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CENTRAL DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ENTERED  
CLERK, U.S. DISTRICT COURT  
JUL 26 2007  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY  
BY BA

B.L., a minor, by and through  
his Parent and Guardian ad  
litem, M.L.,

Plaintiff,

v.

SAN LUIS COASTAL UNIFIED SCHOOL  
DISTRICT,

Defendant.

CV 06-1747 ABC(FMOx)

ORDER RE: APPEAL OF  
ADMINISTRATIVE DECISION DATED  
DECEMBER 27, 2005

This case arises from a dispute regarding the provision of educational services to a disabled child, Plaintiff B.L. ("Plaintiff" or "Student"). Plaintiff, via his parent and guardian ad litem M.L., has sued the San Luis Coastal Unified School District (the "District") for alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. (the "IDEA"). Plaintiff's claims were initially heard in a due process hearing conducted by the California Office of Administrative Hearings, Special Education Division on

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1 September 13 through 16 and September 20 through 23, 2005. Following  
2 the administrative hearing, Administrative Law Judge Judith A. Kopec  
3 ("ALJ Kopec") issued a lengthy decision ("ALJ Decision"). Plaintiff  
4 contests the outcome of the hearing, arguing various procedural and  
5 substantive violations of the IDEA. Plaintiff filed a complaint in  
6 this Court appealing the ALJ Decision on March 27, 2006. Both  
7 Plaintiff and the District filed opening briefs on March 12, 2007  
8 (which Plaintiff amended and refiled on March 27, 2007). Both parties  
9 filed simultaneous reply briefs on April 3, 2007. Also on April 3,  
10 2007, the District filed objections to evidence Plaintiff submitted to  
11 augment the administrative record. Plaintiff responded to those  
12 objections on June 26, 2007, and the District replied on July 9, 2007.  
13 This matter was previously set for hearing on July 16, 2007, but the  
14 Court found the matter proper for resolution without oral argument and  
15 vacated the hearing date and took the matter under submission on July  
16 12, 2007.

17 **I. BACKGROUND**

18 **A. Factual Background**

19 Plaintiff is currently 13 years old and has been eligible for  
20 special education services since pre-school, initially in the category  
21 of "Speech/Language Impaired," but in February 2001 (first grade), he  
22 was found eligible for services in the category of "Other Health  
23 Impaired." (ALJ Decision Factual Findings ¶ 1.) Plaintiff attended  
24 the District's Bishop's Peak Elementary School during the 2004-2005  
25 school year (fifth grade) and the 2005-2006 school year (sixth grade).  
26 (Id.)

27 On February 10, 2005, a team, including Plaintiff's mother, met  
28 to develop an Individualized Education Plan ("IEP") to be effective

1 through February 10, 2006. This IEP included: (1) eight specific  
2 goals for the next twelve months (Administrative Record ("AR"),  
3 A00282-89); (2) intensive school-based/learning center/resource  
4 services ("RSP") for 120 minutes per school day (AR, A00291); (3) 30  
5 minutes each of speech and language therapy and occupational therapy  
6 ("OT") (Id.); and (4) placement for the remainder of the school day in  
7 general education classes (Id.). The District also provided Plaintiff  
8 with assistive technology ("AT") items during this IEP meeting, such  
9 as computers in his general education and special education classrooms  
10 and in the school's computer labs, and a laptop computer to take home  
11 during the school year. (ALJ Decision Factual Findings ¶ 18.)

12 Plaintiff's mother did not consent to the implementation of the  
13 IEP that resulted from this meeting. She instead paid \$8,132.85 for a  
14 private report from Dr. Caryn Kovar and Ms. Carol Moran of the  
15 Children's Health Council (the "CHC Report") to assess Plaintiff's  
16 needs. (AR, A00502 ¶ 6(e) (Statement of Issues).) The District  
17 convened another meeting on April 29, 2005, at which time Plaintiff's  
18 mother provided the District with the CHC Report. (ALJ Decision  
19 Factual Findings ¶ 3.) At this meeting Dr. Kovar and Ms. Moran  
20 reviewed the CHC Report with the District by telephone. (AR, A00293.)  
21 Moreover, Plaintiff's mother brought Speech Pathologist Marna Scarry-  
22 Larkin to this meeting. (Sept. 13, 2005 Hearing Tr. at 70:12-75:7.)  
23 Plaintiff's mother also presented the District with a letter  
24 expressing her belief that Plaintiff had not received the services  
25 necessary from the District to teach him required language skills.  
26 (ALJ Decision Factual Findings ¶ 3.) She requested that the District  
27 provide Plaintiff with: (1) instruction in a specific program at the  
28 Lindamood-Bell Center ("LMB") during the summer of 2005; (2)

1 -instruction at LMB or from Ms. Scarry-Larkin during the 2005-2006  
2 school year; and (3) AT evaluation, implementation and regular  
3 updating through qualified specialists. (Id.)

4 The IEP team met again with Plaintiff's mother on May 26, 2005  
5 and developed a proposed amendment to Plaintiff's IEP. (Id. ¶ 4.)  
6 The District refused Plaintiff's request for LMB services based on the  
7 written and oral comments by Plaintiff's RSP Teacher, Monica Stank.  
8 (AR, A00330.) She stated that Plaintiff was benefitting from the  
9 District's programs, including one-on-one instruction, small group  
10 instruction, peer tutoring, "Learning Network," "Read Naturally," and  
11 Scholastic Research Association ("SRA") direct instruction. (Id.)  
12 The District also denied Plaintiff's request for an AT assessment  
13 because it concluded it had enough information to assess Plaintiff's  
14 AT needs.<sup>1</sup> (AR, A00294.)

15 The District amended Plaintiff's February 10, 2005 IEP in  
16 response to the CHC Report. Plaintiff's May 26, 2005 IEP included:  
17 (1) a new "reading decoding" goal and four new speech and language  
18 goals; and (2) an increase in RSP time from 120 minutes to 150 minutes  
19 per school day to address Plaintiff's AT needs. (ALJ Decision Factual  
20 Findings ¶¶ 12-14.) The IEP team discussed AT items, promised an AT  
21 plan would be provided to Plaintiff by September 30, 2005 and noted  
22 that Plaintiff's increased RSP time would be devoted solely to  
23 learning software on the computer. (Id. ¶ 18.) Plaintiff's mother  
24 did not consent to the implementation of these amendments. (Id. ¶ 4.)

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27 <sup>1</sup>ALJ Kopec noted that Plaintiff only challenged the AT assessment  
28 in the February 10, 2005 IEP. (ALJ Decision Factual Findings ¶ 27  
n.2.)

1 On June 20, 2005, Plaintiff went to the LMB clinic in San Luis  
2 Obispo, California, which assessed Plaintiff and recommended 240-300  
3 hours of LMB services. (AR, A00112.) Plaintiff's parent wrote the  
4 District on August 29, 2005 to request that Plaintiff be permitted to  
5 attend the LMB clinic until noon each school day and attend the  
6 District program in the afternoon, but the District denied her request  
7 both because it did not provide Plaintiff a FAPE and because it would  
8 conflict with the California Education Code's compulsory attendance  
9 requirements. (AR, A00334-36.) Plaintiff began attending the LMB  
10 program anyway, although he does not provide any evidence of the costs  
11 he incurred while attending this program.

12 Plaintiff did not attend any District school during the 2006-2007  
13 school year. (Declaration of Jackie Kirk-Martinez ¶ 9-10.)

14 **B. Issues Before ALJ Kopec**

15 ALJ Kopec outlined the issues raised by Plaintiff:

16 a. Did the District fail to offer a FAPE to Student from  
17 February 10, 2005, through February 10, 2006 by:

- 18 (1) Failing to develop appropriate goals in the  
19 February 10 and May 26, 2005 IEPs?
- 20 (2) Failing to adequately describe services to be  
21 provided by a Resource Specialist in the May 26,  
22 2005 IEP?
- 23 (3) Failing to provide Plaintiff's mother the  
24 opportunity to meaningfully participate in the May  
25 26, 2005 IEP?
- 26 (4) Failing to provide services in the areas of AT,  
27 facilitating speech and language, self-advocacy,  
28 demystification counseling, and intensive reading  
from Lindamood-Bell or a trained speech and  
language pathologist?

26 b. Did the District fail to assess Plaintiff in the areas  
27 of AT, Central Auditory Processing Disorder (CAPD),  
28 visual processing, and speech and language?

1 c. Is the District required to reimburse Plaintiff for  
2 independent educational evaluations ("IEEs") in the  
3 areas of occupational therapy ("OT") and  
4 psychoeducation, and provide an IEE at public expense  
5 in the areas of speech and language?

6 d. Is the District required to provide compensatory  
7 education services?

8 (ALJ Decision Issues ¶¶ 1-4.) These issues were a distillation of the  
9 stipulated issues before ALJ Kopec:

10 a. The District failed to provide FAPE to [Plaintiff] from  
11 February 10, 2005 through February 10, 2006.

12 b. The following allegations concern the Individualized  
13 Education Program (IEP) dated February 10, 2005:

14 (1) Goal #1 is not clearly defined and cannot be  
15 accurately measured.

16 (2) Goal #2 is not clearly defined, cannot be  
17 accurately measured, and is not reasonably  
18 calculated to have an educational benefit.

19 (3) Goal #3 is not clearly defined, cannot be  
20 accurately measured, is not reasonably calculated  
21 to have an educational benefit, and does not  
22 adequately describe [Plaintiff's] present level.

23 (4) Goal #4 is not clearly defined, cannot be  
24 accurately measured, is not reasonably calculated  
25 to have an educational benefit, and does not  
26 adequately describe [Plaintiff's] present level.

27 (5) Goal #6 is not clearly defined, is not reasonably  
28 calculated to have an educational benefit, and  
does not adequately describe [Plaintiff's] present  
level.

(6) Goal #7 is not reasonably calculated to have an  
educational benefit and does not adequately  
describe [Plaintiff's] present level.

(7) Goal #8 is not clearly defined, is not reasonably  
calculated to have an educational benefit, and  
does not adequately describe [Plaintiff's] present  
level.

(8) The District failed to perform an assessment of  
[Plaintiff's] need for Assistive Technology (AT)  
and the District failed to provide AT services  
based on [Plaintiff's] unique needs.

