BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT OF BEHALF OF STUDENT, v. MOUNT DIABLO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015100931

DECISION

Student's Parent filed a due process hearing request with the Office of Administrative Hearings, State of California, on October 22, 2015, naming Mt. Diablo Unified School District as the respondent. At the request of the parties, the matter was continued on November 6, 2015.

Presiding Administrative Law Judge Margaret M. Broussard, heard this matter in Oakland, California, on March 1, 2, and 3, 2016.

Natashe Washington, Attorney at Law, represented Student and was assisted by Hee Kim, Attorney at Law on all days. Mother was present for at least part of every hearing day. Lenore Silverman, Attorney at Law, represented Mt. Diablo. Dr. Wendi Aghily, Mt. Diablo's Special Education Director, represented Mt. Diablo on March 1 and 2, 2016. Bryan Cassin, Mt. Diablo's Alternative Dispute Resolution Administrator represented Mt. Diablo on March 3, 2016.

On March 3, 2016, the matter was continued to March 21, 2016, for the filing of written closing arguments. The parties filed closing arguments on that day, the record was closed, and the matter was submitted for decision.

ISSUES

Student's Issue 1: Did Mt. Diablo commit the following procedural violations, which denied Student a free appropriate public education for the 2015-2016 school year:

a. failing to make a formal, specific written offer of FAPE in the October 14, 2015 individualized education program document;

b. failing to include any goals in the October 14, 2015 IEP document;

c. only offering Student interim services in the October 14, 2015 IEP; and

d. failing to have all required IEP team members present at the October 14, 2015 IEP meeting?

Student's Issue 2: Did Mt. Diablo deny Student a FAPE in the October 14, 2015 IEP, designated as an interim IEP by Mt. Diablo, by failing to offer Student an appropriate placement?

SUMMARY OF DECISION

This decision holds that Mt. Diablo did not commit a procedural violation when it offered Student an interim placement at the October 14, 2015 IEP Team meeting. Because that meeting was to offer Student comparable services, it was not a procedural violation that the IEP document did not include goals. Mt. Diablo did commit a procedural violation when it did not specify whether the speech and language services on the IEP were to be delivered individually or in a group and this procedural violation did result in a denial of FAPE from the IEP team meeting until March 1, 2016. Mt. Diablo also committed a procedural violation when it did not have a general education teacher at the IEP team meeting to consider Student's independent educational evaluation. Student did not show that the IEP developed on October 14, 2015 failed to offer Student an appropriate placement.

Finally, this decision holds that Student is not entitled to reimbursement for his placement at Orion Academy because Student was placed at Orion prior to Mt. Diablo's obligation to provide Student FAPE; because Student did not give the appropriate notice prior to the placement; and, because Student failed to establish that the placement at Orion was appropriate.

FACTUAL FINDINGS

Jurisdiction

1. Student is a fifteen-year-old boy who currently resides with Mother within the geographical boundaries of Mt. Diablo. Student is eligible for special education under the category of speech and language impairment. Student has been eligible for special education since he was three years old.

Student's Residence and School Enrollment

2. Student's educational history is remarkable for the number of schools that Student has attended. Student attended seven schools from preschool to the end of sixth grade, in several states. Student transferred to Walnut Creek Intermediate School in February of his sixth grade year. He stayed at Walnut Creek Intermediate for seventh and eighth grade, and then matriculated to Los Lomas High School for ninth grade. His mother then removed him from Los Lomas, after his ninth grade year, and enrolled him at Orion Academy.

February 27, 2014 Assessments and IEP Team Meeting

3. During the 2013-2014 school year, Student resided within the geographical boundaries of the Walnut Creek School District and he was in eighth grade. Walnut Creek assessed Student in preparation for the February 2014 IEP team meeting.

4. Student's speech and language assessment showed that Student had relative strengths in the areas of semantic (knowledge and use of words and word combinations) and syntactic (knowledge and use of grammar) language. The assessment showed that Student was in the average range when compared to peers in both of these areas. Student showed weaknesses in the areas of comprehension of non-literal language and determining meaning from context and he scored below average in both of these areas. Student's ability to make inferences from verbal language was in the low average range. In the area of pragmatics, Student scored below average and had significant difficulty inferring nonverbal social cues, interpreting social language, and determining appropriate social interaction. Student's reasoning and problem solving were well below average. Student continued to meet the special education eligibility criteria for special education in the category of speech and language impairment.

5. In academics, Student scored in the high average range in basic reading skills. His broad reading, broad mathematics, math calculation skills, and broad written language scores were in the average range. The broad reading, math and written language scores are composite scores made up of several subtests. Student scored below average in the areas of reading comprehension, math reasoning, brief mathematics and written expression. Student's lowest performances were on the subtests of writing fluency and math calculation.

6. Student was enrolled in one period of special education resource per day and spent the rest of his day in general education classes. The curriculum was being modified for Student in the general education classrooms. Overall, Student was described as creative, thoughtful, hard-working, kind and polite. However, his teachers noted that he was below grade level in writing, his social issues impacted his learning at times, he made noises and outbursts in class and that he did not initiate conversations with other Students as often as he should. Student's statewide standardized testing results from spring 2013 had scores of far below basic in the areas of English/language arts and math.

7. During the testing Student exhibited frequent facial movements, vocalizations and noises. Although the frequency and intensity of this behavior waxes and wanes, the evidence established that Student has displayed this behavior for some time and at least through the time of the hearing. In particular, Student talked to himself, often reciting verbatim scripts from nature shows on television about big cats. Student has a vast amount of knowledge regarding sea creatures and some animals.

8. Student's cognitive ability was in the low average range, in the 16th percentile, for verbal. He scored in the average range in nonverbal reasoning, special cluster, and working memory. Student scored in the superior range in the area of processing speed.

9. Student scored in the low average range on a paper and pencil test used to assess his visual-motor integration ability. A score in this range means Student may struggle completing copying and writing tasks in the classroom setting.

10. Student's social emotional levels were assessed, using several instruments. In almost all areas, Student and his mother rated him in the average or normal range, with the exception of attention problems and somatization, on which Student rated himself as at risk and clinically significant. However, Student's pattern of answers on the instrument suggested that his results may need to be interpreted cautiously.

11. Several testing instruments were used to identify whether Student may have characteristics in common with children who are diagnosed with autism spectrum disorder. Student's teachers described Student as having a significant number of stereotyped behaviors, difficulties with communication, and deficits in social interaction. In particular, Student avoids eye contact, eats specific foods, digs through the trash to find food, makes high pitched sounds and other vocalizations, repeats words and phrases over and over, speaks with a flat tone, does not initiate conversations, repeats unintelligible sounds, uses gestures instead of speech and inappropriately answers questions about a statement or brief story. In addition, Student frequently withdraws in group situation, laughs and giggles inappropriately, becomes upset when routines are changed, responds negatively when given direction, flick his fingers rapidly in front of his eyes, flaps his hands in front of his face and does things repetitively. Some teachers reported more of these behaviors than others and some teachers noted very few of these behaviors.

12. Overall, the assessment showed that Student displayed mild signs of autism with moderate difficulties in relating to people, body use, verbal communication and thinking/cognitive integration skills. The assessment determined that Student also met the criteria for special education eligibility as a student with autistic like behaviors.

13. Student's needs, as identified in the February 2014 IEP, were in the areas of speech, language, behavior, social skills, and mathematics. Although the assessments and teacher reports showed Student to have needs in the area of writing, it was not identified as a

need on Student's IEP document. Student had seven goals in the areas of pragmatic language, language, behavior management, mathematics, and social skills. Student should have had a writing goal, but did not.

14. Student had the following accommodations, modifications and supports: reduced/shortened assignments, use of notes for tests/assignments when needed and appropriate, use of calculator when needed and appropriate, flexible setting/extended time on tests, extended time of class assignments of no more than five school days, check for understanding, instructions repeated/rephrased, use of planner/assignment notebook, access to computer on campus, preferential seating and room to move, prompting and refocusing, and math tests to be taken in a flexible setting.

15. Student's placement offer for the 2014-2015 school year was 50 minutes of specialized academic instruction five times a week, for a total of 250 minutes per week. Although the one box on the service offer page lists the services as 250 minutes daily, the rest of the IEP and other evidence presented at hearing show that the word daily was a scriveners error on that page of the IEP and that the offer was for 250 minutes per week of specialized academic instruction. Student was also offered speech and language services for 40 minutes once per week. The offer for speech and language services indicated that it would be delivered in both individual and group settings.

16. During the meeting, Mother did not agree with changing Student's eligibility criteria to autistic like behaviors and the IEP team did not pursue the change, as Student still met the eligibility criteria for speech and language. On March 19, 2014, Mother consented to the IEP with the exception of the use of modified grades. The IEP was modified to remove the modified curriculum and grades. Mother testified at hearing that she requested this change because she was told that Student could not graduate from high school with a regular diploma if his curriculum was modified. However, the evidence established at hearing that modifying the curriculum for Student would not have an impact on his ability to receive a regular high school diploma and attend a junior college. However, the modification of classes would have an impact on admission to a four-year university.

2014-2015 School Year Until March 25, 2015

17. During the 2014-2015 school year, Student lived within the geographical boundaries of the Acalanes Union High School District, in the city of Walnut Creek, California. Student attended Las Lomas High School and was in the ninth grade. When Student started ninth grade, he was receiving services pursuant to the IEP developed on February 27, 2014.

