May 9, 2007, IEP team meeting. Student's disability and history of inability to organize should have been indicators to the District that Student needed specific guidance in how to make up core classes she had failed and those in which she had not achieved at least "C" grades. She also needed specific guidance on how to locate information regarding colleges and their admission requirements, how to determine what she would need in order to qualify for admission to specific schools, and how to complete the various college application processes. However, Student was left without any assistance from District in these areas, and she was not told what classes she would need to make up over the summer to meet her goals.

91. Based on the foregoing, the failure to complete an ITP resulted in a loss of educational benefit and corresponding denial of FAPE to Student.

Placement and services

92. A school district is required to provide placement, instruction, and related services that are designed to meet the Student's unique needs and are reasonably calculated to provide the student some educational benefit. A school district is required to provide related services if a student's unique needs related to his disability require such services for the student to obtain educational benefit. Related services consist of transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. An IEP must include annual goals designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child's other education needs that result from his or her disability. However, a special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

93. District's May 9, 2007, IEP offer provided Student one period of resource services per day to work on the areas of relating to organization, test-taking, note taking, and study skills. Student contends she was denied FAPE because she also required a small class size; remediation in the areas of reading comprehension, writing, speech and language, and word finding; counseling and speech services; and computer programs to accommodate her reading and writing deficits.

Class size

94. Student contends, based on Dr. Kusters' recommendation, that she should have been offered a small class size with routine and structure and visual supports to help prevent her from becoming overwhelmed.

95. However, Student did not establish that she required a small class size. There were approximately 20 students in her freshman English class. Mr. Nelson, Student's teacher, observed Student in class and determined she was following instructions and attending to the speaker. Mr. Nelson was not concerned that Student could not learn in a group of 20 students. There were 35 students in Student's tenth grade history class and Student was able to keep up with the work, work independently, and pass the class.

96. Based on the foregoing, Student did need a small class size in order to receive educational benefit.

Remediation program in the areas of reading comprehension, writing, speech and language, and word finding

97. Student contends she needs a summer remediation program, such as that provided by Lindamood Bell, to address the reading comprehension, writing, speech and language, and word finding needs identified by Dr. Kusters and Ms. Jakubowitz.

98. However, as determined in Factual Findings 62 to 80, Student did not have unique needs in the areas of reading comprehension, writing, speech and language, or word finding. In addition, District's assessments and the testimony of Mr. Newton, Mr. Weger, and Ms. Saca established that Student did not need remediation in these areas because she was performing at grade level which was commensurate with her full scale IQ, which was in the average range. Moreover, Student had passed the high school exit exam as a tenth grader and earned STAR scores in both the ninth grade that were basic or above. Additionally, Mr. Weger worked for Lindamood Bell as a clinician for four to five years during college and graduate school. He was trained to implement the Lindamood Bell programs and, as a mentor, was qualified to train other people to teach the Lindamood Bell program. In his opinion, Lindamood Bell is not an appropriate program for Student because she is in the average range in all areas tested, and the children served at Lindamood Bell were well below, or significantly below, the average range with significant areas of need that Student did not have.

99. Based on the foregoing, Student did not need a remediation program in the areas including reading comprehension, writing, speech and language, or word finding because she did not have unique needs in those areas.

Related services

100. Student contends she was denied FAPE because District did not offer counseling and speech and language services to Student as part of its May 9, 2007, IEP offer.

Counseling services

101. Student contends that she needed counseling services due to her depression.

102. However, as determined in Factual Finding 27, Student's teachers from the tenth grade testified persuasively that Student showed no signs of depression at school. In addition, on May 2, 2007, after it received Dr. Kusters' report, District requested consent to assess Student in the area of social/emotional functioning, and repeated this request at the May 9, 2007, IEP team meeting. Student's parents were not willing to consent unless it was necessary to do more testing, but they did consent to permit Mr. Newton to talk to Dr. Kusters and Dr. Young. Mr. Newton spoke with both Dr. Kusters and Dr. Young, and determined that counseling was not necessary at that time. However, Mr. Newton stated in his supplemental report of May 2007 that he should be notified if Student began to exhibit a need for counseling services provided through the school. He never received notice that she needed any services. Moreover, no one suggested a counseling goal or services at the May 9, 2007, IEP meeting. Student did not have a need for counseling services in order to assist her to benefit from special education.

Speech services

103. Student contends she required speech services for her word finding deficiencies, higher order language issues, and complex language deficits.