1 c. The following allegations concern the IEP amendment  
2 dated May 26, 2005:

- 3 (1) The denial of [Plaintiff's] request for Lindamood-  
4 Bell services or private speech and language  
5 services resulted in a failure to provide FAPE.<sup>[2]</sup>
- 6 (2) [Plaintiff's] mother was denied meaningful  
7 participation in the IEP process.
- 8 (3) Goals #1 through #4 cannot be adequately measured  
9 and do not adequately describe [Plaintiff's]  
10 present levels.
- 11 (4) Goal #5 does not adequately describe [Plaintiff's]  
12 present level.
- 13 (5) The description of Resource Specialist services is  
14 vague and cannot be implemented.

15 d. The District failed to assess [Plaintiff] in the  
16 following areas:

- 17 (1) Central Auditory Process Disorder by a properly  
18 qualified licensed audiologist.
- 19 (2) Visual processing by a developmental optometrist  
20 with the professional training to provide  
21 information to the IEP team regarding visual  
22 processing as it pertains to academic performance.

23 e. The District failed to assess [Plaintiff] in all  
24 necessary areas, failed to reach accurate conclusions,  
25 and failed to provide analysis to the IEP team that was  
26 necessary for it to develop meaningful goals for  
27 [Plaintiff]. As a result, the District must reimburse  
28 [Plaintiff] for Independent Educational Evaluations  
(IEEs) performed by Dr. Terence Sanger in the amount of  
\$687.00 and by Dr. Caryn Kovar and Ms. Carol Moran in  
the amount of \$8,132.85.

f. The District failed to provide [Plaintiff] facilitated  
social experiences using the one-on-one services of a  
Speech and Language Pathologist during naturally  
occurring social opportunities (e.g., lunch, recess,  
etc.) and therapeutic support as part of [Plaintiff's]  
speech and language program in the area of peer  
relationship skills in his IEP.

g. The District failed to provide [Plaintiff] self-  
advocacy skills and demystification counseling using

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<sup>2</sup>This issue was withdrawn by the parties prior to the  
administrative hearing.

1 the one-on-one services of a mutually agreed upon  
2 licensed psychologist.

3 h. The District failed to provide [Plaintiff] with  
4 Lindamood-Bell services two hours a day from either a  
5 Lindamood-Bell center or a trained speech and language  
6 pathologist and necessary compensatory education  
7 services.

8 i. The District shall provide compensatory education  
9 services as necessary.

10 Plaintiff outlined his requested remedies in his brief filed with  
11 the Court:

- 12 1. Compensatory education in the form of reimbursement for  
13 all money spent by Plaintiff's mother on intensive  
14 educational intervention at LMB;
- 15 2. Reimbursement for the amount paid by Plaintiff's mother  
16 for the independent psycho-educational report from the  
17 CHC;
- 18 3. A comprehensive AT assessment to determine what  
19 Plaintiff's needs for the AT are;
- 20 4. Attorney's fees and costs; and
- 21 5. Other relief as appropriate.

22 (Pl. Br. at 8:19-9:2.)

23 The administrative hearing took place over a five-day period in  
24 September 2005, and ALJ Kopec heard testimony from multiple witnesses  
25 and received voluminous documentary evidence from both sides. ALJ  
26 Kopec ultimately found in favor of the District and Plaintiff has  
27 sought review of that decision from this Court.

## 28 I. LEGAL STANDARD

### A. The IDEA

The IDEA guarantees all disabled children a "free appropriate  
public education" ("FAPE") which "emphasizes special education and  
related services designed to meet their unique needs and prepare them  
for further education, employment, and independent living." 20 U.S.C.

1 §1400(d)(1)(A). A FAPE is defined as special education and related  
2 services that: (1) are available to the student at public expense,  
3 under public supervision and direction, and without charge; (2) meet  
4 the state education standards; (3) include an appropriate education in  
5 the state involved; and (4) conform with the student's IEP. 20 U.S.C.  
6 § 1401(9).

7 An IEP is a written statement containing the details of the  
8 individualized education program for a specific child, which is  
9 crafted by a team that includes the child's parents and teacher, a  
10 representative of the local education agency, and, whenever  
11 appropriate, the child. 20 U.S.C. § 1401(14), § 1414(d)(1)(B). An  
12 IEP must contain: (1) information regarding the child's present levels  
13 of performance; (2) a statement of annual goals and short-term  
14 instructional objectives; (3) a statement of the special educational  
15 and related services to be provided to the child; (4) an explanation  
16 of the extent to which the child will not participate with non-  
17 disabled children in the regular class; and (5) objective criteria for  
18 measuring the child's progress. 20 U.S.C. § 1414(d).

19 In addition to these substantive provisions, the IDEA contains  
20 numerous procedural safeguards. The local educational agency must  
21 provide the parents or guardians of a disabled child prior written  
22 notice of any proposed change in the identification, evaluation, or  
23 educational placement of the child. 20 U.S.C. § 1415(b)(3). The  
24 agency also must give parents an opportunity to present complaints  
25 regarding any matter related to the education or placement of the  
26 child, or the provision of a FAPE to the child. 20 U.S.C. §  
27 1415(b)(6). Upon the presentation of such a complaint, the parent or  
28 guardian is entitled to an impartial due process administrative

1 hearing conducted by the state or local educational agency, as  
2 determined by state law or by the state educational agency.

3 **B. Judicial Review of Administrative Decisions Under the**  
4 **IDEA**

5 The IDEA provides that a party aggrieved by the findings and  
6 decision made in a state administrative due process hearing has the  
7 right to bring an original civil action in federal district court (or,  
8 in a state court of competent jurisdiction) in order to secure review  
9 of the disputed findings and/or decision. 20 U.S.C. § 1415(i)(2).  
10 The party bringing the administrative challenge bears the burden of  
11 proof in the administrative proceeding. Schaffer ex rel. Schaffer v.  
12 Weast, 126 S. Ct. 528, 537 (2005). Similarly, the party challenging  
13 the administrative decision bears the burden of proof in the district  
14 court. Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1399  
15 (9th Cir. 1994) (superseded by statute on other grounds).<sup>3</sup>

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

19 In any action brought under this paragraph the  
20 court -- (i) shall receive the records of the  
21 administrative proceedings; (ii) shall hear  
22 additional evidence at the request of a party; and  
23 (iii) basing its decision on the preponderance of  
24 the evidence, shall grant such relief as the court  
25 determines is appropriate.

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24 <sup>3</sup>Plaintiff generally argues that ALJ Kopec improperly placed the  
25 burden on him at various points in the administrative hearing. As the  
26 Supreme Court stated in Schaffer, "[t]he burden of proof in an  
27 administrative hearing challenging an IEP is properly placed upon the  
28 party seeking relief." 126 S. Ct. at 537. Therefore, even assuming  
ALJ Kopec placed the burden of proof on Plaintiff, it was appropriate  
to do so. See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 481  
F.3d 770, 778 n.2 (9th Cir. 2007) (noting Schaffer's alteration of  
existing Ninth Circuit case law on the burden of proof issue).

1 This standard requires that "due weight" be given to the  
2 administrative proceedings. Board of Educ. of the Hendrick Hudson  
3 Central Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982). The amount of  
4 deference accorded is subject to the court's discretion. Gregory K.  
5 v. Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In  
6 making this determination, the thoroughness of the hearing officer's  
7 findings should be considered, and the degree of deference increased  
8 where the hearing officer's findings are "thorough and careful."  
9 Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th  
10 Cir. 1995) (citing Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th  
11 Cir. 1994)). "Substantial weight" is given to the hearing officer's  
12 decision where it "evidences his careful, impartial consideration of  
13 all the evidence and demonstrates his sensitivity to the complexity of  
14 the issues presented." County of San Diego v. Cal. Special Educ.  
15 Hearing Office, 93 F.3d 1458, 1466 (9th Cir. 1996) (internal citations  
16 omitted). This high degree of deference is warranted because "if the  
17 district court tried the case anew, the work of the hearing officer  
18 would not receive 'due weight' and would be largely wasted."  
19 Wartenberg, 59 F.3d at 891.

20 Because of the deference to be accorded to the hearing officer's  
21 decision, a de novo review is not appropriate. Amanda J. v. Clark  
22 Cty. Sch. Dist., 267 F.3d 877, 887 (9th Cir. 2001). Thus, the  
23 district court "must consider the findings carefully and endeavor to  
24 respond to the hearing officer's resolution of each material issue.  
25 After such consideration, the court is free to accept or reject the  
26 findings in part or in whole." Parents of Student W. v. Puyallup Sch.  
27 Dist. No. 3, 31 F3d 1489 (9th Cir. 1994).  
28

1 In this case, ALJ Kopec issued a lengthy, detailed opinion. She  
2 supported her findings with testimony and documentary evidence  
3 presented by the parties during the hearing. ALJ Kopec's decision was  
4 impartial, and her reasoning reflected her detailed understanding of  
5 the complexities of the case. Thus, her decision is entitled to  
6 substantial weight.

7 **C. Additional Evidence**

8 Both parties have submitted additional evidence to augment the  
9 administrative record, which is permitted under the IDEA. 20 U.S.C. §  
10 1415(i)(2). However, "this clause does not authorize witnesses at  
11 trial to repeat or embellish their prior administrative hearing  
12 testimony; this would be entirely inconsistent with the usual meaning  
13 of 'additional.' We are fortified in this interpretation because it  
14 structurally assists in giving due weight to the administrative  
15 proceeding[.]" Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1473  
16 (9th Cir. 1993) (citing Town of Burlington v. Department of Educ., 736  
17 F.2d 773, 790-91 (1st Cir. 1984), aff'd sub nom. School Comm'n v.  
18 Department of Educ., 471 U.S. 359 (1985)). The Court in Jackson then  
19 listed reasons why evidence might be considered "additional": "gaps in  
20 the administrative transcript owing to mechanical failure";  
21 "unavailability of a witness"; "improper exclusion of evidence by the  
22 administrative agency"; and "evidence concerning relevant events  
23 occurring subsequent to the administrative hearing." Id. Therefore,  
24 "an administrative hearing witness is rebuttably presumed to be  
25 foreclosed from testifying at trial" and "a court should weigh heavily  
26 the important concerns of not allowing a party to undercut the  
27 statutory role of administrative expertise, the unfairness involved in  
28 one party's reserving its best evidence for trial, the reason the

1 witness did not testify at the administrative hearing, and the  
2 conservation of judicial resources." Id.

3 The District objects to Plaintiff's references to various items  
4 of evidence: (1) AR, B00200, a February 26, 2001 memorandum admitted  
5 in a separate administrative proceeding; (2) references to Plaintiff's  
6 prior IEPs from 2002-2003, 2003-2004, and 2004-2005, and Exhibits A  
7 and B attached to Plaintiff's opening brief containing this IEP  
8 information; (3) references to California State Education Standards  
9 accessed via the Internet on March 8, 2007; (4) a report from Dr.  
10 Patterson dated May 16, 2006 and a report from Dr. Sandberg dated  
11 January 29, 2007; and (5) a declaration from Plaintiff's mother.