18. At the end of the first semester of high school, Student received an A in PE, an A- in Learning Skills, a B- in Art, a C+ in Drama, a D in English, a D in World History/Geography and an F in Algebra 1.

19. Travis Nelson was Student's special education teacher at Los Lomas. He taught Student's Learning Skills class and also provided push-in support into Student's English class to assist several special education students. Mr. Nelson holds a mild to moderate special education credential and has several years of experience teaching students in both public and non-public schools. Mr. Nelson's testimony was careful and consistent. He had a clear memory, displayed a thorough knowledge of Student, and stood up under cross-examination. He was a credible witness whose conclusions are given substantial weight here.

20. Mr. Nelson described Student's behaviors in the classroom as displaying more twitches and noises at the beginning of the school year but, as time went on, there was a significant decrease. He described Student as nervous about the transition to high school, and he felt that the rigor was more than Student was used to. This was not surprising, as Student had been receiving modified curriculum and grades until late in the previous school year. Mr. Nelson described Student as positive, kind, charming, humorous and a "good kid to be around." At the beginning of the school year, Student would write in his journal to the point where it affected his ability to access the curriculum. This troubled Mr. Nelson because, while the writing consumed Student's attention, it also helped regulate his emotions. When Mr. Nelson severely restricted the use of the journal, Student's attention to task increased.

21. Mr. Nelson consulted regularly with Student's general education teachers. After the first few days of school, Student's tics and twitches did not negatively impact his education or the learning of others. The other students seemed to like Student and there was no evidence that any Student paid attention to the tics and twitches after the first month of school. Although Student was shy, he started to build relationships and friendships with other students and Mr. Nelson heard other students calling out to greet Student in the hallway. While at Los Lomas, Student was on the freshman football team, the rugby team and participated in track and field. Student did not socialize with anyone from school outside of the school day.

22. During the fall of 2015, Mr. Nelson talked with Mother to discuss his opinion that Student was struggling to keep up with the academic pace of high school. He suggested adding one more period of more specialized academic instruction to his day and modifying the curriculum in his general education classes. He suggested that an additional special education Learning Skills class would help Student keep up with the demands of the other general education courses. This would also assist Student with organizing his work and processing the information presented in the other classes.

23. In addition, Mr. Nelson suggested that the Algebra 1 class was moving too swiftly for Student and approached Mother, requesting to have Student moved to the Algebra 1 class that was delivered over two years, instead of one. This two-year class would move more slowly and Student would receive the Algebra 1 credit necessary for graduation with a regular diploma. Mother refused and responded that she would not agree to any of these changes because she felt Student needed to put in more time and effort. During the course of

the school year, Mr. Nelson held a couple of parent teacher conferences with Mother. Mother had email exchanges with Mr. Nelson and several other teachers regarding Student during the year.

24. Student was struggling with the demands of high school, but overall passed most classes the first semester. Student put on a performance in his English class where he sang and acted. The other students seemed to like the performance and Mr. Nelson felt it helped the other students see Student in a different light. There were no reports of Student being picked on at Los Lomas. Mr. Nelson saw Student was a young man trying hard and not doing as well as Student, or Mother, hoped.

25. Mother obtained and paid for some services outside of the school day. During the 2014-2015 school year, until January 2015, a math tutor worked with Student two times a week. From January 2015 through May 15, 2015, Student worked with an educational therapist one to two times a week on math, and strategies to overcome anxiety and help with organization.

March 25, 205 IEP Team Meeting

26. Student's annual IEP team meeting was held on March 25, 2015. At the time of the IEP team meeting, Student had documented needs in the area of speech and language, social skills, behavior management, mathematics, math calculation, organization/task completion, reading and writing. Student did not establish that he had any areas of educational need which were not included in the IEP. The IEP listed Student's then present levels of performance. There was no evidence presented that these present levels of performance were not accurate.

27. The IEP contained seven goals in the areas of behavior management, mathematics, calculation, social skills, pragmatics, reading comprehension, and written language expression. The IEP noted that Student's behavior impedes his learning. Student was exhibiting the following behaviors: losing focus, speaking to himself, writing in his journal, making noises, grunting at directions or prompts and missing instructions. Student's behavior goal was developed to assist Student with these behaviors. The IEP did not include a behavior support plan. The behavior goal in conjunction with the specialized academic services and the speech and language services were appropriate to address the behaviors.

28. The IEP contained a transition plan. Student participated in the development of the plan. The plan contained three goals including looking into community colleges and vocational schools, looking into different job opportunities and completing an independent living budget. Three transition services were offered to Student: college awareness, career awareness and specialized academic instruction. The transition plan also mapped out Student's coursework for the remainder of his high school education such that Student would be on track for a regular high school diploma.

29, The IEP offered the following accommodations and supports for Student: use of notes for tests/assignments when needed and appropriate; use of calculator when needed and appropriate; flexible seating on tests; extended time on class assignments/tests; instructions repeated/rephrased; preferential seating; prompting and refocusing; and speech to text as an option when applicable.

30. Acalanes offered Student specialized academic instruction for 50 minutes, one time each school day, language and speech services for 40 minutes a week (individual and group boxes were checked), college awareness for 30 minutes a month and career awareness for 30 minutes a month. Student was not offered extended year services in the summer. It is not clear why Acalanes did not offer Student more specialized instruction as recommended earlier in the year by Mr. Nelson. Mother did not consent to this IEP and Acalanes continued to implement the February 2014 IEP. The IEP document states that the IEP signature page was not signed and that mother wanted to review the IEP. There are no comments from Mother noted in the IEP which indicate she did not agree to any particular part of the IEP and no communication from Mother in the record after the meeting indicating any specific disagreement.

31. Mother claimed in her testimony that Los Lomas suggested that if Student's grades were modified, he would not receive a diploma and would receive a certificate of completion instead. The evidence did not support Mother's contention.

Remainder of the 2014-2015 School Year and Summer 2015

32. After the meeting, Mother had Student examined and assessed by Kaiser Permanente and, in May 2015, Student was diagnosed with autism spectrum disorder. There was no evidence Mother shared this diagnosis with anyone at Los Lomas.

33. Student's grades for the second semester at Los Lomas were an F in English 1, a D- in World History/Geography, an A in Learning Skills, an F in Algebra 1, an A- in PE, a C+ in Art and a C in Drama. Sometime before the end of June 2015, Mother filed a due process complaint against Acalanes and entered into a settlement agreement. Acalanes agreed to provide an independent educational evaluation at public expense. Testimony at hearing established that the only claim made against Acalanes in the due process complaint was regarding an IEE. Mother chose Dr. Elea Bernou to complete the IEE and scheduled the evaluation to begin in fall 2015.

Student's Placement at Orion Academy

34. The evidence established that sometime around February 2015, Parent made contact with Orion Academy, a California certified non-public school to inquire about enrolling her son there for the 2015-2016 school year. Orion is located in Moraga, California, outside the geographical boundaries of Mt. Diablo. On April 20, 2015, Parent filled out an application for Student to attend Orion. The application for Orion had a section regarding special education. Mother indicated that Student has been placed in a special

education class in the past and that the date of his last IEP was March 25, 2015. However, Mother did not fill out the box which asked for a description of the IEP and did not indicate that the March 25, 2015 was unsigned.

35. At some point, between February 2015 and May 2015, Student attended Orion for an observation as part of the application process on at least one school day. On May 12, 2015, Kathryn Stewart, PhD., executive director of Orion Academy, sent Mother a letter accepting Student for the 2015 - 2016 school year. The letter stated that in order to secure the placement, a $2,500.00 tuition deposit, a signed financial agreement and a signed admission agreement must be returned to the school by May 28, 2015. Mother made the decision to enroll Student for the 2015-2016 school year at Orion sometime between April and May 2015.

36. Mother decided to place Student at Orion because she felt his then current placement at Los Lomas was not working. She thought Orion's policy of no backpacks would help Student, because he would not have access to his journal. She liked that Orion offered computers for Student to write, had smaller classes and she felt that there were other students that were like him. Mother felt that there were no other student's at Los Lomas like Student and that he needed to be around other students like him to fit in. Mother liked the social component of the school. Mother did not tell anyone at Acalanes that she was planning on removing Student from Los Lomas.

37. On May 27, 2015, Mother wrote an email to the director of operations at Orion academy. She asked for a payment arrangement for the $2,500.00 deposit. She asked if she could pay a third of the deposit in May, June and July. She then stated that that she was scheduled to have a mediation with the school district on June 10, 2015, a prehearing conference on June 22, 2015 and a due process hearing which was scheduled to begin on June 30, 2015. She stated specifically that "I am looking to have the district pay his yearly tuition, so I was wondering if I can get an extention [sic] on the yearly tuition until after we go to court." In her testimony, Mother claimed that she was talking about Acalanes in the email when she said district and then testified that she did not ask Acalanes to pay for Orion because she moved to Concord. Mother's testimony on this point is contradictory and not credible. The evidence established that she did not raise any claims against Acalanes regarding Student's placement, and she admitted in later testimony that she did not decide to move to Concord until well after the due process hearing was filed.