104. However, as determined in Factual Findings 73 to 80, Student did not have needs in these areas or in any area of speech and language, and she did not require speech services in order to assist her to benefit from special education.

Assistive technology (computer programs)

105. In addition, a school district must provide any assistive technology (AT) device that is required to assist the child to benefit from special education. An AT device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability.

106. Dr. Kusters recommended that Student be given the use of the "Inspiration" program to address her reading and writing needs. However, as determined in Factual Findings 64 to 72, Student did not have unique needs in the area of reading comprehension or writing, and she did not require AT in order to assist her to benefit from special education.

Remedies

107. When a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is appropriate in light of the purposes of the IDEA.

Reimbursement for Bayhill

108. A school district may be required to reimburse a parent for the costs of a private school if the child previously received special education services from the district and the district failed to make a FAPE available to the child. Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Reimbursement for the cost of a private school may be reduced or denied if the parents did not, prior to removing the child from the public school, provide notice that rejects the proposed placement, states their concerns, and expresses the intent to enroll the student in a private school. Equitable considerations, such as the conduct of both parties, may be evaluated when determining what, if any, relief is appropriate. Several factors may be considered when determining the amount of reimbursement to be ordered: the effort the parents expended in securing alternative placements; the availability of other more suitable placements; and the cooperative or uncooperative position of the school district.

109. On August 2, 2007, Student's parents, through their attorney, gave District 10-day notice of their intent to place Student in Bayhill at public expense.

110. The evidence established District's failure to provide an ITP to Student denied her a FAPE, and deprived her of educational benefit, as determined in Factual Findings 84 to 91.

111. Regarding equitable considerations in this matter, the evidence establishes that Student's parents worked in good faith with District to obtain for their daughter the help that they thought she needed. When Student finally qualified for services on May 9, 2007, District failed to provide an ITP. No one from District discussed with Student the need to make up the classes she had failed, or how she might go about doing that during the summer. Student's parents believed that no matter what they did for Student at Monte Vista, she would fail. This belief was reinforced when Mother drove to Monte Vista to turn in the English work that Student had completed in Ms. Messian's resource class, and the English teacher said it was too late. Student failed that class. In addition, as determined in Factual Findings 25 to 29, the evidence established that by the latter part of her tenth grade year, Student had become depressed, and Mother testified persuasively that "there was no more time to lose."

112. Mother started looking at private schools in the summer, and Bayhill was the closest one they could find and the only one they could find that they and their experts

believed was appropriate for Student. Student's parents waited until the last minute to pay for Bayhill because they were hoping to work things out with District, and that Student could remain at Monte Vista, a public school. On August 17, 2007, Students' parents and attorney met with District to discuss an educational placement. District made the same offer that was made on May 9, 2007. No ITP was offered or discussed at that meeting. Mother never heard anything from District about an IEP including an ITP until Mother received District's letter of December 3, 2007, notifying her of an IEP meeting to be held on December 13, 2007, to complete the transition plan. Had District presented them with an ITP that met legal requirements, including a plan for achieving post-secondary goals, District's offer would have constituted a FAPE. As determined in Factual Finding 88, Student was at risk of not meeting her post-secondary goal of going to a university if she stayed at Monte Vista. Student's parents were concerned that Student would not graduate from high school or go to a university or any other college if she stayed at Monte Vista. Based on the foregoing, Student's parents' actions of placing student in a private school were reasonable under the circumstances.

113. Evaluation of the equitable considerations in this matter weighs in favor of granting some amount of reimbursement. However, reimbursement may not be granted unless Bayhill met Student's needs and provided her with educational benefit. Ms. Rachel Wylde, the director of Bayhill, established through her testimony that Bayhill is meeting Student's needs and providing Student with educational benefit. Bayhill's program is successfully addressing Student's organizational difficulties that previously resulted in failing or poor grades. Bayhill provides reinforcement of organizational skills, study skills, and notetaking. Moreover, Ms. Wylde established that one of the goals at Bayhill is to provide access to college preparatory curriculum, and prepare students for college or the work world. Student is receiving credit for college preparatory courses, including physics, history, geometry, science, and Spanish II, at Bayhill, and is receiving A and B grades in those classes. Bayhill is fully accredited by the Western Association of Schools and Colleges. The WASC accreditation allows colleges and universities to recognize Bayhill courses. Student receives educational benefit at Bayhill, the school has met her needs, and she is back on track to graduate from high school and to complete college preparatory courses. In addition, Bayhill has provided Student with an ITP.