12 As to item one, the Court sustains the District's objection  
13 because this memorandum was admitted in a different administrative  
14 proceeding and Plaintiff has failed to demonstrate how it is relevant  
15 to the Court's determination of the issues. As to item two, the Court  
16 sustains the District's objection. ALJ Kopec properly concluded that  
17 the prior IEPs were not relevant because they did not contain  
18 identical language for Plaintiff's goals moving from year to year.  
19 Moreover, ALJ Kopec's well-reasoned decision addressed Plaintiff's  
20 argument about prior IEPs, concluding that the goals in his February  
21 10, 2005 IEP were in fact different from prior years. (ALJ Decision  
22 Factual Findings ¶¶ 6, 10.) As to item three, the Court sustains the  
23 District's objection. Plaintiff visited the California Department of  
24 Education website in March 2007, over two years after Plaintiff's IEP  
25 was drafted, and Plaintiff has not demonstrated that the same  
26 standards were in effect at the time of his IEP meetings. As to item  
27 four, the Court overrules the District's objections to Dr. Sandberg's  
28 and Dr. Patterson's reports, which post-dated the IEP process.

1 Plaintiff offered them to demonstrate the appropriateness of the LMB  
2 private placement, which is relevant to Plaintiff's reimbursement  
3 claims.

4 As to item five, the Court sustains the District's objections.  
5 Plaintiff offered a declaration from his mother, in which she  
6 testified to various facts that both pre-dated and post-dated the ALJ  
7 Decision. Events pre-dating the ALJ Decision are inadmissible because  
8 Plaintiff has offered no justification for why his mother failed to  
9 testify to these facts in the administrative proceeding. Moreover,  
10 her testimony regarding events that post-date the ALJ Decision is  
11 irrelevant to determining whether the February 10, 2005 and May 26,  
12 2005 IEPs were valid.

13 **III. ANALYSIS**

14 **A. Was Plaintiff Denied a FAPE Between February 10, 2005 and**  
15 **February 10, 2006?**

16 ALJ Kopec outlined in detail the FAPE requirement under the IDEA,  
17 20 U.S.C. § 1412(a)(1)(A), and under the equivalent California law,  
18 Cal. Educ. Code § 56000. (ALJ Decision Applicable Law ¶ 1.)<sup>4</sup> A FAPE  
19 is defined as special education and related services that are provided  
20 at public expense, without charge, under public supervision and  
21 direction, that meet state educational standards, and conform to a  
22 student's IEP. 20 U.S.C. § 1401(8). "Special education" is defined  
23 as specially designed, no-cost instruction to meet a disabled  
24 student's unique needs, whether it occurs in the classroom, at home,

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25  
26 <sup>4</sup>ALJ Kopec noted that the allegations in this case arose prior to  
27 the most recent amendments and reauthorization of the IDEA. (ALJ  
28 Decision Applicable Law ¶ 1 nn.5-6.) As ALJ Kopec did, the Court will  
apply the federal and state law in effect at the time of the events in  
this case. See Amanda J., 267 F.3d at 882 n.1.

1 in hospitals or institutions or other settings. Id. § 1401(25); Cal.  
2 Educ. Code § 56031. "Related services" include developmental,  
3 corrective, and supportive services, such as speech-language pathology  
4 and physical and occupational therapy, to assist a disabled child in  
5 benefitting from education, and to help identify disabling conditions.  
6 20 U.S.C. § 1401(22); Cal. Educ. Code § 56363.

7 The IDEA requires a school district only to provide a "basic  
8 floor of opportunity . . . consist[ing] of access to specialized  
9 instruction and related services which are individually designed to  
10 provide educational benefit to [the child with a disability]."

11 Rowley, 458 U.S. at 201. A District need not maximize a child's  
12 potential, nor provide the "absolutely best" possible education in  
13 order to provide an "appropriate" education for a disabled student.  
14 See id. at 200 n.21; Gregory K., 811 F.3d at 1314.

15 The IDEA imposes both procedural and substantive requirements on  
16 school districts and the analysis of whether a school district has  
17 provided a FAPE is two-fold: (1) whether the school district complied  
18 with procedural requirements of the IDEA; and (2) whether the IEP is  
19 reasonably calculated to provide the student with educational  
20 benefits. Rowley, 458 U.S. at 206-07. Not every procedural violation  
21 results in a denial of a FAPE; procedural violations must result in  
22 denial of educational benefits or a serious infringement of the  
23 parents' opportunity to participate in the IEP process to constitute a  
24 denial of a FAPE. See Amanda J., 267 F.3d at 892.

25 As ALJ Kopec aptly summarized, the IEP must contain a statement  
26 of the child's present levels of educational performance, a statement  
27 of measurable goals, a statement of the special education and related  
28 services and supplementary aids and services to be provided, and a

1 statement of how the child's progress toward the annual goals will be  
 2 measured. 20 U.S.C. § 1414(d)(1)(A)(i)-(iii), (vii)(I); 34 CFR  
 3 300.347(a)(1)-(3), (7)(I); Cal. Educ. Code § 56345(a)(1)-(3), (9).  
 4 "While rigid adherence to the laundry list of items given in [the  
 5 IDEA] is not paramount . . . [w]hen a district fails to meet the  
 6 procedural requirements of the Act by failing to develop an IEP in the  
 7 manner specified, the purposes of the Act are not served, and the  
 8 district may have failed to provide a FAPE." W.G. v. Board of  
 9 Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1483-84  
 10 (9th Cir. 1992). The Court must evaluate the IEP in light of the  
 11 information available at the time it was developed, not in hindsight  
 12 because "[a]n IEP is a snapshot, not a retrospective." See Adams v.  
 13 Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) (citing Fuhrman v. East  
 14 Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993)).

15 Parental participation in the IEP process is critical because  
 16 "[a]n IEP which addresses the unique needs of the child cannot be  
 17 developed if those people who are most familiar with the child's needs  
 18 are not involved or fully informed." Amanda J., 267 F.3d at 892. As  
 19 ALJ Kopec noted, a parent has meaningfully participated in the IEP  
 20 process when he or she is informed of the student's problems, attends  
 21 the IEP meeting, expresses disagreement with the IEP team's

22  
 23  
 24  
 25 <sup>5</sup>Plaintiff argues that the IEP must contain "objective criteria"  
 26 for measuring Plaintiff's progress, relying on Ojai Unified Sch. Dist.  
 27 v. Jackson, 4 F.3d 1467, 1469 (9th cir. 1993). The District correctly  
 28 points out that the "objective criteria" on which that court relied  
 came from 20 U.S.C. § 1401(a)(20), which was no longer effective at  
 the time of Plaintiff's February 10, 2005 IEP. Therefore, ALJ Kopec  
 properly omitted any requirement that the IEP contain "objective  
 criteria" to measure progress.

1 conclusions, and requests revisions in the IEP. See N.L. v. Know Cty.  
2 Schs., 315 F.3d 688, 693 (6th Cir. 2003); Fuhrmann, 993 F.2d at 1036.

3 1. February 10, 2005 IEP

4 a. Goal #1

5 The first goal contains the present level that "[Plaintiff] can  
6 calculate math problems involving addition, subtraction,  
7 multiplication, and simple division. He has great difficulty in  
8 solving word problems and multiple step problems." (AR, A00040.) The  
9 goal states, "[b]y February 2006, when given a mixture of math  
10 problems requiring both single and multi-step solutions, [Plaintiff]  
11 will determine how and when to break a problem into simpler parts with  
12 80% accuracy in 3 of 4 trials as measured by student work samples."

13 (Id.) Plaintiff challenged this goal as not clearly defined and not  
14 susceptible to accurate measurement, but ALJ Kopec rejected these  
15 contentions, finding that this goal "was developed so that Student  
16 would learn to solve a variety of math problems requiring a number of  
17 analytical steps" and "[s]tudent's work samples can be used to  
18 evaluate his progress." (ALJ decision Factual Findings ¶ 5.) ALJ  
19 Kopec concluded that this goal was both clear and measurable. (ALJ  
20 Decision Legal Conclusions ¶ 1.)

21 The Court affirms ALJ Kopec's conclusion. This goal clearly  
22 defines the number of problems Plaintiff must complete, the percentage  
23 of those problems Plaintiff must solve, and time frame in which this  
24 must be achieved. Progress toward this goal will certainly be  
25 measurable through student work samples.<sup>6</sup>

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27 <sup>6</sup>Plaintiff argues that this goal is unclear because it does not  
28 require Plaintiff to "solve" multi-step math problems. However, a  
teacher could readily infer that, because Plaintiff could solve simple

1 b. Goal #2

2 For Plaintiff's present level, the second goal states that  
3 "[Plaintiff] can read grade level text, but does not comprehend or  
4 retain comprehension of the text." (AR, A00041.) His goal, then, is,  
5 "[b]y February 2006, when given a grade five (or lower) text,  
6 [Plaintiff] will state the main idea of the text and identify  
7 statements (evidence) within the text that support the main idea with  
8 at least 85% accuracy in at least 3 of 4 trials as measured by student  
9 work samples/teacher-charted records." (Id.) Plaintiff challenged  
10 this goal as not clearly defined, not susceptible to accurate  
11 measurement, and not reasonably calculated to have an educational  
12 benefit, but ALJ Kopec found that this goal "addresses Student's need  
13 to increase his reading comprehension in his grade-level curriculum  
14 (fifth grade), and his instructional reading level. His progress can  
15 readily be evaluated through work samples." (ALJ Decision Factual  
16 Findings ¶ 6.) ALJ Kopec also found that "[t]his goal is similar to a  
17 goal in Student's previous IEP, dated February 19, 2004. However, the  
18 goals are not identical. They identify different tasks to be  
19 performed and different levels of proficiency." (Id.) ALJ Kopec then  
20 concluded that this goal is clear, measurable, and addresses  
21 Plaintiff's unique needs so as to be reasonably calculated to provide  
22 an educational benefit. (ALJ Decision Factual Findings ¶ 6, Legal  
23 Conclusions ¶¶ 1, 3.)

24 The Court affirms ALJ Kopec's conclusion. This goal clearly  
25 requires Plaintiff to demonstrate reading comprehension at the fifth

26 \_\_\_\_\_  
27 math problems, Plaintiff's goal would be recognizing multi-step math  
28 problems and breaking them down into their simple parts, which he can  
then solve. This goal is thus clear, as ALJ Kopec determined.