38. Mother signed a tuition contract with Orion Academy. The cost of tuition for the 2015-2016 school year was $33,500. By July 7, 2015, Mother had paid Orion $19,230, which, based on the contract with Orion, was not refundable, in all or part, if Student left Orion regardless of the reason. A significant portion of the tuition paid by July 7, 2015, was borrowed from Student's grandmother, who had borrowed it from her retirement plan. Mother entered into a payment plan for the rest of the tuition in November 2015, which required her to pay $4,833.33 in the months of December 2015, February 2016 and March 2016. As of the time of the hearing, Mother had paid the December and February installments. Mother testified that she would have dis-enrolled Student from Orion and

placed him at Mount Diablo High School (MDHS) if the October 2015 IEP had offered Student an appropriate placement even though she would be forfeiting the significant cost she had paid and the balance she would still have to pay and despite the fact she felt strongly Student was doing much better at Orion. Her testimony was not credible on this issue.

39. On July 31, 2015, Student and Mother moved to Concord, California, to within the geographical boundaries of the Mt. Diablo. Mother testified that she moved into less expensive housing in order to better afford Student's private placement at Orion Academy. Mother did not testify that at the time she moved she had intended to enroll Student at MDHS or that she intended that Student attend MDHS.

40. Orion Academy has about 50 students. About 70 percent of the students enrolled either have active IEP's or are privately placed students who would qualify for an IEP. The school only takes 12 ninth grade students each year. The school limits acceptance of students with active IEP's to 50 percent of enrollment.

41. Student began attending Orion on August 6, 2015, the first day of Orion's 2015-2016 school year. This was during the break between the end of the school year in Acalanes and the beginning of the school year at MDHS, which started on August 26 or 27, 2015. Student was enrolled at Orion Academy as a ninth grader. Dr. Stewart had recommended that Student repeat ninth grade when he enrolled because, according to her, she did not feel he was ready for tenth grade as he was unfocused, had no organization skills and was not academically ready for a tenth grade curriculum because he had gaps in his knowledge. Dr. Stewart does not hold a teaching credential or a school administrator's credential. She testified that Student would not have met the criteria to be held back in a public school setting.

42. Orion requires more credits for graduation than the public school and Dr. Stewart testified that she feels that the program works better if students attend all four years, especially the social skills program which is a four-year program and builds each year on the previous years' skills. Dr. Stewart often recommends that new students at Orion repeat ninth grade. After speaking to Dr. Stewart, Mother also expressed a preference for Student to be re-enrolled in ninth grade for the 2015-2016 school year. Dr. Stewart's and Mother's opinion regarding the appropriateness of Student's retention in ninth grade is given no weight.

43. Mr. Nelson has worked at non-public schools and in the public school setting. His testimony that Student was appropriately placed in a public high school and that Student would be successful with another period of special education support and modifications is given great weight. Mr. Nelson never considered retaining Student in ninth grade and thought Student would be successful in tenth grade in the public school setting, if Mother would agree to more supports. The evidence supports that Student should not have been enrolled in ninth grade again in the 2015-2016 school year and that it would have been

appropriate for Student to be placed in 10th grade. Student would still need to make up one semester of ninth grade English and repeat Algebra 1, but testimony established that Student could do this and still graduate on time with a regular diploma.

44. His first semester at Orion, Student was enrolled in and received the following grades: Personal Projects I (B), II (C+), and III (C+), Literature 1 (C+), Forensics 1(B), Social Skills (P), Dog Class (A), Physical Education 9 (A), Earth Science (C-), World History (C), Homebridging (P), Algebra 1 (B), Composition (B-), Homeroom Extended and Homeroom. This was despite Student receiving passing grades for the first semester of English, the whole year of PE, and the whole year of World History at Los Lomas.

45. Student did not establish what curriculum, if any, was used in Personal Projects I, II and III or Homebridging and how those classes were appropriate for Student. Student did not present evidence on the curriculum used in any of his classes, with the exception of literature, which was minimal.

46. There was no evidence presented showing Student's performance on tests, homework, in-class projects or other graded projects such that his semester grades could be analyzed to determine what academic level Student was really performing at while at Orion and what the academic expectations for Student really were. It is unknown whether Student received credit for attempting work or the successful completion of work. Student did not call any teachers other than Ms. Aiko Akers from Orion to testify.

47. Ms. Akers is Student's homeroom teacher and Literature teacher. Student has homeroom for 10 minutes at the beginning of the day except Fridays, when he has extended homeroom for a longer time period. During homeroom, students check in with the teacher, go over the announcements, back up their computers and it gives the teacher the opportunity to determine the mood of the student for the day. In addition, during extended homeroom, students might play social games, do silent sustained reading, and homework. There were six students in Student's Literature class. Most classes at Orion have between 5-8 students. Ms. Akers observed the same behaviors Mr. Nelson did the previous year. Student had made some progress but she was not sure he understood the plot of The Tell Tale Heart or The Old Man and The Sea. He lost focus when writing and summarized instead of analyzing. Ms. Akers did not explain the basis for Student's first term grade of a C+ in her class.

48. Mt. Diablo also included an academic report for Student from term 1 at Orion in its evidence. Student did not include this report in his evidence. Ms. Akers testified regarding the report as it pertained to the Literature class. There is a general section at the top, which notes that Student showed strong reading comprehension and factual recall of text. As weaknesses, it noted that Student's internal dialog can often distract him so that he misses instruction and he often misunderstands written instructions. He demonstrated struggles with organization of his writing and independently implementing academic organizational strategies. His performance on tests and quizzes was reported to be variable.

49. The academic report next describes Student's strengths, weaknesses, interventions and goals for some of his classes. In Composition class, for example, he had comments including "He still relies heavily on individual cuing and frequently misses or misunderstands course concepts, is very slow to complete work, or completes work incorrectly," and "Additionally, [Student] has a difficult time maintaining adequate focus or implementing an effective pattern of organization in his writing." Yet Student received a B- in that course.

50. In Earth Science, Student received a C-, yet the academic report states that Student "often had misconceptions about the material and will answer questions in ways that are confusing or sometimes irrelevant to the questions at hand. While Student generally completes assignments, they often tend to have very little detail. His performance on tests and quizzes, particularly around vocabulary recall, is often low." Student failed to both establish the basis for his grades and adequately explain the contrast between the grades as reported and the academic report. Both documents were admitted, but no foundation or testimony was offered to support his grades. His academic report was given some weight, as it was consistent with previous reports of Student's progress in school. Very little weight is being given to Student's grades, as reported by Orion.

51. Mt. Diablo included with its evidence a social skills summary for Student completed by Ms. Hedi Vafaeenia from the first term at Orion. This report stated that Student was having a difficult time fitting in socially with the rest of the freshman class. The report notes that as of December 10, 2015 Student was still narrating stories in his head and acting them out in class, although he did stop when asked. Student's teachers reported he was struggling with verbal participation in class and continuing to narrate stories. The report noted that candy and gum had been the most useful in having Student decrease his narrating behavior.

52. Dr. Stewart taught Student's Dog Class and also interacted informally with Student on some occasions. Dog Class is a dog training class once a week, that she claims addresses pragmatic language. Dr. Stewart explained that Dog Class was important because "[i]f they can be a good pet owner, they will never be lonely!" Dr. Stewart reported Student exhibited the following behaviors at Orion: trouble staying on topic; running commentary on big cats; verbatim recitations of National Geographic television shows; difficulty making connections with people; stiff body; poor eye contact; trouble maintaining conversations; mouth gestures; and jerking his head. She has noticed improvement in his social skills and that Student is calmer now than when he began. This was consistent with Mr. Nelson's observations of the previous year; as Student acclimated, his behaviors decreased and social interactions increased.

53. Student also did not establish how a dog training class taught by a non-credentialed teacher, Dr. Stewart, was appropriate for him. While Dr. Stewart testified that the class assisted students in their social skills and also taught them to be good pet owners, she did not explain how she was qualified to teach social skills or why Student was given

academic credit for a class not taught by a properly credentialed teacher. Student also did not appropriately explain why he needed both a social skills course and the dog class in order to get educational benefit in the area of social skills.

Student's Enrollment in Mt. Diablo Unified School District

54. Mother's first contact with Mt. Diablo was on August 24 or 25, 2015, when she filled out registration paperwork. Mother checked a box on the enrollment form indicating that Student "is in special education/IEP." When asked for the last school Student attended, Mother wrote Los Lomas High School. Mother was asked for a copy of Student's IEP and agreed to return with a copy of the IEP that day, which she did. Mother returned a copy of the March 25, 2015 IEP but left off the signature page. Mother did not disclose that she did not sign this IEP to anyone at Mt. Diablo. Mother did not provide a copy of the last signed IEP from February of 2014. Mother did not adequately explain why she provided a copy of an IEP she did not agree with to Mt. Diablo without explaining that she did not consent to the IEP.

55. On August 25, 2015, Mother emailed the registrar at MDHS and told her that she did a "Parental Private placement" and that she was going to fax over Student's IEP. However, she did not say that he would continue attending Orion academy and MDHS personnel reasonably thought that Mother wanted Student to attend MDHS. Mother did not disclose at this point that she had no intention of bringing Student to school at MDHS until at least the IEP team meeting in October, 2015, because he was already enrolled for that year at Orion.