114. District contends that Bayhill was inappropriate because Student is reading fifth-grade level novels at Bayhill. However, this fact does not establish that Student's education at Bayhill fails to provide her with educational benefit. As determined in Factual Finding 37, Ms. Saca recognized in her November 2006 assessment of Student that Student may need help in that area in the future. At Bayhill, Student is learning to use graphic organizers and other strategies to help her better understand novels.

115. As stated in Factual Finding 108, the award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. District should have supplied an ITP in May 2007, which would have been Student's plan for passing classes, and making up classes that she had failed, so she could achieve her postsecondary goal of

attending a four-year college. District offered to provide an ITP in December 2007. Thus, beginning in mid-December 2007, District was prepared to provide a plan that offered FAPE. Student's parents received District's notice of the December 13, 2007, IEP meeting, but they did not respond and they did not attend the IEP meeting because Student had been attending Bayhill for four months at that time. Student's parents' failure to attend the IEP meeting and participate in developing an ITP for Student weighs against them in terms of equities. Weighing all of the evidence, in light of District's failure to offer Student a FAPE for the 2007-2008 school year, the evidence supports granting parent's request for reimbursement of their expenses at Bayhill for the first semester of the 2007-2008 school year, which was nearly over when District scheduled the December 13, 2007, IEP team meeting. Father testified credibly that base tuition at Bayhill is \$21,000 per year, and he has paid that in full. Therefore, Student's parents are entitled to reimbursement in the amount of \$10,500.

Reimbursement for mileage

116. Father testified credibly that Bayhill is a 180-mile round trip from parents' home, and that Mother drove Student each day. Father travels approximately 50 percent of the time for his job, and is not involved in the day-to-day matters involving Student, and there was no testimony as to how many trips Mother made each day. Therefore, Student's parents are entitled to reimbursement for one round trip from home to Bayhill each day Student attended in the first semester of the 2007-2008 school year at the rate of \$.485 per mile, which was the Internal Revenue Service rate of reimbursement for mileage in 2007.⁵

Reimbursement for independent educational evaluations

Dr. Kusters' and Ms. Jakubowitz's reports

117. Student is entitled to reimbursement for Dr. Kusters' and Ms. Jakubowicz's, reports, as determined in Factual Findings 48 to 56. Student notified District of her disagreement with the fall 2006 assessments, and District did not file a request for due process to establish at a hearing that its assessments were appropriate. In addition, as determined in Factual Finding 55, Student established that these assessors are qualified examiners who are not employed by the public agency responsible for the education of the child in question.

118. Father established by his testimony and receipts that Dr. Kusters' report cost \$3,000 and Ms. Jakubowitz's report cost \$500, and Student's parents are entitled to reimbursement in those amounts.

⁵ Although the PHC order does not include reimbursement for mileage as a requested remedy, the ALJ has authority to award equitable remedies, and Student established that she is entitled to reimbursement for mileage.

Ms. Loomos's and Dr. Young's reports

119. Student is not entitled to reimbursement for Ms. Loomos's or Dr. Young's report because, as determined in Factual Finding 55, Student did not establish that they were qualified examiners who were not employed by the public agency responsible for the education of the child in question. In addition, Student did not establish that Dr. Young assessed Student for educational purposes, rather than medical purposes.

Preparation of an ITP

120. As determined in Factual Findings 84 to 91, District denied Student FAPE by failing to provide an ITP as part her May 9, 2007 IEP. Student is entitled to an ITP, and District shall convene an IEP meeting to prepare one. The ITP shall include appropriate postsecondary goals and services.

Annual goals

121. As discussed in Factual Findings 81 to 83, Student has not established that she needed reading or writing goals, or goals in the area of speech and language or word finding.

Speech and language therapy services and reimbursement

122. Parents request reimbursement for speech and language services provided by Ms. Mann while Student has been attending Bayhill, and ongoing speech and language services. As discussed in Factual Findings 103 and 104, Student has not established that she has unique needs in the area of speech and language.

Assistive technology (computer programs)

123. As discussed in Factual Findings 64 to 72, Student has not established that she had unique needs in the area of reading comprehension or writing, or that she requires assistive technology and, specifically, a computer program, such as Inspiration, to accommodate any needs in reading or writing.

Compensatory education

124. Compensatory education is an equitable remedy. Student requests compensatory educational services for her denial of FAPE. As determined in Factual Findings 5 to 47, Student was not eligible for special education until May 9, 2007. The IEP offer of that date denied Student FAPE in that it did not include an ITP. However, Student has attended Bayhill School, selected by her parents, since August 2007. She is making progress and doing well in that school. Student did not establish that she would require any compensatory education, over and above the assistance she would receive in resource services, when she returns to Monte Vista in order to achieve passing grades in her classes. To the contrary, District established that Student's needs may be met with resource services

to address with goals relating to organization, test taking, note taking, and study skills. Ms. Messian testified credibly that she began working with Student in resource class on her goals on May 15, 2007. She printed a calendar for Student and wrote what needed to be done and by when, and she wrote a contract for Student's English and biology classes as to what she needed to do to complete those classes and by when. Ms. Messian put a check mark by items as they were completed. Student completed her work while she was with Ms. Messian, and she was very focused and did the work on her own. Ms. Messian established that one period per day of resource services was sufficient for Student, and there was no indication that she needed another period of resource services for any purpose. Ms. Messian testified credibly that if Student does need help in the future in any area, that help can be provided at Monte Vista.⁶

Reimbursement for private tutoring

125. Student received private tutoring and counseling for a number of years, and requests reimbursement. As determined in Factual Findings 5 to 47 and 59 to 61, Student was not eligible for special education until May 9, 2007. Student is, therefore, not eligible for reimbursement for private tutoring obtained prior to May 9, 2007. District denied Student a FAPE from May 9, 2007, through the time scheduled for the IEP meeting, on December 13, 2007, during which IEP meeting Student's ITP was to be drafted. However, Student did not lose educational opportunity between May 9, 2007, and the end of the 2007-2007 school year—particularly since Student was kept very busy by Ms. Messian making up missed assignments during these last few weeks of school and was receiving resource services daily. A tutor would not have been with Student at school to ensure that Student turned in her English homework. Thus, tutoring would not have, and did not, prevent Student from receiving an F grade in English for failing to turn in her completed work before the semester ended. Once Student started attending Bayhill, she received private tutoring from Ms. Mann and private counseling from Mr. Peter Rose. However, Student did not demonstrate that she had unique needs in the area of speech and language, reading comprehension, writing, or social/emotional functioning, or that she could not have passed her classes at Bayhill without Ms. Mann's tutoring services or Mr. Rose's counseling. In addition, Student has not demonstrated that she had unique needs in the areas of speech and language or a need for counseling and, therefore, reimbursement for speech and language and counseling services is not awarded.

Prospective placement at Bayhill or another private school

126. Student contends she requires prospective placement at Bayhill or another private school. However, the evidence establishes that Student is an outgoing, friendly girl with many friends who is quite capable of succeeding at Monte Vista with resource help, as

⁶ Although Student failed English during the second semester of tenth grade because she failed to turn in the work she completed, this does not establish that Monte Vista is unable to provide a FAPE in the future. The evidence establishes that District could provide help in the areas in which Student needed it, such as finding ways to ensure that Student's work is turned in.

determined in Factual Finding 124. Student does not need placement at a private school. Even though the ALJ has the authority to award prospective placement through the remainder of the 2007-2008 school year, the evidence does not support such an award. Weighing all considerations and carefully considering the legal mandate for placement in the least restrictive environment, the evidence shows that Student can receive educational benefit at Monte Vista while attending school in a general education environment with the support of resource services.

Reimbursement for postage and copying

127. Student contends she is entitled to reimbursement for postage and copying. However, Student failed to establish that these were necessary expenses, and what they were for.

Reimbursement for Dr. Kusters' and Ms. Jakubowitz's attendance at IEP meeting

128. Student contends she is entitled to reimbursement of \$700 for Dr. Kusters' attendance at the May 9, 2007, IEP team meeting, and reimbursement of \$50 for Ms. Jakubowitz's attendance at the meeting by telephone. Reimbursement for these costs would be an equitable remedy, and Student did not establish that the hourly rate of either Dr. Kusters or Ms. Jakubowitz, or that their attendance was required at the meeting. The report of Dr. Kusters was very thorough and easily interpreted by Mr. Newton. Her availability by telephone, if necessary, would have been sufficient. Therefore, her attendance at the meeting was not necessary. Ms. Jakubowitz's presence at the meeting by telephone was not necessary and made no difference in the outcome of the meeting.