1 grade level and imposes specific quantified goals based on number of  
2 attempts and accuracy in each attempt. Moreover, both work samples  
3 and teacher-charted records could readily be used to measure this  
4 progress. It is reasonably calculated to render an educational  
5 benefit because Plaintiff experienced trouble in reading comprehension  
6 and this goal is clearly calculated to bring him up to his then-  
7 current grade level.<sup>7</sup>

8 c. Goal #3

9 Goal three states Plaintiff's present level as, "[w]ith practice,  
10 [Plaintiff] can read 150 words per minute from the SRA Decoding  
11 Strategies(B2)." (AR, A00042.) His goal is, "[b]y February 2006,  
12 when given a narrative or expository reading passage at the fourth  
13 grade level, [Plaintiff] will read the passage with appropriate  
14 pacing, intonation, and expression at a rate of 160 correct words per  
15 minute with 90% accuracy in 4 out of 5 consecutive trials as measured  
16 by student work samples/teacher-charted records." (Id.) Plaintiff  
17 claimed that this goal as was not clearly defined, could not be  
18 accurately measured, was not reasonably calculated to have an  
19 educational benefit, and did not adequately describe Plaintiff's  
20 present level. ALJ Kopec rejected these contentions, finding that  
21 this goal "addresses Student's need to improve his reading fluency by  
22 increasing it by a specified number of words per minute. Student's  
23 present level of performance is identified in terms of the speed with  
24 which he can read text at a specific level within the Scholastic  
25

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26 <sup>7</sup>Plaintiff argues that this goal was merely a restatement of the  
27 same goal from prior IEPs, but fails to demonstrate what was required  
28 by the prior IEPs. He attaches two charts to his opening brief, but  
after carefully reviewing them, the Court cannot discern where this  
information came from and what it is intended to show.

1 Research Association (SRA) reading program. This goal can be measured  
2 by his work samples and the teacher's records." (ALJ Decision Factual  
3 Findings ¶ 7.) ALJ Kopec concluded that this goal was clearly  
4 defined, could be accurately measured, contained adequate present  
5 levels, and was reasonably calculated to address Plaintiff's unique  
6 needs and provide him an educational benefit. (ALJ Decision Legal  
7 Conclusions ¶¶ 1, 3.)

8 The Court affirms ALJ Kopec's conclusion. The present level in  
9 this goal refers both to Plaintiff's current reading level of 150  
10 words per minute and to his performance within the SRA reading  
11 program, a program with which District teachers are familiar. (Sept.  
12 15, 2005 Hearing Tr. at 205:8-22.) These criteria would readily  
13 enable any teacher to assess Plaintiff's current level. The goal also  
14 clearly sets progress at an increase of 10 words per minute measured  
15 through attempts and accuracy in each attempt, which are accurate  
16 measures of Plaintiff's progress. Moreover, because he must increase  
17 the number of words per minute he can read with the proper "pacing,  
18 intonation, and expression," this goal is reasonably calculated to  
19 provide Plaintiff with an educational benefit.

20 d. Goal #4

21 Goal four sets Plaintiff's present level as "[Plaintiff] can  
22 write a simple sentence." (AR, A00043.) His goal is set as, "[b]y  
23 February, following teacher-led prewriting activities, [Plaintiff]  
24 will compose or demonstrate the knowledge of finding a single  
25 paragraph including a topic sentence, supporting sentences and a  
26 concluding sentence with 85% accuracy in 4 of 5 trials as measured by  
27 student work samples." (Id.) Plaintiff claimed that this goal was  
28 not clearly defined, could not be accurately measured, was not

1 reasonably calculated to have an educational benefit, and did not  
2 adequately describe Plaintiff's present level. ALJ Kopec found that  
3 this goal "addresses Student's need to develop his skills in written  
4 composition by having him both identify and compose topic sentences,  
5 supporting sentences and concluding sentences. The present level of  
6 performance relates to Student's ability to write a sentence, not his  
7 ability to compose a paragraph. However, the goal is clearly written  
8 and can be readily implemented. Student's work samples can provide  
9 data to assess progress. There is no evidence that Mother was unable  
10 to participate in discussion of this goal at the IEP team meeting."  
11 (ALJ Decision Factual Findings ¶ 8.) ALJ Kopec concluded that this  
12 goal lacked an adequate present level, but that there was no evidence  
13 that this violation would result in a deprivation of an educational  
14 benefit or seriously infringe Plaintiff's mother's right to  
15 meaningfully participate in the IEP process. (ALJ Decision Legal  
16 Conclusions ¶ 2.)

17 The Court disagrees with ALJ Kopec's ultimate conclusion that  
18 this goal provided Plaintiff an educational benefit. The Court agrees  
19 with ALJ Kopec's conclusion that the statement, "[Plaintiff] can write  
20 a simple sentence," inadequately identifies his present level. This  
21 statement fails to define "simple sentence" and contains no details as  
22 to what might be Plaintiff's shortcoming in this area, whether it be  
23 spelling, grammar, punctuation, or any other facet of composition.  
24 Moreover, the Court has difficulty imagining a newly assigned teacher  
25 understanding Plaintiff's present level of composition based on this  
26 statement alone, which is precisely what a thoroughly drafted IEP  
27 would avoid. The District attempts to pull in the present level in  
28 the unchallenged goal five to shore up the inadequacy in goal four,

1 but this argument lacks merit. Goal five obviously addresses  
2 Plaintiff's penmanship, not his composition abilities, two different  
3 skills. (AR, A00044.) The District's argument is unavailing.

4 ALJ Kopec, however, improperly concluded that Plaintiff still  
5 would experience an educational benefit from this goal despite the  
6 inadequate present level. The stated goal in this segment of  
7 Plaintiff's IEP specifically relates to his ability to compose a sound  
8 paragraph with a topic sentence, supporting sentences, and a  
9 concluding sentence. The Court cannot tell from the present level,  
10 however, whether this is where Plaintiff's current skills fall short.  
11 Plaintiff might be proficient in composing paragraphs, but lack  
12 grammar skills, or punctuation skills, or any number of composition  
13 skills. Again, a new teacher taking Plaintiff for the first time may  
14 improperly conclude, based on this goal, that Plaintiff is lacking  
15 paragraph-writing skills and might overlook Plaintiff's actual  
16 shortcomings. This goal in Plaintiff's IEP therefore is both  
17 procedurally flawed and is not reasonably calculated to provide  
18 Plaintiff an educational benefit.

19 e. Goal #6

20 Goal six sets Plaintiff's present level as "[Plaintiff] can read  
21 by using both index fingers for tracking his location in the  
22 paragraph. He uses his right index finger for the right side and left  
23 index [sic] for the left side of his midline. He has difficulty, left  
24 eye more than right, with tracking visually past his body midline.  
25 [Plaintiff] has poor body mechanics and has inconsistent physical  
26 endurance for writing/reading." (AR, A00045.) Plaintiff's goal is,  
27 "[Plaintiff] will read without using his index fingers for tracking  
28 and holding his own reading materials at a preferred position using

1 correct body mechanics for 5-8 minutes with 80% accuracy, 2 of 3  
2 trials." (Id.) Plaintiff claimed this goal was not clearly defined,  
3 was not reasonably calculated to have an educational benefit, and did  
4 not adequately describe his present level. ALJ Kopec found that this  
5 goal was "designed to improve Student's stamina for reading by  
6 decreasing the physical stress created by his current posture. It  
7 will also assist Student in his classroom activities by developing his  
8 ability to track words with his eyes as he reads books and white  
9 board. The description of Student's present level of performance is  
10 specific and detailed." (ALJ Decision Factual Findings ¶ 9.) ALJ  
11 Kopec concluded that this goal was clearly defined, could be  
12 accurately measured, contained an adequate present level, and was  
13 reasonably calculated to provide Plaintiff an educational benefit.  
14 (ALJ Decision Legal Conclusions ¶¶ 1, 3.)

15 The Court affirms ALJ Kopec's conclusion. The present level in  
16 this goal outlines in detail Plaintiff's physical posture problems and  
17 his use of his fingers while reading. The goal is clearly defined to  
18 address Plaintiff's posture issues and using his index fingers to  
19 read, and his progress can be accurately measured through attempts and  
20 accuracy in each attempt at reading with corrected physical posture.  
21 Plaintiff argues that the IEP lacks detail on why curbing Plaintiff's  
22 use of his fingers while reading (a so-called "compensatory strategy")  
23 would "negate Plaintiff's need for it." As far as the Court  
24 understands Plaintiff's argument, the evidence on which ALJ Kopec  
25 likely rested her conclusion strongly demonstrates the problems to  
26 which this goal was directed. (Sept. 14, 2005 Hearing Tr. at 108:9-  
27  
28

1 111:17.)<sup>8</sup> Thus, this goal was calculated to provide Plaintiff an  
2 educational benefit.

3 f. Goal #7

4 Goal seven contains a present level of "[Plaintiff] tends to  
5 swallow his /l/ sound when he speaks. He also has remediation need  
6 for /th/ according to his last speech report. [Plaintiff]'s tongue  
7 movement is slightly limited therefore this program is as much for  
8 maintenance of how he does already pronounce these sounds." (AR,  
9 A00046.) This goal states, "Given pictures that represent words with  
10 /l/ and /th/ sounds, [Plaintiff] will say these in sentences using his  
11 /l/ and /th/ sounds correctly, 25 pictures/session, 100% (CA Standard  
12 1.0 Listening and Speaking)." (Id.) Plaintiff claimed this goal did  
13 not contain an adequate present level and was not reasonably  
14 calculated to provide an educational benefit. ALJ Kopec found that  
15 this goal was "designed to meet Student's need to develop his  
16 articulation of specific sounds. This goal is similar to one included  
17 in his February 2004 IEP. While the proposed goal continues to work  
18 on /l/ sounds, it is not identical to the prior goal. Although  
19 evidence showing that a goal that is repeated without success may  
20 indicate a need to reevaluate the goal, there is no evidence of this."  
21 (ALJ Decision Factual Findings ¶ 10.) ALJ Kopec then concluded that  
22 this goal contained an adequate present level and was reasonably

23  
24  
25 \_\_\_\_\_  
26 <sup>8</sup>Brenda Radtke, an Occupational Therapist from the San Luis  
27 Obispo Office of Education, testified that Plaintiff had a "tendency  
28 of turning into a little ball as he's reading and having very poor  
body mechanics." (Sept. 14, 2005 Hearing Tr. at 108:17-20.) She also  
testified to the importance and usefulness of this goal, and ALJ Kopec  
apparently credited her testimony. The Court will not overturn ALJ  
Kopec's credibility determination.