56. On August 27, 2015, Mother emailed several employees of Mt. Diablo and said the following: "I have registered my son at Mt. Diablo High School, and am requesting an IEP meeting for him. If there is availability for the week of October 12, 2015, please let me know. If there is availability for October 12, at 9:00 a.m. or 11:00 a.m, or Wednesday, October 14th at 9:00 a.m., or October 16th as early as 8:00 a.m. please let me know, as well as dates and times that may work for you."

57. On August 27, 2015, Dr. Dela Cruz, special education teacher at MDHS, responded to Mother and suggested the meeting occur on October 14, 2015 at 9:00 a.m. She noted she would send a notice of the IEP team meeting. On August 28, 2015, an IEP notice was sent to Mother for the October 14, 2015 IEP team meeting. On August 29, 2015, Mother confirmed the date and time of the IEP team meeting.

58. The evidence established that at this point, Mt. Diablo and MDHS personnel thought that Student was going to show up at school, and that they were ready and able to provide Student placement based upon the March 25, 2015 IEP, which Mother had delivered. This finding is supported by the actions of the staff at MDHS who placed Student in a schedule and reserved seats for him in actual classes. This caused Student to be reported absent and took up seats that could have been used for other students. Mt. Diablo staff credibly established that had they known Student would not attend until after the IEP was

held in October, at the earliest, they would not have created an actual schedule for Student. Student had a recently developed IEP and Mt. Diablo staff intended to implement what they thought was a recent, consented to placement, until they could hold an IEP team meeting, which Mother requested be delayed until October.

59. When Student had not shown up for school the first week, Nichole Hackett, vice principal at MDHS, sent Mother an email on September 4, 2015. She said that an IEP team meeting was being arranged and that Student had a schedule, available at the office, that included two classes supported by special education staff and two classes taught by a special education teacher. She had several conversations with Mother between this time and the IEP team meeting. Mother first told her that she wanted to see what services MDHS had in order to see if she wanted to place Student there. Later, Mother said that she wanted to see what services were available so that she could compare the services at MDHS to the services at Orion. After this conversation, Ms. Hackett had the impression that Mother did not want Student to attend MDHS.

60. On September 21, 2015, Mother had another conversation with Ms. Hackett. Mother stated that Student was attending Orion Academy, and that she did not want Student at MDHS. Mother stated that she was requesting the IEP team meeting in October solely to ask Mt. Diablo to pay the tuition and transportation to Orion and for the district to provide Student with a free lunch. Nonetheless, Mt. Diablo continued to work with Mother to make sure a placement was available for Student at Mt. Diablo.

61. On September 29, 2015, Ms. Hackett met with Mother and Lorien Quirk, the behaviorist program manager with Mt. Diablo. The three met to review Student's March 25, 2015 IEP and because Mother had asked again for a proposed schedule for Student. A schedule was developed based on Student's March 25, 2015 IEP placement offer and Mother's request for an additional specialized instruction. There were several emails following up the meeting with a schedule, and information regarding collaborative classes. Mother was advised that space in the specific courses discussed was limited and that Mother should advise Ms. Hackett if Student was planning to attend. Ms. Quirk noted that Student was welcome to start at any time, even before the IEP team meeting. It was noted that the IEP developed at the meeting in October would still be considered a 30 day placement, since Student had not yet attended school in the district. Student was enrolled in the schedule, because that was the only way to hold a place for him in the specific classes.

62. On September 29, 2015, Dr. Bernou wrote to Ms. Hackett asking to observe one of the collaborative classes and the resource room. She suggested October 6, 2015 for the observations and stated that the observations were part of the assessment she was completing. On October 1, 2015, she sent a follow-up email. On October 2, 2015. Ms. Hackett responded with a copy of Student's proposed schedule and a copy of the bell schedule and agreement to the observations on October 6, 2015. On October 4, 2015, Mother confirmed by email that she would wait for the IEP team meeting and that Student

would not begin school at MDHS before the meeting. At this time, Student was removed from the class schedule earlier than proposed, since he would not be attending school before the IEP team met.

63. In the meantime, there was other correspondence happening between Mother and Dr. Dela Cruz. On October 4, 2015, Dr. Dela Cruz sent an email to Mother stating that the IEP team meeting of October 14, 2015 was cancelled because Student was not enrolled in the district. This appears to be in response to Mother stating that she was not intending to begin school before the IEP team meeting and the removal of Student from classes. Mother responded and stated that he was enrolled in the district and that Student had a schedule. The evidence established that Student's failure to attend MDHS after the September 29, 2015 schedule was made, caused him to be dropped from the classes and then the school. This was along the lines of a clerical error and due to the unusual circumstances of Mother meeting with staff and wanting a schedule, but not bringing Student to school. None of the staff members who testified had any experience with a parent who enrolled a student, asked for a specific schedule, and not just an offer of placement, but then never brought the student to school. The district personnel were reasonably perplexed. The IEP team meeting was immediately put back in place and Parent notified that a new schedule would be developed for Student at the IEP team meeting.

64. The evidence did not establish when Mt. Diablo became aware that the March 25, 2015 IEP was not signed by Mother, but by December 15, 2015, the evidence shows that Mt. Diablo was aware of this fact.

Independent Assessment

65. Mother and Dr. Bernou had several email conversations as part of the independent educational evaluation. The evaluation was scheduled to begin in late August 2015, based on Dr. Bernou's schedule. The evaluation was to include observation of Student at Orion and an observation of a public school placement. Dr. Bernou scheduled the observation at Orion on August 13, 2015, about a week after school started.

66. While the assessment was underway, Mother sent an email to Dr. Bernou stating that "I am going to request an IEP from the school, to request the funding after the testing is complete."

67. Dr. Bernou completed her evaluation and produced a written report on October 7, 2015. Dr. Bernou is a clinical neuropsychologist. She has been in private practice providing evaluations and consultations for ages 5-90 since 2004. She has worked in the field since she received her PhD in 1997. She was well-qualified to complete the assessment of Student.

68. As a part of her assessment, she observed Student in his science class, in the lunchroom, and in history class at Orion. She spoke briefly to Mr. Garrison, one of Student's teachers at Orion. Dr. Bernou gave Ms. Akers an Asperger's Syndrome Diagnostic Scale

and a Conner rating scale for attention to complete regarding her impressions of Student. Dr. Bernou did not contact any teacher or administrator from Los Lomas to obtain any information regarding Student or his placement at Los Lomas. In her testimony, she stated that she did not request information from Los Lomas because they were on summer break, however, the evidence showed that her assessment took place after school had started for the 2015-2016 school year. She also documented in her report that she only had the first page of the IEP from March 24, 2015.

69. Dr. Bernou observed three classrooms at MDHS. She wrongly stated in her report that at the time of the observation on October 6, 2014, Mt. Diablo had made an offer of FAPE to Student and that specific classrooms had been offered to Student. As discussed above, by this time it was made clear to Mt. Diablo that Student would not be attending school prior to the IEP team meeting and, because Student was not going to be attending, he was not given a specific schedule of classes, as this results in false absences being reported and eventual removal from the classes. It appears Dr. Bernou was under the impression that the previous schedule for Student was still a proposed schedule. Dr. Bernou spent about one hour total observing at MDHS, and before she had even seen one classroom, stated that she felt the classes were too big.

70. Dr. Bernou observed two collaborative English classes, neither of which were offered to Student at the October 14, 2015 IEP team meeting. She also observed a learning handicapped special day class, which was also not offered as a part of the October 2015 IEP. The second collaborative English class, which Dr. Bernou indicated was offered to Student, had a general education teacher and a special education teacher. There was a time during the observation that the special education teacher left the room to work with a special education student, leaving only the general education teacher in the room with approximately 30 students. However, the English class offered to Student was a special education class with two special education teachers and about 33 students. Therefore, all of Dr. Bernou's comments regarding the placements available and offered to Student in her report are not based on the actual offer, knowledge of the March 25, 2015 IEP or observations of any of the classes offered to Student.

71. Dr. Bernou administered a variety of standardized tests, inventories, rating scales, questionnaires, conducted a mental status examination, completed clinical interviews and reviewed academic records and previous evaluation results. In general, the assessment results were mostly consistent with earlier assessments of Student. Dr. Bernou diagnosed Student with autism spectrum disorder, language disorder, ADHD, predominantly inattentive presentation, specific learning disorder, conceptual mathematics and specific learning disorder written expression and dysgraphia.

72. Dr. Bernou did not specifically list all of the areas of need for Student that she found. She also did not testify to the areas of need which should be addressed in Student's IEP. Her testimony and most of the recommendations in her report were focused on placement, not the development of the IEP. A careful reading of her report reveals her conclusions that Student has average abilities, a language disorder, some adaptive skills

deficits, attention and focus deficits, listening comprehension, social language, handwriting, decoding, reading comprehension, vocabulary, written expression and math reasoning. The result of Dr. Bernou's academic and social emotional testing was not challenged in this hearing. These results are given considerable weight here, as they were unchallenged in hearing, and are consistent with prior assessments. Her accommodation recommendations appear to be closely related to these results and the recommendations for accommodations are given some weight, as are the previous accommodations offered to Student in the 2014 and 2015 IEP's.