LEGAL CONCLUSIONS

Applicable Law

1. Student filed the complaint in this matter and bears the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under both California law and the Individuals with Disabilities Education Act (IDEA), a child is eligible for special education if the child needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C. § 1401(3)(A)(i) and (ii); Cal.Code Regs., tit. 5, § 3030; Ed. Code, § 56026, subs. (a) & (b).) Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), children with disabilities have the right to a free appropriate public education (FAPE) that emphasizes special education and related services, at no cost to parent, designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.)

3. FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9).) “Special education” is specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) Similarly, California law defines special education as specially designed 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.)

4. The IDEA requires that an eligible student receive related services, such as transportation and developmental, corrective, and other supportive services, “as may be required to assist a child with a disability to benefit from special education.” (20 U.S.C. § 1401(a)(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).)

5. The term “unique educational needs” is to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, federal law requires that a special education student be educated with nondisabled peers to “the maximum extent appropriate,” and the student may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a);⁷ Ed. Code, § 56031.)

6. There are two parts to the legal analysis of whether a school district has complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable to child to receive educational benefit. (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*)). However, the IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (20 U.S.C. § 1412(f)(3)(E)(i); Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore requires a remedy only where the procedural violation impeded the child’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892 [hereafter *Amanda J.*].)

⁷ The federal regulations within title 34 Code of Federal Regulations part 300, were amended effective October 13, 2006. The federal regulations cited herein do not substantively differ from their predecessor, although the new federal regulations are numbered differently than the old federal regulations. The citations herein are to the new regulations.

Did District fail to meet its “child find” obligation to identify, locate, and assess Student in areas of suspected disability, including depression, attention deficit/hyperactivity disorder (ADHD), speech and language, reading comprehension, and writing, during the 2005-2006 and 2006-2007 school years?

7. The IDEA and state law impose upon each school district the duty, under child find, to actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(ii); Ed. Code, §§ 56300, 56301.) This obligation is known as “child find”, and is expressly provided for in the IDEA at Title 20 United States Code section 1412(a)(3)(A). The child find obligation applies also to children who are suspected of being a child with a disability and in need of special education even though they may be advancing from grade level to grade level. (34 C.F.R. § 300.111(c)(1).) “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III Sch. Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

8. A district’s child find obligation toward a specific student is triggered when there is reason to suspect a disability and that special education services may be needed to address that disability, and the district’s obligation is not dependent on any request by the parent for special education testing or referral for services. (*Dep’t of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The appropriate inquiry for the district is whether the child should be referred for an evaluation, and not whether the child actually qualifies for services. (*Id.* at p. 1195.) Neither the statutes nor the regulations establish a deadline by which time children who are suspected of having a qualifying disability must be identified and evaluated.

9. Once a child is identified as a child with a disability, “child find” provisions are no longer applicable: “Nothing in this title requires that children be classified by their disability so long as each child who has a disability [. . .] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.” (20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. § 300.111(d).)

10. District did not violate its child find obligation to Student during the 2005-2006 school year. As determined in Factual Findings 5 to 18, the evidence did not establish District had a reason to suspect that Student had a disability or that she may have needed special education services. During Student’s ninth grade year, she passed all of her classes, and her teachers established that she was happy and sociable and capable of doing the work at grade level. Her teachers did not suspect a disability. Although the evidence established that Student had fluctuating academic performance, Student’s teachers established that those fluctuations are common among high school student and that Student, in particular, was very well-liked and sociable and not as concerned about schoolwork and grades. Therefore, as determined in Factual Findings 5 to 18, District did not have reason to suspect that Student had a disability, or that she may have needed special education services during the 2005-2006 school year.

11. In Student's tenth grade year, the 2006-2007 school year, as determined in Factual Finding 19, District assessed Student in all areas of suspected disability in October and November 2006. Thus, District met its child finding obligation at that time. Based on the determinations in Factual Findings 5 through 47, the evidence did not establish that District had reason to suspect that Student had a disability or that she may have needed special education services in any of the above areas until District received Dr. Kusters' report on March 28, 2007. Just over a month after receiving that report, District requested consent to assess Student, and Student's parents declined. This constitutes a referral for assessment. District convened an IEP team meeting on May 9, 2007. A delay of five weeks in requesting consent to assess Student and convening an IEP meeting was not unreasonable under the circumstances, because Student's teachers still did not suspect a disability. Thus, District did not fail to meet its child find obligation.

Are Student's parents entitled to reimbursement for independent educational evaluations (IEE) obtained between January and March 2007?

12. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) An IEE means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(1).) Federal law requires that when a parent requests an IEE at public expense, the school district must "without unnecessary delay" either file a request for a hearing to show that its evaluation is appropriate, or provide an IEE at public expense. (34 C.F.R. § 300.502(b)(2).) If a parent requests an IEE, the school district may ask for the parent's reason why he or she objects to the district's assessment. However, the district may not require the parent to provide an explanation. (34 C.F.R. § 300.502(b)(4).) A school district may not impose conditions or timelines relating to an independent educational evaluation at public expense that are not otherwise authorized by law. (34 C.F.R. § 300.502(e)(2).)

13. Based on Factual Findings 48 to 56, Student's parents requested that District provide an IEE at public expense on November 29, 2006. District failed to either provide the requested IEE or request a due process hearing to show that its assessments were appropriate. Student's parents objected to District's assessments, including its psychoeducational assessment and its speech and language assessment, and obtained a psychoeducational evaluation from Dr. Kusters and a speech and language evaluation from Ms. Jakubowitz, and established that these professionals are qualified examiners. Therefore, Student is entitled to a psychoeducational IEE and a speech and language IEE at public expense, and to reimbursement for the IEEs prepared by these Dr. Kusters and Ms. Jakubowitz. Student did not, however, establish that Ms. Demitra Loomos or Dr. Young was a qualified examiner for special education purposes, or that they were not employed by District. Neither Ms. Loomos nor Dr. Young testified at the hearing. Student did not establish that Dr. Young assessed Student in the area of educational needs, rather than medical needs, and Student did not establish the cost of Dr. Young's assessment. Therefore, reimbursement for Ms. Loomos's and Dr. Young's reports is not awarded.

Did District deny Student FAPE by failing to provide prior written notice that it was denying Student's request that District fund IEEs?

14. A school district must provide written prior notice to the parents of a child whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).) The notice shall include a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; if the notice is not an initial referral for evaluation, the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the school district's proposed or refused action. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

15. Based on Factual Findings 48 to 56, Student's parents requested that District provide IEEs at public expense on November 29, 2006. District offered evidence that it prepared prior written notice of its refusal to provide an IEE at public expense. However, Student's Mother testified credibly that she never received that notice. Even if Student's parents did not receive prior written notice, the evidence does not support finding that Student's parents they were denied an opportunity to meaningfully participate in the decision-making process, or that Student was denied educational opportunity, because within a month of making their request for IEEs, parents arranged to obtain outside assessments which were eventually considered by District and a determination was made that Student was eligible for special education.

Did District deny Student a free appropriate public education (FAPE) because Student's May 9, 2007, individualized education program (IEP) was not reasonably calculated to provide educational benefit for Student from May 9, 2007, through the end of 2006-07 school year, and for the 2007-2008 school year?

16. 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. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 [hereafter *Gregory K.*].) 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. The program proposed by the school district must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by and Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 [hereafter *Adams*].)⁸

⁸ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County*

17. For a school district's offer of special education services to constitute a FAPE under the IDEA, the district's offer of educational services and placement must be designed to address the student's unique educational needs, be reasonably calculated to provide student some educational benefit, and comport with student's IEP. (*Rowley, supra*, 458 U.S. at pp. 198-200.) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA and held that a student's IEP must be reasonably calculated to provide the student some educational benefit, but that the IDEA does not require school districts to provide the best education available or to provide instruction or services that maximize a student's abilities. (*Ibid.*)

Unique needs

18. A school district must offer a program that meets the student's unique needs and is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J., supra*, 267 F.3d at p. 890.)

19. As determined in Factual Findings 62 to 80, the evidence does not support Student's contention that she had unique needs in the areas of reading comprehension, writing, speech and language, or word finding.

Annual goals

20. An IEP must include annual goals designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child's other education needs that result from his or her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriate toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).) The IEP's goals and methods are evaluated as of the time they were developed to determine whether they were reasonably calculated to confer an educational benefit to the student. (*Adams, supra*, 195 F.3d at p. 1149.)

21. As determined in Factual Findings 81 to 83, Student does not have unique needs in the areas of reading comprehension, writing, speech and language, or word finding. Therefore, District was not required to include annual goals in Student's IEP relating to these areas.

Office of Educ. (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, District Courts within the Ninth Circuit have adopted the *Adams* analysis in evaluating IEPs. (See, e.g., *Pitchford v. Salem-Keizer Sch. Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.)

Individual transition plan

22. Beginning not later than the first IEP to be in effect when a student receiving special education reaches 16 years of age, or younger, if the IEP team deems it appropriate, an IEP must contain a transition plan that contains appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. The plan must also contain the transition services, including courses of study, needed to assist the pupil in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b); Ed. Code, §§ 56345, subd. (a)(8)(A), (B); 56345.1.)

23. As determined in Factual Findings 84 to 91, District denied Student FAPE by failing to provide an ITP for Student as part of her May 9, 2007, IEP. Student was completing her sophomore year in high school in May 2007. While she was on track to graduate from high school and go to a four-year college in November 2006 when she was assessed by Mr. Newton, she was on track for neither at the time of her May 9, 2007, IEP meeting and thereafter. Although an ITP is required under state and federal special education law, District did not attempt to provide one for Student until December 2007, which was near the end of her first semester at Bayhill. Student lost educational benefit as a result of District's failure to provide an ITP. As determined in Factual Finding 120, Student is entitled to an ITP, and District shall convene an IEP meeting to prepare one. The ITP shall include appropriate postsecondary goals and services.

Placement and services

24. A district is required to offer educational services and placement that are designed to address the student's unique educational needs, that are reasonably calculated to provide student some educational benefit, and that comport with student's IEP. (*Rowley, supra.*) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) A school district must provide any AT device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1401(1), (2); Ed. Code, § 56341.1, subd. (b)(5).) An AT device is any item, piece of equipment, or product system that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1).)

25. As determined in Factual Findings 94 to 99, Student did not have a unique need for a small class size or a remediation program in the areas of reading comprehension, writing, speech and language, or word finding. Therefore, District was not required to provide a smaller class size or a remediation program in the above areas.

26. As determined in Factual Findings 100 to 104, Student did not have a unique need for counseling and speech and language therapy. Therefore, District was not required to provide related services in these areas.

27. As determined in Factual Finding 105 to 106, Student did not have unique needs in the area of reading comprehension or writing. Therefore, District was not required to provide AT, including a computer program such as “Inspiration,” to address any of Student’s needs.

Are Student’s parents entitled to reimbursement for Student’s attendance at Bayhill during the 2007-2008 school year because District failed to offer Student FAPE, parents notified District of their intent to enroll Student in a private school placement, and Bayhill provides educational benefit?

28. In general, when a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Sch. Comm. of Burlington v. Dep’t of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385] [hereafter *Burlington*].) “The conduct of both parties must be reviewed to determine whether relief is appropriate.” (*W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra*, 960 F.2d at p. 1487.)

29. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the local school district if the parents prove at a due process hearing that: (1) the district had not made a FAPE available to the student in a timely manner prior to placement; and (2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175; see also *Burlington, supra*, 471 U.S. at p. 369.) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, and by having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].) An award for reimbursement for placement in a private school after a denial of FAPE may be reduced or denied upon a judicial finding of unreasonableness with respect to actions by the Student’s parents. (34 C.F.R. § 300.148(d)(3).)

30. Reimbursement for the costs of a private school may be reduced or denied if the parents did not give written notice to the school district ten business days before removing their child from the public school that they were rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)(1)(i); Ed. Code, § 56176.) In addition, reimbursement may be denied or reduced based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. v. Board of Educ.* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement for a unilateral private placement.”

31. Factors to be considered when determining the amount of reimbursement include the existence of other, more suitable placements, the effort expended by the parent in securing alternative placements and the general cooperative or uncooperative position of the school district. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra*, 960 F.2d at p. 1487.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (hereafter *Reid*)).

32. As determined in Factual Findings 84 to 91, District denied Student a FAPE by failing to provide an ITP. Parents’ attorney properly notified District of its intent to place Student at Bayhill. In addition, as determined in Factual Findings 108 and 114, Student has received educational benefit at Bayhill. As determined in Factual Finding 115, Student is entitled to reimbursement for the first semester at Bayhill because a reimbursement award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place, and District was prepared to offer a FAPE on December 13, 2007.

Reimbursement for mileage

33. As determined in Factual Finding 116, Student’s parents are entitled to reimbursement for transportation to Bayhill for each school day during the first semester of the 2007-2008 school year, at the rate of \$.485 per mile. The round trip mileage is determined to be 180 miles, and Student’s parents are entitled to reimbursement one round trip for each day Student attended school that semester.

Other Remedies

Compensatory education

34. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Parents of Student W. v. Puyallup School Dist. No. 3*, (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) 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 p. 1497.) 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, supra*, 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

35. As determined in Factual Finding 124, Student is not entitled to reimbursement for compensatory education. Student did not become eligible for special education until May 9, 2007. After that time, she received resource services for the

remainder of the school year, and in the fall of 2007, her parents placed her Bayhill where she is receiving educational benefit. The evidence does not establish that Student is in need of compensatory education or that Student needed tutoring while at Bayhill to benefit from her education there. Student has passed the high school exit exam. In addition, the evidence establishes that Student can receive a FAPE at Monte Vista with resource help.

Reimbursement for private tutoring

36. As determined in Factual Finding 125, Student is not entitled to reimbursement for private tutoring, including tutoring, counseling, and speech services. Student was not eligible for special education until May 9, 2007. In September 2007, she began attending Bayhill, which met her needs, and for which her parents have received an order for reimbursement for the first semester.

Prospective placement at Bayhill or another private school

37. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.) There is an obvious tension between the IDEA's requirement that a child with a disability receive a FAPE that meets the child's unique needs and the requirement that a child with a disability be educated alongside nondisabled children to the maximum extent appropriate. (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) While both are legally required, it is clear which prevails when there is a direct conflict: "[T]he Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom." (*Ibid.*, quoting *Daniel R. R. v. State Bd. of Education* (5th Cir. 1989) 874 F.2d 1036, 1045.)

38. The ALJ has the authority to prospectively place Student for the remainder of the 2007-2008 school year. As determined in Factual Finding 126, Monte Vista offers the environment and services that are reasonably calculated to meet all of Student's needs and result in meaningful academic progress for the remainder of the 2007-2008 school year, and was prepared to provide that on December 13, 2007. Weighing all of the evidence and giving careful consideration to the legal mandate for placement in the least restrictive environment, Student's placement at Monte Vista will provide a FAPE in the least restrictive environment. Therefore, Student's request for placement at Bayhill, or in another private placement, is denied.

Reimbursement for postage and copying

39. Student contends she is entitled to reimbursement for postage and copying. However, as determined in Factual Finding 127, Student failed to establish that these were necessary expenses, and what they were for.

Reimbursement for Dr. Kusters' and Ms. Jakubowitz's attendance at IEP meeting

40. Student contends she is entitled to reimbursement for Dr. Kusters' and Ms. Jakubowitz's attendance at the May 9, 2007, IEP team meeting. As determined in Factual Finding 128, Student did not establish that the hourly rate of either Dr. Kusters or Ms. Jakubowitz, or that their attendance was required at the meeting. The report of Dr. Kusters was very thorough and easily interpreted by Mr. Newton. Her availability by telephone, if necessary, would have been sufficient. Therefore, her attendance at the meeting was not necessary. Ms. Jakubowitz's presence at the meeting by telephone was not necessary and made no difference in the outcome of the meeting.

ORDER

1. Within 45 days of the date of this Decision, District shall reimburse Student for all of the following:
 - a. The cost of Dr. Kusters' January 2007 independent neuropsychological assessment in the total sum of \$3,000.
 - b. The cost of Ms. Jakubowicz's independent speech and language assessment in the total sum of \$500.
 - c. Tuition for Bayhill School for the first semester of the 2007-2008 school year in the amount of \$10,500.
 - d. One round trip from Student's home to Bayhill, for a total of 180 miles per round trip, for each school day Student attended in the first semester of the 2007-2008 school year, at the rate of \$.485 per mile. Student shall provide District with attendance records for this purpose, within 15 days of the date of this Decision.
2. Within 15 days of the date of this Decision, District shall convene an IEP meeting, to be held within 30 days of the date of this order, and shall, at that meeting, prepare an Individual Transition Plan as part of Student's IEP.
3. All other requests for remedies and reimbursement are denied.

PREVAILING PARTY

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

Student prevailed on Issues 2 in that she received an order for reimbursement for three of the four IEEs. She prevailed on Issue 3.c. In addition, Student prevailed on Issue 5 in that she received an order for reimbursement for one-half of a year's private tuition at Bayhill and mileage. District prevailed on the remaining issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 12, 2008



DEBRA R. HUSTON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division