1 calculated to provide Plaintiff an educational benefit. (ALJ Decision  
2 Legal Conclusions ¶¶ 1, 3.)

3 The Court affirms ALJ Kopec's conclusion. The present level  
4 outlined in this goal contains substantial detail on Plaintiff's  
5 current problems with his /l/ and /th/ sounds, including that he  
6 "swallows" the /l/ sound and that he had limited tongue movement,  
7 requiring that the District maintain his current instruction in this  
8 area. Moreover, Plaintiff's continuing need for help with  
9 articulation of these sounds, coupled with the specific benchmarks  
10 contained both in the IEP and in the reference to state-law standards,  
11 was calculated to provide Plaintiff an educational benefit.

12 g. Goal #8

13 Goal eight contained a present level of "[Plaintiff] is in fifth  
14 grade and [t]he following goals are addressing fifth grade  
15 understanding of synonyms, antonyms, and homographs." (AR, A00048.)  
16 Plaintiff's goal is, "Given 18 words from the three  
17 categories/session, and given a choice of two, [Plaintiff] will choose  
18 the best word to pair with the one presented, 100% (CA standard Word  
19 Analysis, Fluency, Systematic Vocabulary Development)." (Id.)  
20 Plaintiff claimed that this goal was not clearly defined, was not  
21 reasonably calculated to provide an educational benefit, and did not  
22 adequately describe Plaintiff's current level. ALJ Kopec found that  
23 this goal "addresses Student's need to develop vocabulary by  
24 understanding synonyms, antonyms, and homographs. The present level  
25 of performance does not indicate his current level of vocabulary or  
26 his ability to use synonyms, antonyms, and homographs. According to  
27 licensed Speech and Language Pathologist Rosalyn McQuade, who has  
28 provided speech and language services to Student since kindergarten,

1 she understood this goal and would be able to implement it. There is  
2 no evidence that Mother was unable to participate in discussion of  
3 this goal at the IEP team meeting." (ALJ Decision Factual Findings ¶  
4 11.) ALJ Kopec concluded that this goal contained an inadequate  
5 present level but did not deprive Plaintiff of an educational benefit.  
6 (ALJ Decision Legal Conclusions ¶ 2, 3.)

7 The Court disagrees with ALJ Kopec's ultimate conclusion that  
8 this goal provided Plaintiff an educational benefit. She properly  
9 determined that this goal contained an inadequate present level  
10 because it lacks any mention of Plaintiff's present proficiency with  
11 synonyms, antonyms, and homographs, and provides no way for a teacher  
12 to make that assessment from the face of the document. ALJ Kopec  
13 improperly concluded that this goal was nonetheless reasonably  
14 calculated to provide an educational benefit to Plaintiff because the  
15 District cannot rely on a single individual's understanding -- here,  
16 Ms. McQuade -- of this goal. Plaintiff may be performing at the fifth  
17 grade level in this area, and because the present level does not  
18 indicate this, the goal requiring him to perform at the fifth grade  
19 level would provide no benefit to Plaintiff. Moreover, while Ms.  
20 McQuade's testimony is important and ALJ Kopec may accord it  
21 substantial weight, Ms. McQuade's understanding of this goal becomes  
22 irrelevant if another individual is assigned to help Plaintiff in this  
23 area. An IEP should preserve the institutional knowledge of  
24 Plaintiff's educational needs, regardless of the staffing changes in  
25 his educational life, which Congress recognized when it imposed  
26 detailed requirements for an IEP. When the present level in the IEP,  
27 such as the one in goal eight here, is vague and can only be  
28 interpreted through the lens of a single individual's understanding,

1 that IEP is not calculated to provide a student an educational  
2 benefit.

3 2. May 26, 2005 IEP

4 a. Goals #1 Through #4

5 The May 26, 2005 amendments to Plaintiff's IEP added five goals,  
6 and ALJ Kopec found that they "were developed in response to the  
7 private assessment from CHC." (ALJ Decision Factual Findings ¶ 12.)  
8 Plaintiff claimed goals one through four could not be adequately  
9 measured and contained inadequate present levels. ALJ Kopec found  
10 that the present levels "reference the lengthy CHC report, although  
11 they do not identify specific data from the report. The goals are  
12 clearly written and provide a standard by which to evaluate Student's  
13 performance. Student's performance on these goals can be tracked  
14 using goal charts or other teaching records." (Id.) ALJ Kopec  
15 concluded that these goals contained inadequate present levels,  
16 although the goals themselves were appropriate, and that there was  
17 insufficient evidence to conclude that these procedural violations  
18 would result in the deprivation of an educational benefit or seriously  
19 infringed Plaintiff's mother's right to meaningfully participate in  
20 the IEP process. (ALJ Decision Legal Conclusions ¶¶ 4, 5.)

21 The District claims the ALJ Kopec improperly concluded that the  
22 present levels in these goals were inadequate because they referred to  
23 the CHC Report. The Court agrees with the District on this point.  
24 The CHC Report was obtained by Plaintiff's mother in response to what  
25 she viewed as an inadequate February 10, 2005 IEP. Plaintiff's mother  
26 and the District then built goals based on its contents, referring  
27 specifically to the CHC Report. This is distinguishable from goals  
28 four and eight discussed above. In concluding that those goals were

1 deficient, the Court's main concern was preserving institutional  
2 knowledge of Plaintiff's IEP requirements, which is critical when and  
3 if the District changes Plaintiff's teachers. Here, in contrast, the  
4 CHC Report is a written document, specifically referenced in  
5 Plaintiff's IEP, and, importantly, was commissioned and obtained by  
6 Plaintiff's mother, not by the District. There is little concern that  
7 Plaintiff's mother will change in the same way as Plaintiff's teachers  
8 might; thus there is little risk that the knowledge contained in the  
9 CHC Report would be lost. Moreover, because it is written, there is a  
10 much better chance to preserve the information it contains as it is  
11 transferred to any new teachers or instructors. Therefore, referring  
12 to the CHC Report for Plaintiff's present levels in goals one through  
13 four is appropriate.

14 This conclusion does not end the Court's inquiry, however.  
15 Plaintiff claims that the CHC report itself insufficiently outlines  
16 Plaintiff's present levels in the areas addressed by these goals.  
17 Goal one's present level states, "[a]ccording to a recent  
18 neuropsychological evaluation, [Plaintiff] needs greater assistance  
19 with comprehension answers to questions"; goal two's present level  
20 states, "[a]ccording to a recent neuropsychological evaluation,  
21 [Plaintiff] needs assistance with phonological awareness"; goal  
22 three's present level states, "[a]ccording to a recent  
23 neuropsychological evaluation, [Plaintiff] needs assistance with  
24 following directions of a visual-spacial nature"; goal four's present  
25 level states, "[a]ccording to a recent neuropsychological evaluation,  
26 [Plaintiff] needs assistance with expressing differences and  
27 similarities." (AR, A00297-98.) The Court has thoroughly reviewed  
28 the CHC Report and finds Plaintiff's position without merit. This 32-

1 page report contained precise details on Plaintiff's then-present  
2 proficiency in the categories in goals one through four, including  
3 appendices outlining Plaintiff's numerical scores in assessment tests  
4 in these areas. Therefore, the Court disagrees with ALJ Kopec's  
5 conclusion that goals one through four contained inadequate present  
6 levels by mere reference to the detailed CHC Report. On that basis,  
7 however, the Court affirms ALJ Kopec's ultimate conclusion that these  
8 goals were reasonably calculated to provide Plaintiff an educational  
9 benefit.

10 b. Goal #5

11 Goal five contained a present level of "[Plaintiff] has  
12 difficulty decoding unfamiliar words." (AR, A00299.) Plaintiff's  
13 goal was, "[b]y February 2006, when given 50 unfamiliar words  
14 containing complex word families (e.g., -ight), [Plaintiff] will  
15 correctly decode the target words with 90% accuracy in 4 out of 5  
16 consecutive trials as measured by teacher observation/teacher-charted  
17 data." (Id.) Plaintiff claimed only that this goal did not  
18 adequately describe his present level. ALJ Kopec found that goal five  
19 was "designed to improve Student's decoding skills. The description  
20 of Student's present level of performance does not provide specific  
21 information about the words that he has difficulty decoding. The  
22 District is able to properly implement this goal. There is no  
23 evidence that Mother was unable to participate in discussion of the  
24 goals at the IEP team meeting." (ALJ Decision Factual Findings ¶ 13.)  
25 ALJ Kopec concluded that the present level was inadequate, but the  
26 goal was appropriate, and the procedural violation did not deprive  
27 Plaintiff of educational benefits nor seriously infringe his mother's  
28

1 right to meaningfully participate in the IEP process. (ALJ Decision  
2 Legal Conclusions ¶¶ 4, 5.)

3 The Court affirms ALJ Kopec's conclusion. The present level in  
4 this goal is deficient because it lacks any detail as to Plaintiff's  
5 present proficiency, as well as his need for further assistance in  
6 this area. However, the deficient present level does not impact  
7 Plaintiff's achieving an educational benefit from this goal. The term  
8 "unfamiliar" is pliable, allowing teachers to present him with more  
9 difficult "unfamiliar" words as his abilities progress. Regardless of  
10 his present level, he would have gained an educational benefit from  
11 achieving this goal and learning to decode 50 "unfamiliar" words.

12 c. Description of Resource Specialist

13 Plaintiff claimed before ALJ Kopec that the description of  
14 Resource Specialist in the May 26, 2005 IEP was vague and could not be  
15 implemented. As ALJ Kopec found, "[t]he May 26, 2005 IEP indicates  
16 that Resource Specialist Monica Stank will provide Student with non-  
17 intensive, school-based resource/special education services, five days  
18 per week outside the regular classroom. The initial offer of 120  
19 minutes a day was increased to 150 minutes to allow additional time  
20 for Student to receive assistance learning new software programs.  
21 Mother testified that she understood this. There is no evidence that  
22 anyone responsible for either implementing or evaluating this IEP  
23 failed to understand the type and amount of services the Resource  
24 Specialist would provide Student." (ALJ Decision Factual Findings ¶  
25 14.) ALJ Kopec concluded that the Resource Specialist description in  
26 the IEP was adequate. (ALJ Decision Legal Conclusions ¶ 6.)

27 Plaintiff believes that the description of Resource Specialist  
28 should have included the nature of the services offered because

1 Plaintiff's mother did not know what portions of the 150 minutes of  
2 RSP time would be devoted to reading, writing, math, or other  
3 instruction.<sup>9</sup> ALJ Kopec found that Plaintiff's mother knew that 30  
4 minutes of this time would be devoted to learning new software as an  
5 AT benefit, and Monica Stank, Plaintiff's Resource Specialist,  
6 testified that she used 60 minutes for reading instruction and 60  
7 minutes for math and writing. (Sept. 16, 2005 Hearing Tr. at 17:22-  
8 19:1.) Plaintiff has neither pointed to nor offered any contrary  
9 evidence and ALJ Kopec appears to have relied on the lack of any  
10 contrary evidence to find that Plaintiff understood "the type and  
11 amount of services the Resource Specialist would provide Student."  
12 (ALJ Decision Factual Findings ¶ 14.) Moreover, Ms. Stank's position  
13 as Resource Specialist entails "implementing IEPs." (Sept. 15, 2005  
14 Hearing Tr. at 164:10-13.) The provision of RSP services in  
15 Plaintiff's IEP appears not to add any substantive instruction outside  
16 of the IEP goals, rather than merely using Ms. Stank's services to  
17 implement the IEP goals. Therefore, the IEP goals themselves provide  
18 the substantive guidelines for RSP time. The District may rely on the  
19 expertise of a Resource Specialist such as Ms. Stank to determine the  
20 best division of RSP time to meet these goals without artificially  
21 constraining Ms. Stank's ability to divide RSP time in different ways  
22 based on Plaintiff's progress. The Court affirms ALJ Kopec's  
23 conclusion.

24 d. Plaintiff's Mother's Meaningful Participation

25 \_\_\_\_\_  
26 <sup>9</sup>ALJ Kopec appears not to have addressed this argument and the  
27 District argues that Plaintiff failed to advance it during the  
28 administrative process. After reviewing the proceedings before the  
ALJ, however, the Court finds that Plaintiff did raise it, even if ALJ  
Kopec did not address it.

1 ALJ Kopec's decision addresses three reasons advanced by  
2 Plaintiff as to why Plaintiff's mother was not given an opportunity to  
3 participate in the May 26, 2005 IEP meeting: (1) Plaintiff's mother  
4 could not understand much of the IEP because of the vague present  
5 levels contained in the IEP goals; (2) the IEP team failed to consider  
6 how the IEP was designed to help Plaintiff in terms of measuring  
7 improvement in his reading; and (3) the IEP team brought a non-  
8 negotiable pre-typed IEP to the meeting. (ALJ Decision Factual  
9 Findings ¶¶ 15-17.) ALJ Kopec rejected each of these contentions and  
10 concluded that Plaintiff's mother had been given the opportunity to  
11 meaningfully participate in the May 26, 2005 IEP meeting. (ALJ  
12 Decision Legal Conclusions ¶ 7.) The Court has scoured Plaintiff's  
13 briefs and can only discern a challenge to ALJ Kopec's first  
14 conclusion; therefore, the Court treats Plaintiff's challenge to the  
15 second and third conclusions as abandoned.

16 ALJ Kopec found that there was no evidence that the present  
17 levels in the May 26, 2005 IEP amendment negatively impacted  
18 Plaintiff's mother's participation in the IEP process. Plaintiff  
19 maintains that his mother did not understand the IEPs because of these  
20 vague present levels. Undoubtedly, "[p]rocedural violations that  
21 interfere with parental participation in the IEP formulation process  
22 undermine the very essence of the IDEA. An IEP which addresses the  
23 unique needs of the child cannot be developed if those people who are  
24 most familiar with the child's needs are not involved or fully  
25 informed." Amanda J., 267 F.3d at 892. However, this is not such a  
26 circumstance. As discussed in detail above, references to the CHC  
27 Report in goals one through four in the May 26, 2005 IEP provided  
28 clear present levels, so Plaintiff's mother could not have been denied

1 meaningful participation on this basis. Goal five contained an  
2 inadequate present level but did not deny Plaintiff an educational  
3 benefit and Plaintiff adduced no evidence that his mother did not  
4 understand this goal. The District offered evidence that Plaintiff's  
5 mother attended and participated in two IEP meetings on April 29, 2005  
6 and May 26, 2005, offering her objections to Plaintiff's IEP and  
7 providing the District with an alternate assessment of Plaintiff's  
8 needs through the CHC Report. (ALJ Decision Factual Findings ¶¶ 3-4.)  
9 The authors of the CHC Report attended via telephone, and Plaintiff's  
10 mother brought Marna Scarry-Larkin, a private speech and language  
11 pathologist with over twenty years of experience to attend the  
12 meeting. (AR, A00298; Sept. 13, 2005 Hearing Tr. at 70:12-75:7.)  
13 Plaintiff has offered no evidence to demonstrate that the goal was so  
14 vague as to prevent Plaintiff's mother from understanding it and the  
15 Court affirms ALJ Kopec's conclusion on this point.<sup>10</sup>

16 **B. Failure to Provide Certain Services to Plaintiff<sup>11</sup>**

17 **1. AT Services**

18 The District must provide AT services to a student if they are  
19 required for the student's special education, related services,  
20 supplementary aids and services, or as part of an IEP if required to

21 \_\_\_\_\_  
22 <sup>10</sup>Beyond focusing on the specific goals in the IEPs, Plaintiff  
23 generally argues that the IEPs were not calculated to provide him with  
24 a meaningful educational benefit. The ALJ Decision contains no  
25 specific ruling on this overarching question and it appears from  
26 Plaintiff's briefs that the arguments advanced under this theory is  
27 more properly analyzed under Plaintiff's challenge to the District's  
28 denial of intensive reading from LMB or from a trained speech and  
language pathologist. The Court therefore treats them accordingly.

11 Plaintiff has offered no arguments or evidence to challenge  
ALJ Kopec's conclusions that Plaintiff did not need self-advocacy and  
demystification counseling. The Court finds that Plaintiff has  
abandoned any challenge to these portions of the ALJ Decision.

1 provide the student with a FAPE. 34 C.F.R. § 300.308. An "assistive  
2 technology device" is "any item, piece of equipment, or product  
3 system, whether acquired commercially off the shelf, modified, or  
4 customized, that is used to increase, maintain, or improve functional  
5 capabilities of a child with a disability." 20 U.S.C. § 1401(1). An  
6 "assistive technology service" is "any service that directly assists a  
7 child with a disability in the selection, acquisition, or use of an  
8 assistive technology device," and includes, inter alia, training on AT  
9 devices, adapting AT devices to a student's needs, and coordinating  
10 the use of the AT device with the student's other programs or  
11 services. Id. § 1401(2). As ALJ Kopec found, "[t]he February 10,  
12 2005 IEP team discussed Student's needs for AT and included them in  
13 the IEP. Student had access to a variety of aids in his general  
14 education classroom and special education resource classroom. He had  
15 access to a computer in his general education and special education  
16 classrooms as well as in th school's computer laboratory. In  
17 addition, during February 2005, Student was given a laptop computer of  
18 his own, which he used in school and at home for the rest of the  
19 school year." (ALJ Decision Factual Findings ¶ 18.)

20 The Court has thoroughly reviewed the parties' papers and finds  
21 that Plaintiff has not objected to ALJ Kopec's conclusion on the use  
22 of AT devices and services, as opposed to the District's AT assessment  
23 (discussed infra). Therefore, the Court affirms ALJ Kopec's decision  
24 on this issue.

## 25 2. Facilitated Speech and Language Services

26 ALJ Kopec found the following related to Plaintiff's claim for  
27 one-on-one services:  
28

1 Speech and Language Pathologist Rosalyn McQuade screened  
2 Student for speech and language services when he was in  
3 kindergarten and provided speech and language services to  
4 him from 2000 through June 2004. According to Ms. McQuade,  
5 Student did not need to have one-on-one speech and language  
6 services to help him with social communication. The CHC  
7 report recommended that a speech and language pathologist  
8 observe Student in the playground at lunch or recess and  
9 help him generalize the skills he is learning to specific  
10 situations. Ms. Moran based this recommendation on  
11 information from Mother. Student offered no other evidence  
12 concerning this issue. Ms. McQuade's opinion is deserving  
13 of considerable weight because of her education and training  
14 and her long-term experience working with Student.

15 (ALJ Decision Factual Findings ¶ 19.) ALJ Kopec concluded that  
16 Plaintiff did not require one-on-one facilitated speech and language  
17 services during naturally occurring social opportunities. (ALJ  
18 Decision Legal Conclusions ¶ 9.)

19 ALJ Kopec's conclusion is supported by substantial evidence, not  
20 only from the reliable testimony from Ms. McQuade -- based on her  
21 extensive experience and expertise -- but also from other witnesses  
22 who also did not have concerns about Plaintiff's ability to socially  
23 interact with other students. (Sept. 13, 2005 Hearing Tr. at 128:18-  
24 129:10, 130:19-131:2, 132:11-22; Sept. 16, 2005 Hearing Tr. at 13:17-  
25 16:4; Sept. 20, 2005 Hearing Tr. at 194:13-23.) Plaintiff has offered  
26 no contrary evidence and the Court affirms ALJ Kopec's conclusion.

27 3. Intensive Reading from LMB or a Trained Speech and  
28 Language Pathologist

a. ALJ Kopec's Decision

The ALJ Decision contains a detailed factual finding on  
Plaintiff's claim for intensive reading instruction, in which ALJ  
Kopec resolved witness credibility issues and conflicts in witness  
testimony. ALJ Kopec found the following facts:

Student alleged that the District failed to provide  
him with Lindamood-Bell services two hours a day from either

1 a Lindamood-Bell center or a trained speech and language  
2 pathologist. Lisbeth Ceaser, Ph.D., San Luis Obispo,  
3 reviewed Student's educational records, the District's  
4 assessments, and the private assessment by CHC. According  
5 to Dr. Ceaser, Student needs a program of comprehensive  
6 reading instruction in the areas of decoding, fluency and  
7 comprehension. While all three areas are important, the  
8 state educational standards recognize that reading  
9 comprehension is the most important area. Decoding skills  
10 are important technical skills, particularly for young  
11 children. However, as children grow older, they need  
12 additional support in phonics and comprehension to  
13 understand the meaning of language. Dr. Ceaser opined that  
14 Student's decoding skills are consistent with his cognitive  
15 ability, and his fluency is consistent with his decoding  
16 skills. Dr. Ceaser testified that since Student is decoding  
17 and reading with comprehension at the fourth grade level, he  
18 had sufficient decoding ability to move on and further  
19 develop comprehension.

20 The SRA reading program, which is one of the programs  
21 the District uses, is a structured program that addresses  
22 decoding, fluency, vocabulary, and comprehension. Dr.  
23 Ceaser opined that the SRA program would benefit Student in  
24 all areas of reading development. The SRA program links the  
25 further development of his decoding skills with the  
26 development of his reading comprehension, and it builds on  
27 his strengths. Student requires a multi-sensory and  
28 systematic reading program, which SRA provides. Although  
Student will benefit from some one-on-one reading  
instruction, it is also important that he learn reading  
skills in a group setting so that he can benefit from and  
further develop peer communication skills.

Dr. Ceaser has used the Lindamood-Bell reading program  
with children. She believes that the Lindamood-Bell program  
would address gaps in Student's overall reading ability by  
focusing on specific skills in isolation. In contrast, the  
SRA addresses these goals while building on Student's  
strengths and working within the context of developing all  
the skills necessary for reading development. Dr. Ceaser  
opined that SRA was a more effective program than Lindamood-  
Bell to assist Student to develop reading comprehension.

Dr. Ceaser opined that if Student were to receive two  
hours a day of Lindamood-Bell reading instruction, and spent  
the remainder of his school day on his other special  
education services and general education curriculum, she  
would expect that the gap in reading ability between Student  
and his peers would increase. This is because he would be  
getting less exposure to academic grade level text, and the  
more grade level comprehension he missed, the further behind  
he would get.

1 Nikki Jakins, Clinic Director and Regional Manager of  
2 Clinics, Lindamood-Bell Learning Processes, Inc., testified  
3 about Student's progress after 96 hours of intensive  
4 instruction in two of the Lindamood-Bell programs. These  
5 programs focus on increasing Student's phonemic awareness.  
6 A comparison of Student's scores on the Gray Oral Reading  
7 Test 4 (GORT-4) that Ms. Moran administered in January 2005,  
8 and the scores on the GORT-4 that Ms. Moran administered in  
9 June 2005 before he received any Lindamood-Bell services,  
10 shows that prior to receiving any Lindamood-Bell services,  
11 Student had improved in all areas tested: reading rate,  
12 accuracy, fluency, and comprehension.

13 Ms. Jakins does not have any experience using the SRA  
14 reading program and, unlike Dr. Ceaser, is unable to compare  
15 the two approaches. Dr. Ceaser is an expert in reading  
16 education, reading methodologies, and the development of  
17 reading programs to assist students with a variety of  
18 deficits contributing to poor reading skills. Dr. Ceaser's  
19 testimony is entitled to considerable weight and deference.  
20 Ms. Jakins is an employee of the Lindamood-Bell Learning  
21 Centers. She had a professional, if not personal, interest  
22 in advocating the benefits of the Lindamood-Bell programs  
23 and their methodologies.

24 (ALJ Decision Factual Findings ¶¶ 21-26.) Based on ALJ Kopec's  
25 thorough factual analysis and credibility determinations, she  
26 concluded that:

27 The District was not required to offer Student the  
28 requested services from either a Lindamood-Bell center or a  
trained speech and language pathologist. Student  
essentially argued that the District's reading program did  
not maximize his potential. In his view, he was capable of  
reading at grade level and the District was obligated to do  
what was necessary to get him reading at grade level.  
However, the law . . . does not support this view. This  
District's offer of reading services was directed at  
Student's unique needs. Even though the IEP was not  
implemented . . . Student showed more than a trivial or  
minimal level of progress through the end of fifth grade.  
In addition to the academic progress that was reasonably  
expected from the District's offer, the District also showed  
that Student would be reasonably expected to receive  
benefits in non-academic areas. The District's offer of  
reading services met Student's unique needs and was  
reasonably calculated to provide him with an educational  
benefit.

(ALJ Decision Legal Conclusions ¶ 11.)

b. Plaintiff's Challenges

1 Plaintiff principally argues that the District did not  
2 provide him with the program he needed to obtain an educational  
3 benefit. He asserts that he experienced little progress under  
4 the District's program (SRA) and needed to obtain outside  
5 services (either intensive LMB services or a services from a  
6 speech and language pathologist). The Court rejects this  
7 contention and affirms ALJ Kopec's contrary conclusion.

8 The dispute between the parties on this point turns on a  
9 single question: did the District's services provide Plaintiff an  
10 educational benefit? Two sub-issues must be resolved to answer  
11 this question: (1) did Plaintiff progress under the District's  
12 program?; and (2) if so, was Plaintiff's progress trivial because  
13 Plaintiff did not progress to the grade level of his peers?

14 The evidence clearly demonstrates that Plaintiff progressed  
15 through the District's SRA program. For example, ALJ Kopec  
16 accepted Dr. Ceaser's testimony that the SRA program adequately  
17 served Plaintiff's needs, even more so than the LMB services he  
18 sought as a replacement. (ALJ Decision Factual Findings ¶ 22-  
19 24.) Ms. Stank testified that Plaintiff had progressed through  
20 the SRA program and Ms. Jakins admitted the same. (Sept. 15,  
21 2005 Hearing Tr. at 273:17-286:19; Sept. 22, 2005 Hearing Tr. at  
22 184:4-187:4.) Plaintiff's GORT-4 scores corroborated their  
23 opinions, which, as ALJ Kopec found, demonstrated that Plaintiff  
24 had progressed in the areas of reading rate, accuracy, fluency,  
25 and comprehension. (ALJ Decision Factual Findings ¶ 25.)<sup>12</sup> The  
26

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27 <sup>12</sup>In reading rate, Plaintiff increased one grade level; in  
28 accuracy, .7 grade level; in fluency, .7 grade level; in  
comprehension, at least 1.2 grade levels. (AR, A00111, A00137.)

1 Court affirms ALJ Kopec's reasoned and sound conclusion that  
2 Plaintiff progressed under the District's program.<sup>13</sup>

3 The more complicated question, however, is whether the  
4 District was required to bring Plaintiff up to the grade level of  
5 his peers, rather than simply provide him some progress, short of  
6 bringing him up to his then-current grade level. In Rowley, the  
7 Supreme Court stated that the IDEA did not require States to  
8 "maximize the potential of handicapped children commensurate with  
9 the opportunity provided to other children." 458 U.S. at 189-90,  
10 192 ("Thus, the intent of the Act was more to open the door of  
11 public education to handicapped children on appropriate terms  
12 than to guarantee any particular level of education once  
13 inside."). The Court indicated that States must provide the  
14 "basic floor of opportunity" under the IDEA, although it never  
15 specifically defined this phrase, finding instead that the facts  
16 before it amply demonstrated that the student had received an  
17 educational benefit. See id. at 201. Although the Ninth Circuit  
18 has not addressed this issue, other Circuits have reviewed the  
19 Rowley opinion and concluded that, while the IDEA may not require  
20 maximizing potential, it requires more than simply a "trivial" or  
21 "de minimis" educational benefit as the "floor or opportunity."  
22 See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d  
23 171, 180 (3d Cir. 1988) (engaging in an extensive discussion of  
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25  
26 <sup>13</sup>Plaintiff advances various arguments on why the Court should  
27 not consider Plaintiff's GORT-4 scores as a measure of Plaintiff's  
28 progress. The Court has considered these arguments and finds them  
without merit. ALJ Kopec relied on Plaintiff's GORT-4 scores and, in  
light of her expertise in this area, the Court agrees with her  
finding.

1 Rowley); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577  
2 (3d Cir. 2000); Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840,  
3 861 (6th Cir. 2004). The courts in these cases indicate that a  
4 benefit "must be gauged in relation to a child's potential."  
5 Polk, 853 F.2d at 185; Kingwood, 205 F.3d at 578; Deal, 392 F.3d  
6 at 862. "Only by considering an individual child's capabilities  
7 and potentialities may a court determine whether an educational  
8 benefit provided to that child allows for meaningful advancement.  
9 In conducting this inquiry, courts should heed the congressional  
10 admonishment not to set unduly low expectations for disabled  
11 children." Deal, 392 F.3d at 864.

12 Plaintiff argues that the evidence does not establish what  
13 his "maximum" potential was, and that bringing him up to grade  
14 level was required to provide him with more than a trivial  
15 educational benefit. However, the evidence amply demonstrates  
16 that Plaintiff suffered from cognitive problems that limited his  
17 ability to progress to his grade level and that he was performing  
18 up to his abilities. For example, Plaintiff's CHC Report  
19 indicated that he was on the borderline range of ability (AR,  
20 A00129), and a Wechsler Intelligence Scale for Children-4th  
21 Edition test of his cognitive ability placed him two standard  
22 deviations below the average (AR, A00317; Sept. 13, 2005 Hearing  
23 Tr. at 247:22-251:18; ALJ Decision Factual Findings ¶ 34). Dr.  
24 Ceaser testified that, when a student's performance is within  
25 range of his cognitive ability, the student is performing to his  
26 potential, and Plaintiff was proficient up to his potential given  
27 his reduced cognitive abilities in comparison to his peers.  
28 (Sept. 15, 2005 Hearing Tr. at 40:11-50:4.) Contrary to

1 Plaintiff's arguments, this evidence established that the  
2 District actually maximized Plaintiff's potential, which was more  
3 than it was obligated to do under the IDEA. Plaintiff was  
4 performing within the limits of his cognitive ability and the  
5 Court cannot understand -- and Plaintiff has offered no evidence  
6 -- how Plaintiff, with the LMB services or other intensive  
7 reading instruction, could perform beyond what he was physically  
8 capable of achieving. Therefore, the Court affirms ALJ Kopec's  
9 conclusion that "[t]he District's offer of reading services met  
10 Student's unique needs and was reasonably calculated to provide  
11 him with an educational benefit." (ALJ Decision Legal  
12 Conclusions ¶ 11.)

13 **C. Failure to Perform an AT Assessment for Plaintiff<sup>14</sup>**

14 Under both the IDEA and California law, the District must  
15 reevaluate a student at least once every three years, based upon  
16 a parent or teacher request, or otherwise if "conditions warrant  
17 a reevaluation." 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.536(b);  
18 Cal. Educ. Code § 56381(a). Assessments must be conducted for  
19 every area of a student's suspected disability. 20 U.S.C. §  
20 1414(b)(3)(C); 34 C.F.R. § 300.532(g); Cal. Educ. Code §  
21 56320(f). The District, however, may not conduct any  
22 reassessment unless it obtains parental consent to do so. 34  
23 C.F.R. § 300.505(a); Cal. Educ. Code § 56381(f).

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25  
26 <sup>14</sup>Plaintiff has offered no arguments or evidence to challenge ALJ  
27 Kopec's conclusions that District did not need to conduct assessments  
28 in the areas of Central Auditory Processing Disorder, visual  
processing, and speech and language. The Court finds that Plaintiff  
has abandoned any challenge to these portions of the ALJ Decision.

1 In addition to providing AT services, Plaintiff also claims  
2 that the District failed to adequately assess him for the need  
3 for AT services at the February 10, 2005 IEP meeting.<sup>15</sup> ALJ  
4 Kopec found that "[t]he IEP team discussed Student's need for AT  
5 and included them in the February 10, 2005 IEP. Student offered  
6 no evidence that his parents requested that the District perform  
7 an AT assessment at or prior to this meeting." (ALJ Decision  
8 Factual Findings ¶ 27.) Plaintiff principally argues that an  
9 assessment was required but offers no evidence that Plaintiff's  
10 mother or any teacher ever requested an AT reassessment prior to  
11 or at the February 10, 2005 IEP. The District was legally  
12 prevented from conducting a reassessment without parental  
13 consent, see 34 C.F.R. § 300.505(a); Cal. Educ. Code § 56381(f),  
14 and without evidence that Plaintiff's mother requested the  
15 reassessment, the Court affirms ALJ Kopec's conclusion on this  
16 point.<sup>16</sup>

17 **D. Reimbursement for Independent Educational Evaluation in**  
18 **Psychoeducation<sup>17</sup>**

19 \_\_\_\_\_  
20 <sup>15</sup>ALJ Kopec noted that the only AT assessment at issue during the  
21 hearing was that contained in the February 10, 2005 IEP. (ALJ  
22 Decision Factual Findings ¶ 27 n.2.) This limitation is supported by  
the parties' formulation of the issues prior to the administrative  
hearing. (AR, A00489, ¶ 6(b)(8).)

23 <sup>16</sup>Plaintiff asserts that ALJ Kopec improperly excluded testimony  
24 from Paul Mortola, an expert in assistive technology, based upon Cal.  
25 Educ. Code § 56505(e)(7)-(8), which requires the parties to exchange  
26 witness lists and documents five days prior to the administrative  
27 hearing. ALJ Kopec made clear, however, that she excluded Mr.  
Mortola's testimony because Plaintiff failed to factually demonstrate  
that the District needed to conduct an AT assessment. Mr. Mortola's  
opinion on the requirements of an assessment was therefore irrelevant.

28 <sup>17</sup>Plaintiff has offered no arguments or evidence to challenge ALJ  
Kopec's denial of reimbursement for independent educational

1 Plaintiff seeks reimbursement of \$8,132.85 his mother paid  
2 for the CHC Report from Dr. Kovar and Ms. Moran to assess  
3 Plaintiff in the area of psychoeducation. ALJ Kopec made  
4 detailed factual findings on this point:

5 School psychologist Dean Johnson prepared a Multi-  
6 disciplinary Triennial Report for Student dated February 12,  
7 2004. He administered the WISC-IV, which is a standardized  
8 test of cognitive ability. Student's Full Scale IQ, which  
9 combines all subtests and indicates his total cognitive  
10 ability, was 71, in the borderline range. This score  
11 indicates that Student is cognitively delayed. His Full  
12 Scale IQ from three years earlier was 86, which is in the  
13 low average range. According to Mr. Johnson, the most  
14 recent WISC-IV test has greater validity. In addition, the  
15 subtests scores are generally consistent and do not show  
16 significant variation between them, indicating that the  
17 results are reliable.

18 Mr. Johnson reviewed Student's results from the  
19 Woodcock-Johnson III, Tests of Achievement (WJ-III)  
20 administered by Resource Specialist Margie Walters in  
21 January 2004. He found that the scores on the WJ-III were  
22 generally consistent with those on the WISC-IV. Because  
23 Student exhibited little variation between the subtests and  
24 tests, Mr. Johnson did not believe that Student needed  
25 additional assessment.

26 Mr. Johnson discussed the results of Student's  
27 triennial evaluation at an IEP team meeting on February 19,  
28 2004, which Mother attended. Mr. Johnson reviewed the  
29 results of the standardized tests, explained the subtests  
30 and the scores, and summarized what was indicated concerning  
31 Student's strengths and weaknesses. Mother signed the IEP,  
32 indicating that she received and reviewed the triennial  
33 report and that she agreed with the IEP, except for the  
34 rating concerning physical education.

35 In January 2005, Dr. Kovar evaluated Student's  
36 cognitive functioning using the Stanford-Binet Intelligence  
37 Scales, 5th Edition (SB-V). His Full Scale IQ was 73, in  
38 the borderline range. Mr. Johnson testified that one can  
39 appropriately compare scores on the WISC-IV and SB-V. In  
40 his view, Student's results on the SB-V further validate his  
41 results on the WISC-IV. As with his scores on the WISC-IV,  
42 Student's subtest scores on the SB-V are generally  
43 consistent and do not exhibit significant variation.

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evaluations in occupational therapy and speech and language. The  
Court finds that Plaintiff has abandoned any challenge to these  
portions of the ALJ Decision.

1 (ALJ Decision Factual Findings ¶¶ 34-37.) ALJ Kopec then  
2 concluded that the District adequately assessed Plaintiff for  
3 psychoeducation and it did not need to reimburse Plaintiff's  
4 mother for the CHC Report. (ALJ Decision Legal Conclusion ¶ 17.)

5 Plaintiff concedes that the February 2004 assessment was  
6 valid for what it covered, but asserts that the District was  
7 required to further assess Plaintiff based on the gap between his  
8 math scores and language scores and on his executive functioning  
9 skills. As ALJ Kopec pointed out, Plaintiff's mother signed the  
10 February 2004 IEP, indicating that she received and reviewed the  
11 triennial report containing Plaintiff's assessment.

12 Plaintiff's mother "has the right to an independent  
13 educational evaluation at public expense if [she] disagrees with  
14 an evaluation obtained by the public agency." 34 C.F.R. §  
15 300.502(b)(1) (emphasis added); see also Cal. Educ. Code §  
16 56329(b). The District correctly argues that Plaintiff never  
17 "disagreed" with the triennial report in 2004, but disagreement  
18 prior to obtaining a private reevaluation is not a prerequisite  
19 to obtaining reimbursement. See Warren G. ex rel. Tom G. v.  
20 Cumberland Cty. School Dist., 190 F.3d 80, 87 (3d Cir. 1999).  
21 Rather, the relevant question is whether a school district can  
22 demonstrate that the prior evaluation was valid. See id.; Board  
23 of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v.  
24 Illinois State Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994)  
25 (ordering school district to reimburse student for reevaluation  
26 because it failed to validate the private reevaluation at due  
27 process hearing); 34 C.F.R. 300.502(b)(2)(I).

28

1 Here, ALJ Kopec's detailed analysis of this issue amply  
2 demonstrates that the District's triennial evaluation  
3 appropriately evaluated Plaintiff's abilities, which was later  
4 confirmed by the findings in the CHC Report. ALJ Kopec credited  
5 the testimony on Dean Johnson as to the sufficiency of the  
6 triennial evaluation. Plaintiff has offered no evidence to  
7 contradict the ALJ Kopec's conclusion and the Court affirms the  
8 ALJ Decision on this issue.

### 9 III. CONCLUSION AND RELIEF

10 Based on the foregoing, the Court affirms the ALJ Decision  
11 on all points challenged by Plaintiff except the Court finds that  
12 goals four and eight in the February 10, 2005 IEP contained  
13 inadequate present levels that denied Plaintiff an educational  
14 benefit for the areas those goals addressed.<sup>18</sup> The Court **ORDERS**  
15 the District to reimburse Plaintiff for costs he incurred in  
16 obtaining private services to fulfill goals four and eight in the  
17 February 10, 2005 IEP. See School Comm'n of Burlington v.  
18 Department of Educ., 471 U.S. 359, 369 (1985).<sup>19</sup>

19 Plaintiff also claims attorney's fees and costs in bringing  
20 this challenge. "The court, in its discretion, may award  
21 reasonable attorney's fees as part of the costs to the parents or  
22 guardian of a child with a disability who is the prevailing  
23 party." 20 U.S.C. § 1415(i)(3)(B). "A prevailing party is one  
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25  
26 <sup>18</sup>The Court has considered Plaintiff's various other arguments to  
27 overturn the ALJ Decision and, to the extent they are not discussed  
28 herein, finds them without merit.

<sup>19</sup>Plaintiff identifies his reimbursement as a claim for  
"compensatory education." The Court treats them as identical.

1 who succeeds on any significant issue in litigation which  
2 achieves some of the benefit the parties sought in bringing the  
3 suit." Van Duyn, 481 F.3d at 783 (citing Parents of Student W.,  
4 31 F.3d at 1498). "The success must materially alter the  
5 parties' legal relationship, cannot be de minimis and must be  
6 causally linked to the litigation brought." Id. The district  
7 court may award "reasonable" attorney's fees that take into  
8 account that a student prevailed on some, but not all, the issues  
9 raised at the administrative hearing and before the district  
10 court. See id. at 784 ("[T]he [district] court has discretion to  
11 consider that Van Duyn prevailed on one issue at the  
12 administrative hearing but lost on all the others.").

13 Plaintiff did not prevail in the administrative hearing on  
14 his claims, but he has successfully challenged in this Court  
15 goals four and eight in the February 10, 2005 IEP, which are not  
16 de minimis and which alter the parties' legal relationship. The  
17 Court therefore **ORDERS** the District to pay Plaintiff's reasonable  
18 attorney's fees and costs incurred during the proceedings before  
19 ALJ Kopec and in this Court in challenging goals four and eight  
20 in the February 10, 2005 IEP.

21 Because the evidence is insufficient to determine the amount  
22 for reimbursement and attorney's fees and costs Plaintiff  
23 incurred as limited by the Court's ruling, Plaintiff is **ORDERED**  
24 **within ten (10) of the date of this Order** to submit evidence of  
25 his expenses in obtaining private services to replace the invalid  
26 goals four and eight in the February 10, 2005 IEP, and the  
27 attorney's fees and costs incurred in challenging ALJ Kopec's  
28 erroneous conclusion on these two issues in this Court only. The

1 District may file objections to this evidence within ten (10)  
2 days of the date of Plaintiff's submission.

3 IT IS SO ORDERED.

4  
5 DATED:

July 25, 2007

6  
7 Audrey B. Collins  
8 AUDREY B. COLLINS  
9 UNITED STATES DISTRICT JUDGE  
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