73. However, Dr. Bernou's comments and conclusions regarding Student's prior academic performance, the MDHS placements, and her recommendations for placement are not given any weight. Dr. Bernou made blanket statements regarding Student's previous school experiences without contacting any of Student's previous teachers for information, or having access to his March 2015 IEP from Los Lomas, which contained present levels of performance and other relevant information regarding Student's experience at Los Lomas. While she did contact teachers from Orion, their experience with Student ranged from just a week to two months.

74. There were several factual errors in background information in Dr. Bernou's report, including stating on page two of the report that Student has had an IEP since first grade, when the evidence showed, and her own report on page five states, that he has had an IEP since he was three years old. On page four of her report she lists the schools Student has attended and the grades he was in and then, on the next page, lists different years for the schools. In her summary on page 19, she states that Student received very poor grades –with many F's, in middle school and in ninth grade at Los Lomas. In reality, from the time Student arrived at Walnut Creek middle school at the end of his sixth grade year, he received five grades that were a P for pass, 22 A's, 13 B's, 20 C's, 8 D's and one F. At Los Lomas, he received four A's, one B, three C's, three D's and three F's. Dr. Bernou used this statement to contrast his grades at Orion, where she claimed his grades were higher. However, at the time of her observation, Student had been in school for a week and by the time the report was issued, only about two months and no formal grades had been issued. It is important to note that while Mother emailed Dr. Bernou early in Student's enrollment at Orion when Student had all A's, by the time of the IEP team meeting, Mother was saying that Student had nothing lower than a C. It is important to note here that Student was repeating the ninth grade curriculum; therefore, the improvement in the grades would be expected and is given little weight when determining the appropriateness of Orion Academy below. Also, as discussed above, Student did not meet his burden to show that the grades from Orion could be relied upon as he failed to show the basis upon which the grades were given and the comments on the academic report were somewhat inconsistent with the grades reported.

75. Dr. Bernou recommended that Student remain at Orion academy and then stated several reasons for her recommendation. However, Dr. Bernou admitted in testimony that she was comparing the placement with her perception of the available placement at Mt. Diablo and did not evaluate the Mt. Diablo placement independently to determine if a FAPE

was offered to Student. She opined that she did not know how much Student would benefit in the public school but he would not benefit as much as he would at Orion. This is not the standard for placement under the IDEA. Further, many of her reasons are either misrepresentations or gross oversimplifications. For instance, she states that at Orion, Student could remain on diploma track and graduate from high school with a decent grade point average and the knowledge he needs to succeed after high school. Student was on track to receive a diploma at Mt. Diablo. At the time of the report, Student had been issued no grades at Orion, and Dr. Bernou had no way of knowing what his actual grades would be. When the grades for the first semester came out, they were much lower than the all A's mother reported to Dr. Bernou in late August. Dr. Bernou also stated that Student was doing well academically and that he was benefitting from the small classes and personnel that are trained to work with students on the autism spectrum. This presupposes, without information to support it, that the personnel at Mt. Diablo would not have experience and training to work with students on the autism spectrum. There was no evidence in her report or offered at hearing that the teachers at Mt. Diablo are not trained to work with students on the autism spectrum.

76. Dr. Bernou stated that she did not believe that Student's needs could be met in a larger classroom – particularly a setting where he would not have a specially trained teacher in the room with him. She acknowledged that for some periods he would have a special education teacher, but not one that has much experience with autism. Again, Dr. Bernou made blanket statements with no information regarding the experience of any teacher who might be assigned to work with Student. She stated that Student was on a modified academic program in middle school and ninth grade and that he would not be able to stay on a diploma track if he were in a big classroom with more than 30 students and not enough supports. However, Student was not on a modified program for the last quarter of middle school and all of ninth grade. Further, as Mt. Diablo had not yet offered supports on an IEP, Dr. Bernou was not analyzing the specific supports Student needed.

77. Dr. Bernou stated in her report that Student "failed" in the general education/collaborative setting offered to him in middle school and at Los Lomas. While Student did fail ninth grade Algebra and one semester of English 9, he passed all of his other classes. She stated that a self-contained special day class would not be appropriate because Student has average intelligence. This was another blanket generalization and there are plenty of students with average intelligence appropriately placed in a special day class for a variety of reasons. She claimed that there were no other students in the Mt. Diablo high school program that resemble Student and that he would stand out and not be able to build friendships. Dr. Bernou did not observe the actual classes in which Student was offered placement, and had no basis from which to make this assertion. Further, testimony established that there were students on the autism spectrum that would be in classes with Student at MDHS. The report from Orion showed that Student stood out at Orion and that he had a difficult time at Orion fitting in with his class.

78. Dr. Bernou stated that the ongoing social skills groups and social skills support that is available to Student at Orion would not be available at MDHS. This is simply not true

as Student was offered a social skills group and supports at MDHS. She states that Student would not be allowed to chew gum during class and listen to music on his phone at MDHS. This is again a bold generalization which had no basis in fact. Student was offered both of these supports at MDHS. The generalizations and false statements showed Dr. Bernou to be biased in favor of placement at Orion and her recommendations for placement are given no weight.

October 2015 IEP Team Meeting and Offer

79. Mt. Diablo held an IEP team meeting for Student on October 14, 2015. The purpose of the meeting was to develop interim placement and services for Student for a 30 day period, at which time a full IEP would be developed and to consider the independent educational evaluation by Dr. Bernou. Mother, Dr. Bernou, Ms. Hackett, Dr. Dela Cruz and Ms. Jennifer Steinbeck, school psychologist, attended the meeting. Mother signed an excusal form at the IEP team meeting excusing the general education teacher from the IEP team meeting.

80. Dr. Bernou presented her independent evaluation and the team discussed her report. The team considered the information in the assessment and Dr. Bernou's recommendations.

81. Testimony established that the IEP team decided to offer Student the goals, services and placement in the IEP as developed on March 25, 2015 with some specific changes, based upon the new information from Dr. Bernou and based upon discussions with Mother. The changes were: adding more minutes of specialized academic instruction for Student, the determination of a specific schedule of classes, and including the accommodations recommended by Dr. Bernou of chewing gum, listening to music, requesting the teachers send notes electronically to his computer, and taking pictures of the lecture notes. The IEP team also offered to have Student attend Period 1 social skills of autism class for leadership purposes. The team agreed to discuss the recommendation for another 45 minutes of speech and language services at the upcoming 30 day IEP, as well as the recommendations for 100 hours of written expression remediation and 50 hours of math remediation.

82. The IEP offered Student the following placement and services:

- specialized academic instruction for 177 minutes per day
- speech and language one time a week for 40 minutes
- college awareness for 30 minutes
- career awareness for 30 minutes.

The clear intention of the IEP team was that this placement was an interim placement, for 30 days, which would allow MDHS staff time to get to know Student in advance of a full IEP team meeting in 30 days.

83. Student's proposed schedule as offered in the IEP team meeting was:

- English 2 with Collaborative Special Education teachers (Specialized instruction)
- Academic Success with Dr. Dela Cruz (Specialized Instruction)
- Algebra 1 with special education teacher (Specialized Instruction)
- Biology (General Education, as there was no room in the collaborative class)
- PE (General Education)
- Art 1.

84. Mother did not sign consent to the offered IEP. Mother did not tell the team she was rejecting the placement offer or ask for placement at Orion or ask Mt. Diablo to pay for Student's placement at Orion.

85. Mt. Diablo created a document to accompany the October 14, 2015 IEP titled IEP at a Glance. That document listed the goals which were part of Student's 2012, 2013 and 2014 and 2015 IEP's. It also listed Student's accommodations and the placement offer from the October 2015 IEP. This document was not adequately explained in testimony and it is unclear when this document was created, or by whom or for what purpose. The document is given no weight.

86. Mt. Diablo did not schedule an IEP team meeting within 30 days of October 14, 2015 to review Student's placement because Student never attended MDHS. Mt. Diablo credibly established that one of the purposes of the 30 day interim placement was for teachers and other staff to observe Student and interact with Student and to evaluate Student's educational performance before the complete IEP is held to allow the IEP team to have current information about Student in their program as they develop the IEP. This decision was reasonable given the circumstances in this case.

87. On December 15, 2015, Bryan Cassin, ADR administrator with Mt. Diablo, sent Mother a letter requesting Parent consent to an exchange of information between Mt. Diablo and Orion, consent to allow Mt. Diablo to obtain Student's records from Orion, a request to observe Student at Orion and permission to assess Student's current educational functioning and social emotional functioning including social skills and pragmatics. Mother never responded to the letter.

88. On February 19, 2016, Mr. Cassin sent another letter asking for the same in preparation for Student's upcoming annual IEP team meeting, which was due on or before March 25, 2016. He also proposed an IEP date of March 23, 2016. Mother never responded to this request.

Parent's Request for Reimbursement

89. On October 21, 2015, Student's attorney wrote a letter to Mt. Diablo titled "Notice of Intent to Place at Orion Academy." The letter stated that Mt. Diablo's placement

offer was not appropriate and that Mother was continuing Student's placement at Orion Academy and intended to seek reimbursement for the costs of the program. On December 15, 2015, Mt. Diablo denied the request for reimbursement for Orion. Parent did not respond to the letter.

LEGAL CONCLUSIONS

Introduction – Legal Framework [1]

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth

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[1] Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

[2] All subsequent references to the Code of Federal Regulations are to the 2006 version.

Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.)

Burden of Proof

5. As the petitioning party, Student has the burden of proof by a preponderance of the evidence on all issues in this case. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [163 L.Ed.2d 387].)

30 Day Interim IEP Offer and Requirement for a Full IEP Team Meeting

6. Student contends that Mt. Diablo's failures stem from their decision to offer Student an interim 30 day IEP at the October 14, 2015 IEP team meeting, which was improper. Student contents that it was improper because: 1) he was not a Student with a disability at the time he enrolled in Mt. Diablo; 2) Student was not transferring between school districts; and 3) he was not transferring within the same academic year. Student contends that instead of an interim IEP, Mt. Diablo should have developed a complete new initial IEP by September 23, 2015. In the alternative, Student argues when he enrolled as a student with no IEP, Mt. Diablo was required to have an IEP in place at the beginning of the school year which required Mt. Diablo to either adopt the prior District's IEP or implement a new one and that Mt. Diablo was prohibited from offering a 30 day IEP placement.

7. Mt. Diablo argues that it was not unreasonable to offer a 30 day IEP based upon the procedures set forth in 20 U.S.C. § 1414(d)(2)(C)(i)(1). The statute reads:

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously

> held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

Mt. Diablo also relies on 34 C.F.R. §300.323(e) which reads:

> If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either— (1) Adopts the child's IEP from the previous public agency; or 2) Develops, adopts, and implements a new IEP that meets the applicable requirements in§§ 300.320 through 300.324.

Finally, Mt. Diablo relies on California Education Code § 56325(a)(1):

> As required by subclause (I) of clause (i) of subparagraph (C) of paragraph (2) of subsection (d) of Section 1414 of Title 20 of the United States Code, the following shall apply to special education programs for individuals with exceptional needs who transfer from district to district within the state. In the case of an individual with exceptional needs who has an individualized education program and transfers into a district from a district not operating programs under the same local plan in which he or she was last enrolled in a special education program within the same academic year, the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved individualized education program or shall develop, adopt, and implement a new individualized education program that is consistent with federal and state law.

8. When confronted with the situation of complying with one procedural requirement of the IDEA or another, the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, the agency is allowed reasonable latitude in making that determination. (*Doug v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038.)

STUDENT'S CLAIM OF REVOCATION

9. Student claims that he was a student without an IEP and was entering Mt. Diablo as a general education student because Mother's unilateral placement of Student at Orion should be treated as a de facto revocation of consent for special education. Student argues further than when Parent enrolled at Mt. Diablo without an IEP (because of the de facto revocation) that Mt. Diablo was required to have an IEP in place for Student at the beginning of the school year by either adopting the prior district's IEP or implementing a new one under 20 U.S.C. § 1414(d)(2)(a). He claims that because he was not coming with an IEP, the only course Mt. Diablo could follow was to implement a new IEP. Student then argues that under Ed. Code § 56344(a) Mt. Diablo was given 30 days to hold this IEP because Mt. Diablo made an initial determination that Student needed special education on the date Mother enrolled Student by acknowledging his previous IEP. Alternatively, Student argues that Mt. Diablo's child find obligation was triggered upon enrollment, that they deemed him eligible for special education by their conduct, and then failed to offer to assess Student immediately, which waived any right to assess Student, and therefore should have held an IEP within 30 days.

10. If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency may not continue to provide special education and related services to the child, will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and is not required to convene an IEP Team meeting or develop an IEP under§§ 300.320 and 300.324 for the child for further provision of special education and related services. A public agency shall be deemed in compliance with the requirement to make a free appropriate public education available to a child if the agency ceases to provide the child with further special education and related services pursuant to this subdivision. (C.F.R. 300.300(b)(4), Ed. Code Section § 56346.)

11. At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program. (20 U.S.C. § 1414(d)(2)(a).)

12. An individualized education program required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days, not counting days between the pupil s regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent s written consent for assessment, unless the parent agrees, in writing, to an extension. However, an individualized education program required as a result of an assessment of a pupil shall be developed within 30 days after the commencement of the subsequent regular school year as determined by each local educational agency s school calendar for each pupil for whom a referral has been made 30 days or less prior to the end of the regular school year. In the case of pupil school vacations,

the 60-day time shall recommence on the date that pupil schooldays reconvene. A meeting to develop an initial individualized education program for the pupil shall be conducted within 30 days of a determination that the pupil needs special education and related services pursuant to Section 300.323(c)(1) of title 34 of the Code of Federal Regulations. (Ed. Code § 56344(a).)

13. Student's arguments on this point are convoluted and inconsistent. First, his argument that he entered Mt. Diablo as a general education student without an IEP fails. There was no evidence that Mother revoked consent for the further provision of special education services to Student at either Acalanes or Mt. Diablo. Student's argument that the placement at Orion was a de facto exit from special education is without any legal support and in direct contravention to the statute, which requires the revocation to be in writing. Most importantly, it would never allow for any reimbursement to any student for a unilateral placement because, at the time of the placement, all obligations of a district to the student to provide FAPE would cease. If simply making a unilateral placement of Student at Orion was found to be a revocation of consent for all special education services, then Mt. Diablo would have been under no obligation to provide any services to Student, or develop any IEP.

14. Parent's behavior was also not consistent with an intention to revoke Student's eligibility for Special Education. Parent's emails to Orion and Dr. Bernou regarding her intention to have Student's placement at Orion publically funded show her continued intent that Student was entitled to a special education placement. Her request on the day after she enrolled Student at Mt. Diablo for an IEP team meeting also belied her intent. Parent did not revoke Student's eligibility for special education when Student was placed at Orion Academy.

15. Student then inconsistently argues that when he enrolled in Mt. Diablo, after the purported revocation, Mt. Diablo had obligations to him under the IDEA and California law. The effect of the revocation would be precisely the opposite. Student's argument that 20 U.S.C. § 1414 (d)(2)(a) would be applicable is wrong. The obligation to have an IEP in place at the beginning of the school year only applies to students identified as eligible for special education, and Student argues consent was revoked. Student's argument that Mt. Diablo somehow deemed him newly eligible by their actions to offer student a FAPE and schedule an IEP team meeting in October 2015 which then triggered an obligation to hold and develop a new IEP within 30 days fails as well. Mt. Diablo would have been under no obligation to hold an IEP team meeting for Student at all, unless Parent asked for and consented to an initial special education evaluation or Mt. Diablo referred Student for an initial special education assessment after observing Student in the classroom and trying general education interventions. Student was still eligible for special education when he enrolled at Mt. Diablo.

ENROLLMENT BETWEEN ACADEMIC YEARS OR IN THE SAME ACADEMIC YEAR

16. Student then argues that that he was not transferring within the same school year but that he transferred between academic years. There is no doubt that the facts of this

case present a very unusual situation not contemplated by the legislature or courts. Student completed the last school day of the 2014-2015 school year as a special education student in Acalanes. Student had a consented to IEP from 2014 and an unsigned IEP from March 25, 2015. Student started at the beginning of the Orion school year on August 6, 2015, as a privately placed student. On August 25, 2015. Mother enrolled Student in Mt. Diablo.

17. Mother asked for an IEP team meeting to be held on October 14, 2015, a request Mt. Diablo immediately granted, as they are obligated to hold an IEP at a date and time mutually convenient with Parent under Ed. Code 56341.5(c). The evidence shows that Mother did not intend to place Student at MDHS until at least after the IEP team meeting. Mother made it clear to Mt. Diablo staff prior to the October 14, 2015 IEP team meeting that she would not consider placing Student at MDHS until after the IEP team meeting.

18. Student argues that the enrollment date in the district of August 25, 2015 should be used to determine whether Student transferred in between school years or during the academic year. Student argues that because Parent filled out the initial paperwork between school years, the day before school started at MDHS, that the interim placement statutes cannot apply and that Mt. Diablo was obligated to convene an IEP team meeting immediately under 20 U.S.C. § 1414(d)(2)(a).

19. Student's argument that Mt. Diablo was required to convene an IEP team meeting, however, is not consistent with the plain language of 20 U.S.C. 1414(d)(2)(a). Mt. Diablo was only required to have an IEP in place for Student, the statute does not require an IEP team meeting specifically. The purpose of 20 U.S.C. 1414(d)(2)(a) is to ensure the continuous provision of special education services to students who arrive on the doorstep of a new school at the beginning of the year are served without a delay. Mt. Diablo believed it had a copy of a recent, approved IEP.

20. Student did not arrive at school, however, at the beginning of the school year. He was newly enrolled at Orion and attending school there. It is undisputed in this case that Student would not have entered MDHS until at least October 15, 2015. This is in the middle of a school year. Mt. Diablo's decision to treat Student as if he was transferring in the middle of a school year at the IEP held on October 14, 2015 was reasonable, under the circumstances of this case. Student did not show that Mt. Diablo committed a procedural violation by treating Student as a transferring in the middle of a school year.

WAS STUDENT TRANSFERRING FROM ONE DISTRICT TO ANOTHER?

21. The question remains whether Student was transferring to one school district from another school district within the state. Student argues that his placement at Orion after Acalanes makes the interim IEP statutes inapplicable and unlawful because the transfer of Student was not from public school to public school. There is no question that Student transferred from a public school to a private school and then became a resident of Mt. Diablo, a situation not contemplated in the transfer statute. This case has a unique posture. Mother presented Mt. Diablo with a very recent IEP, developed in March 2015, which the

evidence shows Mt. Diablo reasonably thought was signed at the time. This was not like the case of a student with a stale IEP who had been enrolled in private school for a year or two and presents with a several years old IEP. The amount of time Student was enrolled at the private school was de minimus in this case and, therefore, it was not a procedural violation for Mt. Diablo to treat Student as if he was a transferring Student from public school to public school.

21. Student argues that Mt. Diablo should have followed the procedural requirements of 20 U.S.C. § 1414(d)(2)(a) instead of 20 U.S.C. § 1414(d)(2)(C)(i)(1), the transfer statute. This likely would have resulted in Mt. Diablo implementing either Student's unsigned March 2015 IEP or Student's February 2014 signed IEP with outdated goals, and without a transition plan and no requirement that the IEP team meet again until Student's annual IEP was due in March 2016. Mt. Diablo chose instead to treat Student as a transfer Student. This resulted in a new IEP offer developed for Student, based in part on his previous services, which incorporated recommendations from Dr. Bernou and more specialized academic instruction offered for Student. This decision promoted the purposes of the IDEA and was less likely to result in a denial of FAPE for Student than implementing Student's last signed IEP, which did not have a transition plan or a goal in the area of writing. Mt. Diablo was reasonable in making the decision and is being afforded reasonable latitude to make the decision.

22. Because Mt. Diablo did not err in treating Student as a transfer Student and offering an interim IEP, Student does not prevail on his claims that the IEP was procedurally deficient because it was an interim IEP or because the IEP did not have goals attached.[3] The statute requires only that Mt. Diablo offer comparable services for the first 30 days, there was no requirement to develop a full IEP. The record established that Mt. Diablo offered to implement the March 2015 IEP with the changes made at the meeting, including the goals. The question of clarity of the offer, however, still needs to be determined, as there is no exception to the obligation that a district has to make a clear, written offer.

23. Because Mt. Diablo offered an interim IEP, there is requirement that an IEP team meeting be held. However, meeting on October 14, 2015, was also convened to allow the IEP team to consider the independent educational evaluation. Mt. Diablo provided no authority which would have exempted an IEP team which met to consider an independent assessment from being properly constituted.

Clarity of the October 14, 2015 Placement Offer

24. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear,

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[3] This decision makes no determination as to whether Mt. Diablo's offer of placement and services was comparable, because Student did not raise this as an issue in this case.

written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). (*Union* , *supra,* 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

25. One District Court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi, supra,* 122 F.Supp.2d at p. 1108.)

26. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP's that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H*. (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108**;** *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ*. (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.)

27. Under the IDEA, in matters alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Parents' child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii).)

28. In this case, Student alleges that the offer made on the October 14, 2015 IEP was not a clear offer in regards to the biology class and English class. He claims that the offer is unclear whether the biology class offered to Student is the collaborative class or a regular class. He claims that it was unclear at the time if the English collaborative class was actually available and whether, if Student accepted the offer, the schedule offered could be implemented. He then claims that the offer of 40 minutes of speech and language services is

not clear because the offer did not specify whether it was offered in group or individual and because the IEP did not state when during the day the speech and language services would be delivered.

29. The October 14, 2015 IEP offer for biology states that the collaborative class was full and that the offer was for the general education biology class which had one teacher and 28 students. The IEP offer was sufficiently clear that the class was a general education class. The handwritten part of the IEP also identified the three classes that were special education classes or collaborative classes by placing the words specialized Academic Instruction next to those classes, which were English 2, Algebra 1 and Academic Success. The IEP was sufficiently clear regarding the offer of biology.

30. The offer regarding the English class was sufficiently clear as well. Mt. Diablo offered Student placement in a collaborative English class, taught by two special education teachers. Speculation regarding whether the class may still have room had Mother accepted the placement is not relevant to the determination of clarity. Had Mother accepted, Mt. Diablo would have been required to provide the class to Student. The evidence did not show that the class was not available at the time the placement offer was made. The IEP was sufficiently clear regarding the English class

31. The speech and language offer does not specify whether the services would be delivered individually or in a group. There was a recommendation from Dr. Bernou that Student receive both individual and group services. The IEP is not sufficiently clear in this case because there was a request from parent for both and there was only one session offered and the IEP does not indicate whether it was group or individual. As to the failure to say when during the week the services would be delivered, Student did not provide any authority that a school district must provide this level of specificity on an IEP.

32. In order for the procedural violation of not specifying whether the speech and language services were individual or group to result in a denial of FAPE to Student, he had the burden of proof to show that this violation either deprived Mother of meaningful participation in the IEP development process or resulted in a depravation of educational benefit to Student. Without the information regarding the character of the speech and language services, especially because Dr. Bernou had recommended both individual and group speech and language services, Mother's ability to participate in the process was impaired. Even after a full hearing, the evidence did not establish whether the services were individual or group. This failure resulted in a denial of FAPE to Student from October 14, 2015. Because Mt. Diablo had not held another IEP team meeting through the first date of hearing, the denial of FAPE continued until March 1, 2016.

Failing to have all required IEP team members present at the October 14, 2015 IEP meeting?

33. The IDEA requires a district to ensure that an IEP team for a child with a disability include not less than one general education teacher of the child (if the child is or

may be participating in the general education environment) and not less than one special education teacher of the child. (34 CFR § 300.321 (a).)

34. The failure to include at least one general education teacher on a child's IEP team may result in a deficient IEP. (*See, e.g., M.L. v. Federal Way Sch. Dist.*, 42 IDELR 57 (9th Cir. 2004), because the student might have been placed in an inclusion classroom, the district erred in holding an IEP meeting without a general education teacher.)

35. A member of the individualized education program team shall not be required to attend an individualized education program meeting, in whole or in part, if the parent of the individual with exceptional needs and the local educational agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting or when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if both of the following occur: (1) The parent, in writing, and the local educational agency consent to the excusal after conferring with the member and (2) The member submits, in writing, to the parent and the individualized education program team input into the development of the individualized education program prior to the meeting. (Ed. Code § 56341(f).)

36. There was no requirement that a regular education teacher be at the meeting to offer the 30 day interim placement, because there is no requirement for an IEP team meeting. However, in this case, the independent educational evaluation was being considered by the IEP team at the meeting and changes were made in response to the report. Student is entitled to have the entire team consider the IEE. Student's present levels of educational performance and other information in the report is relevant to serving student in both the special education and general education environments. Because changes were made to the general education accommodations and the amount of special education and general education services provided to Student at the meeting, and there was no written report by a general education teacher provided, the ability to excuse the regular education teacher was not supported by statute. Student correctly points out that the reason given by Mt. Diablo that no teachers had been assigned does not exempt Mt. Diablo from the requirement. This resulted in a deprivation of Mother's ability to participate in the IEP development process because she was unable to discuss the report with a general education teacher and hear any input or response a general education teacher had to the report. This resulted in a denial of FAPE to Student.

Did the October 14, 2015 IEP fail to offer Student an appropriate placement?

37. "Placement is the determination of where a district will implement a child's IEP in the least restrictive environment." *In the Matter of La Mesa-Spring Valley School District v. Parent, on Behalf of Student,* OAH Case No. 2011030394, p. 9, citing 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(2006); Ed. Code § 56342. The analysis focuses on

the district's offer, not the parents preferred placement and the district's offer must be designed to meet the child's unique needs, be reasonably calculated to provide educational benefit and comport to the IEP. *Rowley, supra,* at 197.

38. Student contends that the placement offer in the October 14, 2015 IEP does not offer Student FAPE because Student's needs require him to be in small classes, with highly trained people, have the ability to use a computer all day and that he needs a social skills program built into the classroom and academic time.

39. Student claims that he requires a small class size to receive a FAPE. However, Student's expert Dr. Bernou did not specify what she considers a small class size. She did say that the small classes at Orion were benefitting Student and he was doing well in the small classes. However, the standard is not whether parents preferred placement is more beneficial to Student. Student did not establish that he could not get educational benefit in larger classes and that the size of the classes alone resulted in a failure to receive educational benefit. Student was able to get a passing grade in his ninth grade year in all classes, except for Algebra 1 and one semester of English. The District's October 14, 2015 offer calls for placement in special education classes for both these subjects. Because Dr. Bernou's report was not given weight in the area of placement recommendations, the grades reported from Orion were not given any weight for reasons detailed above, and Student did not show he received educational benefit in smaller classes at Orion, Student did not meet his burden to show that he needs small classes to receive educational benefit.

40. Student did not show that he needed access to a computer all day to receive educational benefit. He did not put on any evidence that this was required for Student to receive a FAPE.

41. Student did not show that the staff at Mt. Diablo was not appropriately trained to work with Student. While Dr. Bernou made some comments in her report regarding her assumptions about the level of training, there was no credible evidence presented on this issue.

42. Finally, Dr. Bernou claims that Student needs a social skills program that is integrated throughout his school day. However, Dr. Bernou concluded in her report that Student had made progress in pragmatic language and social skills in the time between the last district assessment in 2014 and her assessment. She found that Student improved in his ability to read nonverbal cues such as facial expression and body language and that his understanding of irony and sarcasm had improved tremendously. This showed that Student received educational benefit from the 40 minutes of speech and language services provided to Student from February 2014 until the time of Dr. Bernou's assessment at the beginning of the 2015-2016 school year. Therefore, Student did not show that he needed an integrated social skills program to receive educational benefit.

43. Student did not argue that any other component of the placement offer was not appropriate. Student did not show that the placement offer in the October 14, 2015 IEP was not appropriate for Student and did not show that the offer denied Student a FAPE.

Remedies

44. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v.Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484].)

45. When a school district denies a child with a disability a FAPE, the student is entitled to relief that is " "appropriate"" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374, [105 S. Ct. 1996, 85 L.Ed.2d 385](*Burlington*); 20 U.S.C. § 1415.) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*See Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.*)

46. Compensatory education is an equitable remedy and must rely on a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra,* 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*); *Shaun M. v. Hamamoto* (D. Hawai'i, Oct. 22, 2009 (Civ. No. 09-00075)) 2009 WL 3415308, pp. 8-9 [current needs]; *B.T. v. Department of Educ.* (D. Hawai'i 2009) 676 F.Supp.2d 982, 989-990 [same].)

47. The compensatory education 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 supra,* 401 F.3d at p. 524.) In determining the equitable remedy, the ALJ may consider the school district's failure to update an outdated IEP and refusal to cooperate. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1059-1060; *T.B. ex rel. Brenneise v. San Diego Unified School Dist.* (S.D.Cal, March 30, 2011, No. 08CV28–MMA (WMC)) 2011 WL 1212711, p. 3.)

48. Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to the student in a timely manner prior to the private enrollment and the private placement is appropriate. (34 CFR 300.148 (c), *See also Letter to Chamberlain,* 60 IDELR 77 (OSEP 2012) (finding that tuition reimbursement may be a proper form of relief where the district failed to offer FAPE in a timely manner prior to enrollment and the unilateral placement is appropriate).)

49. If a school district fails to offer an appropriate program for a child and the child's parents are forced to place the child in a private program as a result, the parents may be entitled to reimbursement of the tuition they paid to enroll the child in that school. *(Burlington, supra,* 471 U.S. at p. 369.) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the court. *(Ibid.)*

50. In *C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d. 1155 *(C.B.)*, the court noted that a parent or guardian is entitled to reimbursement for a private school only if: 1) the public placement violated the IDEA; and 2) the private school placement was proper under the IDEA. "If either criterion is not met, the parent or guardian may not obtain reimbursement [citation omitted]. If both criteria are satisfied, the district court then must exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is appropriate." *(Id.* at p. 1159.) Reimbursement may be appropriate, even if the private school does not meet all the state's educational standards or furnish every special service the child needs. The student "need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *(Ibid., quoting from Frank G. v. Board of Education* (2nd Cir. 2006) 459 F.3d 356, 365.)

51. Specifically, the IDEA states that the cost of reimbursement can be reduced or denied if at the most recent IEP team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency. (34 CFR 300.148 (d).)

52. Student asks for several remedies including a request that Mt. Diablo notice and hold an appropriate IEP team meeting, Mt. Diablo train its staff on the applicable circumstances of interim IEP's, reimburse mother for tuition at Orion, reimburse mother for transportation associated with Orion, and award Student compensatory education in math and written language.

53. Student's request for reimbursement for tuition and transportation at Orion is denied. 34 C.F.R. 300.148 allows reimbursement for private school tuition when a district does not make FAPE available to a student ***prior*** to the placement in a private school. In this case, Student did not show that Mt. Diablo had an obligation to make FAPE available to Student prior to his placement at Orion. Student was placed at Orion days after Mother and Student moved into Mt. Diablo and weeks before she enrolled Student. Student was not receiving extended school year services, Mother did not notify Mt. Diablo that Student moved into the district or otherwise put Mt. Diablo on notice regarding Student prior to placing Student at Orion. At the earliest, Mt. Diablo's obligation to make FAPE available to Student was August 26, 2015. The evidence established that the placement at Orion occurred before Mt. Diablo was under any obligation to make a FAPE available to Student.

54. Reimbursement for expenses associated with Orion is further denied because of Student's failure to provide the required notice. The ALJ has discretion to reduce or deny reimbursement for a unilateral placement where the parent has not given adequate notice to the district ***prior*** to the placement. Here, Mother planned to place Student at Orion as early as May 2015. She did not provide any notice to Acalanes, even though she knew Student would start the next school year at Orion. Further, she did not take steps to notify Mt. Diablo of her intent after she moved into the district boundaries. Mother notified both Orion and Dr. Bernou of her intention to place Student at Orion and seek reimbursement, but not Mt. Diablo. Despite numerous contacts with Mt. Diablo when she registered Student, Mother did not give notice regarding her intent to seek reimbursement when she enrolled Student. Mother also did not give the required notice at the IEP team meeting on October 14, 2015 that she was rejecting the placement offer. It was not until days after the IEP team meeting that notice was sent to Mt. Diablo, more than two months after Student's placement. The law requires notice ***prior*** to placement, not several months after. Therefore, for this reason also, Student's request for reimbursement for costs associated with Orion is denied.

55. Student's request for reimbursement of expenses associated with Orion is further denied because the Student failed to show that the placement at Orion was appropriate. Student was inappropriately retained in ninth grade and was repeating classes at Orion he had successfully passed at Los Lomas and for which he received high school credit. Dr. Stewart admitted that Student did not meet the criteria to be retained in a public school. Student also failed to show that he had been receiving educational benefit while at Orion. He did not show that he had made educational progress in the area of academics, behavior or social skills while he was enrolled at Orion. There was no reliable evidence presented showing any academic progress. The behavioral reports at the end of the first term at Orion were virtually identical to the reports from the previous year at Los Lomas. Student also did not show that his social skills improved while at Orion. Again, the reports of Student's social skills were also virtually identical to the reports from Los Lomas. He did not show that the courses in which he was enrolled were appropriate for him including the Dog Class, Homebridging and Personal Projects. Therefore, Student failed to show that placement at Orion was appropriate and reimbursement for the placement must also be denied for this reason.

56. At the time of the IEP team meeting, the evidence showed that Student liked the placement at Orion and that in the past he has been moved very often from school to school. Transitions are difficult for Student and Dr. Bernou's concerns about moving Student after his initial success at Orion was carefully considered in this decision. However, unilateral placement is a risk. Unilateral placement paired with retention was a considerable risk. These legitimate concerns for Student do not overcome the previous determinations that reimbursement for Student's placement at Orion is denied.

57. However, this decision does hold that Mt. Diablo committed procedural violations at the October 14, 2015 IEP team meeting which resulted in a denial of FAPE because the IEP did not designate the speech and language services as individual or group

and because there was not a regular education teacher at the IEP team meeting when Dr. Bernou's evaluation was considered.

58. For the denial of FAPE because Mt. Diablo failed to specify whether the speech and language services were individual or group, the determination of the remedy is complicated and Student put on no evidence regarding compensatory speech and language services. Both Student's March 2015 and February 2014 IEP's have individual and group checked on the services page. Student did not establish what services were actually provided.

59. The evidence established that Student needs social skill instruction through speech and language services and that he has benefited from them in the past. It is appropriate to deliver social skills speech and language compensatory services for Student in a small group, so that Student can practice what he learns with other students. Mt. Diablo denied Student a FAPE from October 14, 2015 through March 1, 2016, a total of about 20 weeks. Therefore, Student is entitled to 20,40-minute sessions of group speech and language services, focusing on social skills. Parents shall provide Mt. Diablo with the name of a certified non-public agency of their choice and Mt. Diablo shall contract with the provider promptly. The services shall conclude no later than August 30, 2017.

60. For Mt. Diablo's failure to have a regular education teacher at the IEP team meeting, Mt. Diablo shall notice and convene an IEP team meeting within 30 days of this decision. All required members shall be in attendance. Mt. Diablo will pay for Dr. Bernou to attend the IEP team meeting and the IEP team shall consider her assessment.

61. Student's requests for compensatory education in the areas of math and writing are denied. Dr. Bernou's determination that Student needed this compensatory education was not based upon any calculation of an appropriate amount based on any denial of FAPE by Mt. Diablo for Student, but appears to be a recommendation for remediation. At the time Dr. Bernou determined that Student needed these services, he had been in the District approximately six weeks. Student did not show that Mt. Diablo's offer of writing or math was not appropriate for Student and resulted in any denial of FAPE. Therefore, this request is denied.

ORDER

1. Parent shall promptly provide Mt. Diablo with the name of a certified non-public agency to provide Student's compensatory social skills speech and language services in a group.

2. Mt. Diablo shall promptly contract with the non-public agency to provide 20, 40-minute compensatory sessions. Mt. Diablo will reimburse Parent for mileage for one round trip for each session of the services. These services may take place in the summer or

during the school year, as determined by Parent. If no group services can be located for Student, the services may be delivered individually.

3. Any sessions not completed by August 30, 2017 will be forfeited.

4. Within 30 days, Mt. Diablo will hold an IEP team meeting specifically to consider Dr. Bernou's evaluation and pay for Dr. Bernou to attend the IEP. Mt. Diablo will ensure that all required team members are present at the meeting.

5. All other requests for relief 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. Here, Parent on behalf of Student, prevailed on part of issue 1a and all of issue 1d. Mt. Diablo prevailed on all other issues.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: May 2, 2016

/s/

MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings