

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

CORONADO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009010392

DECISION

Administrative Law Judge (ALJ) Susan Ruff, Office of Administrative Hearings (OAH), State of California, heard this matter in Coronado, California, on March 9 – 13, 2009.

Student's mother represented Student. Student attended part of the hearing and testified on his own behalf.

Robin Champlin, Esq., represented the Coronado Unified School District (District). Richard Erhard, Director of Pupil Personnel Services for the District, also appeared on behalf of the District.

Student filed his request for a due process hearing on January 9, 2009. On January 26, 2009, OAH granted the parties' request for a continuance of the case. The case was taken under submission at the close of evidence on March 13, 2009.¹

¹ The District requested and received leave to file a short brief on one legal issue. Student was given an opportunity to file a short brief in response. The District's brief has been marked for identification as exhibit 23, and Student's response to that brief has been marked for identification as exhibit O.

On March 24, 2009, after this case was heard and submitted, Student filed a motion to strike one of the defenses raised by the District in this case. Student never sought leave to file this post-hearing motion, and it is not appropriately filed at this time. Although the moving and opposing papers for the motion have been marked for identification to maintain a clear record for this case (Student's motion as exhibit P, Student's reply as exhibit Q, and the District's opposition as exhibit 24), no consideration was given to Student's motion in reaching a decision in this due process case.

ISSUES

The issues for this hearing were those set forth in Student's due process hearing request, as clarified during the prehearing conference held before OAH on February 27, 2009, and as further clarified in a letter from Student's mother dated March 4, 2009:²

1. Did the District deny Student a free appropriate public education (FAPE) by failing to timely conduct a review of Student's IEP and write a new one, including appropriate goals, services, supports and accommodations?
2. Did the District fail to implement Student's "stay put" IEP resulting in a denial of FAPE?

FACTUAL FINDINGS

1. Student is 16 years old, and is eligible for special education and related services under the eligibility categories of specific learning disability and speech or language impairment. The parties do not dispute that Student was a resident of the District at all relevant times in this matter, and do not dispute his eligibility for special education. For the current school year (the 2008 – 2009 school year), Student is in the 10th grade at Coronado High School.

2. This case involves a continuation of a dispute between these parties that began in OAH case number 2007120415. On May 28, 2008, ALJ Darrell Lepkowsky issued a decision in that case in which she found in favor of Student.³

3. As determined in ALJ Lepkowsky's decision, the dispute between Student and the District began when Student transitioned from middle school (eighth grade in the 2006 – 2007 school year) to high school (ninth grade in the 2007 – 2008 school year). As will be discussed in more detail below, ALJ Lepkowsky ruled that the District's ninth grade IEP offer made to Student in approximately October 2007 did not offer a FAPE because the District predetermined Student's program and services, thereby preventing Student's mother from appropriately participating in the IEP process for her son. ALJ Lepkowsky also found that the District had failed to implement Student's existing IEP after Student transitioned to the high school in ninth grade. The existing IEP had been developed in October 2006, when Student was in eighth grade, with minor modifications added later.

² There was initially a third issue in the case, but it was withdrawn by Student's mother during the hearing. During the hearing, Student's mother clarified that the remedy sought by Student in this case is reimbursement for the \$2,645.00 paid for tutoring services.

³ At the request of Student, official notice is taken of ALJ Lepkowsky's decision. (See Gov. Code, §11515; Evid. Code, §§ 451, 452.)

4. In addition to ordering that the District provide compensatory education to Student and reimbursement of expenses to Student's mother, ALJ Lepkowsky ordered the District to hold a new IEP meeting within 45 days of the date of her decision. She also ordered that, until a new IEP offer was proposed by the District and accepted by Student's mother or upheld in a due process hearing, Student's eighth grade IEP (also sometimes referred to herein as the "October 2006 IEP" or the "stay put IEP") would remain in effect, with the minor changes agreed to later, and the goals adopted in the fall of 2007.

5. The current case involves the events that took place after the issuance of ALJ Lepkowsky's decision on May 28, 2008. Student contends that the District denied him a FAPE after May 28, 2008, by failing to hold an IEP team meeting to make a new offer of FAPE to Student. Student also contends that the District did not implement Student's existing IEP (Student's eighth grade IEP) after the date of ALJ Lepkowsky's decision. The District contends that it attempted to hold a timely IEP meeting as required by law, but was prevented from doing so by the loss of a District staff member. It contends that it attempted to implement Student's IEP but was prevented from doing so by the actions of Student's mother. The District also contends that, even if it committed procedural violations, there was no harm to Student because he made educational progress in his classes.

6. Because this case is a direct continuation of the case heard and decided by ALJ Lepkowsky, many of the Factual Findings made in that prior case are directly relevant to these proceedings. Those Factual Findings are incorporated herein by reference. For clarity of the current decision, some of the pertinent Factual Findings from ALJ Lepkowsky's decision are quoted or paraphrased below.

ALJ Lepkowsky's Findings Regarding Student's Unique Needs

7. ALJ Lepkowsky made the following Factual Findings regarding Student's unique needs:

Student's specific learning disability affects his ability to comprehend what he is reading. He has difficulty processing what he is reading, does not understand subtleties, and requires visual cues to understand written material and to learn and understand vocabulary words. Although he is an excellent writer, Student has great difficulty with abstract, figurative, and idiomatic language concepts. While he is good at mathematical equations, his processing deficits also affect Student's ability to understand word problems. Student's reading deficits impact his ability to comprehend grade-level text books. One-on-one assistance with reading of textbooks and school reading material significantly improve Student's ability to comprehend what he was reading.

Student also has a diagnosis of attention deficit disorder (ADD), for which he takes medication. The ADD contributes to Student's difficulties in attending, hearing, processing, and understanding, particularly oral instructions. A

hearing loss in his left ear compounds these difficulties for Student. He also has sensory issues (for example, he does not like touching newspaper), motor skills deficits, and exhibits symptoms of obsessive compulsive disorder (for example, Student dislikes messy paper and does not tolerate erasure residue).

Additionally, Student suffers from extreme anxiety and depression, for which he also takes medication. He has very little social skills, believes, without reason, that he is “stupid,” and has an excessive fear of having his peers identify him as a special education Student. Student is uncomfortable in large groups, and does not know how to “fit in” with his peers. When stressed, Student’s anxiety increases to a point that it interferes with his ability to concentrate on his schoolwork.

ALJ Lepkowsky’s Findings Regarding Student’s Eighth Grade IEP

8. At all times relevant to the current dispute, the IEP in effect for Student was the IEP developed in October 2006, when Student was beginning the eighth grade. There were minor changes made later, and new goals and objectives for Student were agreed to in the fall of 2007, during Student’s ninth grade year. However, aside from those changes, the program and services of the eighth grade IEP remained in effect until March 2009. Because that eighth grade IEP was also the IEP in effect during ALJ Lepkowsky’s case, she made detailed findings regarding the terms and effect of that eighth grade IEP. She found that the IEP had been developed through a collaborative process between Student’s mother, the teachers and other District personnel.

9. ALJ Lepkowsky found that Student had previously been educated in middle school in the Coronado Academy (the Academy), a public school program modeled after small, nonpublic school (NPS) programs, in which classes were co-taught by regular education teachers with support from special education teachers. At the eighth grade IEP meetings in October 2006, Student’s IEP team determined that the appropriate educational placement for Student was a general education setting with accommodations. The numerous accommodations included, but were not limited to, multi-sensory teaching strategies, including the use of visualization and verbalization (V & V) methodologies developed by a nonpublic agency (NPA) provider known as Lindamood Bell, preferential seating in class, access to a laptop computer, and provision of study guides.

10. ALJ Lepkowsky also found that “the IEP attachment specifies that Student receive pre-teaching, post-teaching, and supplemental teaching through either a special education teacher, general education teacher, or Student’s speech language pathologist, with the teaching to take place during Student’s study skills class at the Academy. The IEP specifies that Student would receive after-school instruction if the amount of support he needed could not be met during his study skills class.”

11. Student's eighth grade IEP also contained related services, also known as designated instruction and services (DIS services) in California. ALJ Lepkowsky made the following findings regarding those services:

The IEP team also determined that Student required several related services in order for him to access his education...The team determined that Student required 105 minutes a week of speech and language services, in both individual and group settings and occupational therapy consultation between the occupational therapist and Student's teachers. The team further determined that Student required two 50-minute sessions a month of psychological counseling to be provided by the Coronado Counseling Center (CCC), with which the District would contract for services, in order to address Student's anxiety, self-esteem issues, and stress. The District ultimately selected Dr. Eileen Callahan from the CCC to provide counseling services to Student.

Importantly, the services the IEP deemed necessary for Student also included one session a day with the RSP [resource] teacher for 30 to 45 minutes where Student would receive pre-teaching, post-teaching, and supplemental teaching of concepts covered in his general education classes, and instruction by the RSP teacher and speech language pathologist (SLP) using visualization and verbalization strategies.

12. ALJ Lepkowsky found that the parties held an addendum IEP meeting on April 20, 2007, to discuss a problem with two boys at school bullying Student. The bullying was affecting his school performance and greatly increased his stress and anxiety levels. The IEP team developed a plan to help Student address the bullying. The IEP team also met on March 27, 2007, to discuss the transition to high school the following year and developed accommodations for use at high school, but no high school employees attended that meeting.

ALJ Lepkowsky's Findings Regarding Student's Transition to High School

13. As found by ALJ Lepkowsky, the parties held another transition meeting on June 7, 2007, to discuss how to implement Student's eighth grade IEP when he transferred to the high school the following year. This time high school staff attended the meeting. The IEP team recognized that Student's IEP required that he receive individualized teaching, including pre-teaching, post-teaching, and supplemental teaching, but the high school did not have the staff or the educational structure to provide Student with those services. Rebecca Black, the high school resource teacher who would be Student's case manager during his ninth grade year, "stated that she could not implement Student's IEP under the present structure of her RSP classes and given her caseload of some 28 students." The team discussed the need to hire another special education teacher to staff the resource (RSP) room to permit Black to provide Student with the individualized teaching required by his IEP.

14. Despite the recognition that Black could not implement Student's eighth grade IEP without additional staff support, the District did not hire another teacher or provide the additional support to Black during Student's ninth grade year. ALJ Lepkowsky determined that the District failed to implement Student's October 2006 IEP after Student began attending the high school. In particular, ALJ Lepkowsky made the following Factual Findings:

At the due process hearing and in its closing brief, the District admitted that it failed to implement significant portions of Student's October 2006 IEP. The District failed to provide Student with individual and small group pre-teaching, post-teaching, and supplemental teaching. It also failed to provide Student with the study guides mandated in his IEP. It further failed to use visualization and verbalization methodologies in Student's RSP class since Ms. Black had never received training in that methodology....

The primary intervention developed by Student's IEP team to address his reading, comprehension, and processing deficits (which form the core of Student's specific learning disability) was through pre-teaching, post-teaching, and supplemental teaching of his academic subjects using the V & V method. The District's failure to provide any of these teaching supports, and its failure to provide Student with any individual instruction meant that the District was not implementing the core component of Student's IEP. The provision of study guides, written instructions, and confirmation of oral instructions, were all designed to address Student's ADD and his learning deficits. That Student required these intense interventions was underscored by the fact that even with the supports in middle school, he did not meet all his goals and objectives by June 2007. According to Ms. Sullivan, Student had not met his final benchmarks on three of the four reading goals in his eighth grade IEP.

15. ALJ Lepkowsky determined that the District's failure to implement the IEP denied Student a FAPE, caused him to fail tests, and resulted in increased anxiety by Student. Student's anxiety was so great that his speech-language pathologist was required to use his speech and language sessions as extra counseling sessions to help with his anxiety.

The October 2007 IEP

16. Beginning in October 2007, after Student had transitioned to ninth grade in the high school, the parties held his annual IEP review at a series of IEP meetings. The parties agreed to updated goals and objectives for Student and one or two minor changes to the IEP, but were unable to agree upon the remaining portions of the District's proposed IEP for Student at those meetings. Student's mother filed a request for due process on December 12, 2007, in ALJ Lepkowsky's case (case number 2007120415). On December 20, 2007, OAH issued a "stay put" order in that case, requiring the District to continue implementing the eighth grade IEP (with the updated ninth grade goals) while that case was pending. ALJ Lepkowsky found that, despite the stay put order from OAH, "except for reinstating

Student's full speech/language services, the District did not attempt fully to implement the IEP until the due process hearing."

17. The agreed-upon goals in ninth grade included a self-advocacy goal designed to help Student request his special education accommodations if his special education teachers forgot to provide them, reading comprehension, math, and language processing goals, as well as social-emotional and adaptive living (coping skills) goals. The social-emotional goals were designed to address Student's difficulty with socializing with peers. The adaptive living skills goal was designed to address Student's anxiety and stress.

18. Aside from the agreed-upon goals and minor changes, ALJ Lepkowsky ultimately determined that the District's October 2007 offer of FAPE was invalid. ALJ Lepkowsky found that the District had predetermined Student's placement and services prior to the IEP meetings in violation of the Individuals with Disabilities Education Act (IDEA), significantly impeding the opportunity of Student's mother to participate in the decision making process with respect to her son's education, and thereby denying Student a FAPE. Because of the District's procedural violation, it was unnecessary for ALJ Lepkowsky to address the substantive aspects of the District's October 2007 IEP offer. Therefore, ALJ Lepkowsky made no findings as to whether the District's October 2007 IEP proposal was reasonably calculated to provide Student with educational benefit.

19. In addition to ordering reimbursement for Student's mother and compensatory education for Student, ALJ Lepkowsky's order included the following two provisions:

The District shall continue to implement in full Student's eighth grade IEP dated October 2006, except as to those parts of Student's October 2007 IEP to which Mother has already agreed, until the parties agree to another IEP or until a subsequent IEP is found appropriate through a due process hearing or other legal procedure.

Within 45 days of this Order, the parties shall hold another IEP meeting for Student.

The May 14, 2008 Progress Report

20. On May 14, 2008, after the due process hearing had been held in ALJ Lepkowsky's case, but prior to the issuance of the decision, Rebecca Black, who was still Student's case manager and resource teacher at that time, sent a letter to Student's mother with a report on Student's progress on the goals agreed to by the parties in ninth grade. The progress report noted that, with respect to the self-advocacy goal, Student had not made any progress. He was still unable to ask his teachers for his IEP accommodations. Instead of notifying teachers when he did not receive an accommodation, he would do without the accommodation.

21. Black's letter noted that Student made some progress on his reading comprehension goals, but still had difficulty with "the more abstract analysis of how the characters influence the plot and conflicts." He also had difficulty with abstract language, figurative meanings of words and understanding literary devices. He made progress on his note taking goal. He was making progress on math, but still had difficulty with word problems. Student still had difficulty with peer interactions and had not yet met his social-emotional goal of having lunch or "hanging out" with a peer. He had made some progress on his adaptive (coping skills) goal, but still had significant difficulties.

The June 2008 IEP Meeting

22. Prior to the issuance of ALJ Lepkowsky's decision, Student's mother requested an IEP meeting to discuss extended school year (ESY) services for Student for the summer of 2008. That meeting was held on June 4, 2008, approximately a week after the issuance of ALJ Lepkowsky's decision.

23. The IEP Amendment Page relating to the June 4, 2008 IEP recited that the purpose of the meeting was to "discuss Placement and Services, ESY and determine the need for additional services." The page also recited that the meeting related to "Changes to the IEP Dated 10/8/2007." However, during the hearing, the parties stipulated that this meeting was not intended to be, nor was it in fact, Student's annual review IEP. Aside from minor amendments to the accommodations listed in the eighth grade IEP relating to taping lectures and study notes, the team did not review or revise the placement, accommodations or services from that IEP. Instead, the meeting discussed extended school year (ESY) services for Student for the summer of 2008 and how the District would implement the compensatory education required by ALJ Lepkowsky's decision.

24. Student and Student's mother attended the meeting. Rebecca Black attended the meeting as the special education teacher, and Samantha Metzger, who would be Student's English teacher for 10th grade, participated as a general education teacher. Richard Erhard, the Director of Pupil Personnel Services, attended as the local educational agency (LEA) representative and conducted the meeting. Pam Martens, Student's speech and language instructor, and Karl Mueller, the Coronado High School principal, also attended.

25. During the meeting, the parties set up an ESY system under which Student would receive pre-teaching during the summer of some of the books that he would be reading in his 10th grade classes. There was also a discussion of whether Student should take an advanced placement biology class (AP Bio class) without taking a chemistry class, which was the usual prerequisite. Arrangements were made for Student to receive chemistry study materials over the summer to allow him to take the class in the fall. The team also discussed and agreed upon a method for the District to provide the compensatory education ordered by ALJ Lepkowsky. The IEP team decided that the District would contract with Banyan Tree, a nonpublic school (NPS) to provide the compensatory education hours. Nancy Woolway, a former District special education teacher under contract with Banyan

Tree, worked with Student that summer to provide the compensatory education required by ALJ Lepkowsky's decision.

26. In response to questions from Student's mother about how the District would implement the one-to-one resource specialist services required under the eighth grade IEP during Student's 10th grade year, Mueller told the IEP team that he was working on an implementation plan and would present it to Student's mother at the beginning of the school year in August 2008. Student's mother anticipated that there would be another IEP meeting at the start of the new school year.

27. At no time between May 28, 2008 (the date of ALJ Lepkowsky's decision) and October 2008, did the District hold or attempt to hold another IEP meeting besides the June 4, 2008 meeting. At no time between May 28, 2008, and February 2009, did the District make a new or revised offer of FAPE to Student. Instead, the District continued to rely upon Student's eighth grade IEP as Student's program for 10th grade, using the goals agreed upon in ninth grade.

28. The District staff did not believe that they needed to hold another IEP team meeting prior to October 2008. They believed that, by holding the June 4, 2008 meeting, they had complied with ALJ Lepkowsky's order to hold an IEP team meeting within 45 days of the decision. They did not believe a meeting to review and revise Student's IEP was required until Student's annual review in October 2008. Erhard did not think the District would have been able to assemble the IEP team and rewrite the IEP between May 28 and June 16, when the school year ended. He also testified that the teachers were not on contract during the summer and would not have been available for an IEP meeting.

29. Between the date of ALJ Lepkowsky's decision on May 28, 2008, and the end of the 2007-2008 school year in June 2008, Black continued to act as Student's case manager and resource teacher. Black attempted to implement the October 2006 IEP for Student during that time. The District did not provide any additional teacher or aide support to Black to assist her with duties. Black testified that prior to ALJ Lepkowsky's order she had been providing services to other pupils during her resource time with Student, but after the order she provided only one-to-one instruction to Student for 30 – 45 minutes as required by the "stay put" IEP. Student, however, testified that she only worked with him one-to-one once or twice after May 28, 2008.⁴

30. At the end of the 2007-2008 school year, Black informed the District that she did not want to be involved with development of Student's IEP or provision of services to Student any longer.

⁴ It is unnecessary to resolve this factual dispute because, as discussed in Legal Conclusions 21 – 22 below, the failure to hold a new IEP meeting was a procedural violation that resulted in a substantive denial of FAPE. Therefore, it is not necessary to decide whether there was a further procedural violation based on a failure to implement the IEP.

31. The evidence supports a finding that the District should have held an IEP meeting to review and revise Student's eighth grade IEP as soon as possible after receiving ALJ Lepkowsky's decision, or at least by the start of the 2008 – 2009 school year in August 2008. As discussed in Legal Conclusions 6 – 7 below, a district must hold an IEP meeting at least annually or whenever a pupil demonstrates a lack of anticipated progress. (Ed. Code, §§ 56341.1, subd. (d); 56343; 56380.) As of May 28, 2008, when the District received ALJ Lepkowsky's decision, the District knew that the October 2007 IEP meeting had not complied with the procedures set forth in IDEA and had significantly impeded the ability of Student's mother to participate in the decision making process for her son's education. To remedy that problem, the District needed to hold a procedurally proper IEP team meeting. The District also knew, based on Black's 2008 progress report, that Student was not making the progress anticipated on his IEP goals from the ninth grade IEP. That should also have alerted the District that the eighth grade IEP was no longer sufficient to meet Student's needs in high school. At that point, the District should have taken immediate steps to remedy the situation by noticing and holding a procedurally proper IEP meeting to review and revise Student's IEP.

32. The evidence also supports a finding that the June 2008 IEP meeting was not sufficient to substitute for the IEP review required by law. The District is correct in its contention that the June 2008 IEP was sufficient to meet the requirements of ALJ Lepkowsky's order that the District hold an IEP meeting within 45 days. However, the District's obligation to hold an annual review IEP meeting for Student was not based on ALJ Lepkowsky's order (although ALJ Lepkowsky's order certainly should have been another indication to the District that a full review IEP was required). Instead, the District's obligation to hold a meeting to review and revise Student's eighth grade IEP to meet his 10th grade needs was mandated by law.⁵

33. The District does not contend that the June 2008 IEP was intended to take the place of a full IEP meeting to review and revise Student's eighth grade IEP. In fact, the parties stipulated that it was *not* intended for that purpose. The discussion of a couple of accommodations for the following school year was not intended by the parties to substitute for a full review meeting. The evidence at hearing showed that Student's mother expected a full review meeting to be held by the beginning of the 2008-2009 school year, in August 2008.

The October 2008 IEP Team Meeting

34. During the summer of 2008, the District hired Ryan Woodard, a credentialed special education teacher, to provide the one-to-one resource support for Student required in

⁵ The District does not argue (nor could it argue) that it was justified in delaying the review IEP meeting based on the portion of ALJ Lepkowsky's decision that ordered the District to use the eighth grade IEP until a new IEP was developed. ALJ Lepkowsky merely ordered what the law required – that until a revised IEP was agreed upon, the last agreed-upon and implemented IEP would remain in effect. Nothing in ALJ Lepkowsky's decision prevented the District from revising that eighth grade IEP. To the contrary, ALJ Lepkowsky ordered the parties back to another IEP meeting.

Student's eighth grade IEP. Woodard did not have any other pupils assigned to him during the resource period that he was scheduled to work with Student, so he was able to devote the time required by the eighth grade IEP specifically to Student.

35. Between the time Woodard began working with Student at the start of the 2008-2009 school year and the October 2008 IEP meeting, Student's mother sent email messages to Woodard and other District employees. In some of these emails, Student's mother directed the subject of the pre- and post-teaching that should occur during Woodard's one-to-one resource time with Student. Woodard admitted at hearing that he was unable to work with Student on the goals and objectives in Student's IEP, but said it was because he took the time in the one-to-one sessions working on the tasks directed by Student's mother in her emails. In addition, Woodard was forced to spend much of his time working with Student on studies related to the AP Bio class, to the exclusion of Student's other classes. During the hearing, the District contended that the mother's conduct in directing Woodard's activities prevented the District from implementing the IEP. Even if that was a proper excuse for failing to implement an IEP, it does not provide an excuse for the failure to hold another IEP meeting. To the contrary, Woodard's inability to work on Student's IEP goals should have been further indication to the District that a new IEP meeting was needed as soon as possible.

36. Woodard, who was Student's case manager at the time, first attempted to contact Student's mother about scheduling Student's annual IEP meeting around September 24, 2008, about a month after school began. After communication with Student's mother regarding scheduling, on October 3, 2008, the District sent Student's mother notice of an IEP meeting to be held on October 6, 2008. The purposes of the meeting listed on the notice were: 1) annual review; 2) to discuss transition after Student graduated from high school; and 3) to discuss placement and services.

37. The District decided to hold the October 6, 2008 IEP meeting as a "facilitated" IEP meeting. In that type of meeting, instead of working from a draft IEP, the IEP team starts from scratch to determine present levels of performance and then moves on to develop goals, accommodations, placement and DIS services.⁶

38. The meeting began at 2:30 p.m. and continued until 4:30 p.m. Erhard conducted the meeting. Student's general education teachers attended the meeting and gave information regarding Student's performance in their classes. The parties were unable to

⁶ This "facilitated" IEP meeting was different from the type of IEP meetings held by the District for Student in the past, and Student's mother believed that the change to this type of meeting and the District's failure to provide her with a draft IEP prior to the meeting were evidence of an "agenda" against her by Erhard. However, the evidence does not support such a finding. Instead, given ALJ Lepkowsky's determination that the District had predetermined its ninth grade IEP offer, the District's decision to start from scratch in the 10th grade IEP, without working from a pre-written draft IEP, was both proper and prudent. The District's problem in the instant case was not the decision to hold a facilitated meeting, it was the failure to hold the meeting sooner, and the failure to complete the meeting in a timely fashion once it began.

finish developing the present levels of performance during the meeting, and did not have an opportunity to discuss goals, placement, accommodations or services during the meeting.

39. Student's mother was a judge in a commercial arbitration in another state during that time and was required to change the arbitration schedule to attend the October 6 IEP meeting. At the end of the meeting, Student's mother was unable to schedule a follow-up meeting, because she did not know what her schedule would be like. She agreed to provide follow-up dates to the District. On October 10, 2008, four days after the October 6 IEP meeting, Student's mother hand-delivered a letter to the District, stating she was available to meet on October 29 or 30, and November 3 or 4, 2008.

40. At no time prior to the January 9, 2009 date of filing of Student's due process request in the instant case, did the District respond to the letter of Student's mother suggesting dates, nor did the District notice or even attempt to schedule a follow-up IEP meeting. The District did not hold another IEP team meeting until January 26, 2009.

41. At some point after the October 6, 2008 IEP meeting, Woodard made it known that he would be leaving his employment with the District. He could not specifically recall what date he gave written notice to the District, but he thought it was around October 24, 2008. On October 24, 2008, he sent a letter to the parents of the children he taught to let them know he was leaving. His last day of employment with the District was in November, after the November 3 and 4, 2008 dates proposed by Student's mother for the IEP meeting.

42. After Woodard left, the District had substitute teachers assist with Student's one-to-one resource time instruction. In approximately November 2008, Brooke Moccock was hired as a long term substitute teacher to take Woodard's place. She ultimately became Student's permanent resource teacher on December 19, 2008, just before the start of the District's winter break.

43. Mueller testified that the District did not want to hold another IEP meeting until they had a permanent replacement for Woodard, which was why no IEP meeting was held prior to January 2009. The District contends that it could not hold a legal IEP team meeting without Student's special education teacher present.

44. The evidence does not support a finding that Woodard's departure prevented the District from holding an IEP meeting between October 6, 2008, and January 26, 2009. Instead, the evidence shows that the District made no attempt to hold a meeting, with or without Woodard in attendance. Neither Erhard nor Mueller noticed another IEP meeting between those two dates or asked Woodard or Black to participate in such a meeting. The four dates proposed by Student's mother for the follow-up meeting were all prior to Woodard's last day of employment with the District, but no effort was made to use one of those dates. Neither Erhard nor anyone else from the District telephoned or sent an email to Student's mother to see if she would agree to have a different individual besides Woodard attend as the special education teacher at the meeting.

45. Erhard testified that he did not ask Black to step in as the special education teacher at the meeting, because he feared she would seek a transfer from her position rather than be involved with Student's IEP meeting again. However, he made no effort to see if a different special education teacher of Student could attend the meeting, such as Pamela Martens, Student's speech and language instructor, or Nancy Woolway from Banyan Tree. The District did not contact Student's mother to see if she would agree to have either or both of them attend the meeting in the capacity of a special education teacher. Although the evidence at hearing showed that some of the District's special education staff (such as Woodard and Black) had problems dealing with Student's mother at that point in time, the tension between them was not an excuse for ignoring the obligation to hold an IEP meeting or failing to make any attempt whatsoever to schedule the continuation of the October meeting.

46. Given all these factors, the evidence does not support a finding that the departure of Woodard from the District prevented the District from continuing the October 6, 2008 IEP.

47. The District also contends that it was justified in failing to hold the IEP meeting, because Student's mother did not care whether a continuation IEP meeting was held. Even if this was a proper defense, the evidence does not support the District's contention. The District cites to an email sent by Student's mother to Woodard on October 27, 2008, in which she mentioned that she did not care if an IEP meeting was held. However, the balance of the evidence shows that Student's mother did, in fact, want another IEP meeting. In other emails sent on October 27 and October 28 – including an email sent to the District superintendent Jeffrey Felix – she complained about the lack of an IEP meeting. On November 12, 2008, she sent an email to Mueller, which stated, in part:

The all mighty IEP. Doesn't mean much, does it? Can't even talk about this with the IEP team because Richard refuses to convene one. Let's see – [Student's] IEP and his goals are now 6 weeks expired.

48. The evidence supports a finding that Student's mother wanted an IEP meeting and did nothing to prevent the District from holding one. To the contrary, she provided dates she was available and even made herself available to meet on October 6, in the middle of a commercial arbitration in another state. Finally, she was forced to file a request for a due process hearing in order to move the District to start the IEP process once more. The evidence supports a finding that the District's failure to hold a complete IEP meeting to review and revise Student's eighth grade IEP between the start of the 2008 – 2009 school year and the time Student's mother filed for due process in January 2009, constituted a procedural violation of IDEA and compounded the District's earlier violation for failure to hold a timely IEP meeting.

The Events Following the October 2008 IEP Meeting

49. As stated above in Factual Finding 42, Brooke Moccock began providing Student with one-to-one pre- and post-teaching services in approximately November 2008. She worked with Student for 50-55 minutes on three days of the week and for 90 minutes on Wednesdays.

50. Moccock spent two or three days of her one-to-one time with Student working on studies related to his AP Bio class. She spent the rest of the time working with him on history, because she was directed to do so by Student's mother. At some point, when he began doing poorly in history, she increased the time she spent with him on history. She also worked occasionally with Student on his geometry. She did not work with Student on English, because Student stated that he did not have anything to work on for that subject. She admitted during her testimony and in an email written in January 2009, that she did not have time to work on the goals and objectives in Student's IEP. She explained that, when she started as Student's resource instructor, she thought she had to work on the things that Student's mother directed her to do. Student's mother did not direct her to work with Student on studies related to his goals and objectives, so she did not do so.

51. Pamela Martens, the speech and language pathologist providing DIS services to Student, is trained in the use of Lindamood-Bell V & V techniques and used those with Student. During the hearing, the parties stipulated that Student made progress in speech during the time periods in question. Martens worked with Student on vocabulary related to his English class in addition to other areas.

52. On January 9, 2009, Student's mother filed the current due process request with OAH. On January 20, 2009, Summer Stech was hired as a Program Specialist for the District. She has a background in both law and special education, and she was assigned the task of completing an IEP for Student. IEP meetings were held on January 26, 2009, February 17, 2009, and February 25, 2009. A revised IEP offer was finally made by the District in February 2009. Student's mother ultimately signed an IEP, agreeing to the District's offer on March 3, 2009.

53. The District contends that, even if the District staff did not fully implement his October 2006 IEP during his 10th grade year, Student still gained educational benefit. Student's general education teachers – including Samantha Metzger, Student's English teacher for 10th grade, Nicole Belong, Student's AP Bio class teacher, Michelle Walker, Student's geometry teacher, and Davin Heaphy, Student's advanced placement world history teacher – all testified that Student made progress in their classes and received average to above-average grades overall. They acknowledged that Student did poorly on exams, but explained that his exemplary work on other assignments such as homework led to better grades.

54. The parties dispute whether Student's ability to maintain his grades in his general educational classes was the result of the District's program or supplemental tutoring

paid for by the parent. However, there is no dispute that Student made little or no progress on his non-academic goals. Student's self-advocacy goal was designed to assist Student with requesting his IEP accommodations when his general education teachers forgot to provide them. However, prior to January 2009, Student remained unable to request these accommodations from his teachers. For example, in Student's English class when the teacher did not invite pupils to use a laptop computer, Student did not request that accommodation, even though it was one of the accommodations listed in his IEP. Student described one occasion when that happened and he was unable to read his handwritten notes later.

55. Student also made little or no progress on his goal related to adaptive/coping skills which was intended to address his anxiety and stress. Student's mother testified regarding the difficulties he had with stress and her concerns that he would plunge into a downward emotional spiral.

56. During Student's January and February 2009 IEP meetings, a real emphasis was made on assisting Student with self-advocacy issues. Because Student is now in high school, self-advocacy is particularly important for Student. As a result of the 2009 IEP meetings and the new IEP, Student is finally beginning to self-advocate and to seek assistance from his general education teachers. Without a current IEP geared toward his high school needs, he was unable to make that progress.

57. The District contends that Student's March 2009 IEP is very similar to the October 2006 IEP. Therefore, the District believes that there was no harm to Student if the District continued to use the eighth grade IEP for Student instead of developing a new one. However, the evidence does not support the District's contention. The new IEP contains additional services and accommodations designed to address Student's needs in the high school environment. For example, the March 2009 IEP includes 30 minutes of consultation time per semester between the speech-language pathologist and Student's general education classroom teachers and additional one-to-one speech-language time to allow Student to work on self-advocacy issues. As discussed above, self-advocacy is a critical skill now that Student is in high school, and the eighth grade IEP was unable to assist Student with making progress in this area in the high school setting.

58. At the 2009 IEP meetings, the team discussed how to implement Student's one-to-one resource support in the high school setting. The IEP provides for additional individual and small group academic support, if needed, to accomplish this implementation. The IEP team also discussed plans for assisting the formation of pupil study groups to help Student both academically and socially.

59. The evidence supports a finding that, although the 2009 IEP reflects the earlier IEP in many ways, the new IEP was designed to address Student's needs in a high school setting. The March 2009 IEP addressed Student's self-advocacy and social/pragmatic needs in a way that the October 2006 IEP, developed while Student was in middle school, failed to do. The failure to have an updated IEP designed for the high school environment prevented

Student from making progress on his non-academic IEP goals and increased his level of stress.

60. The evidence supports a finding that the District's failure to hold a new IEP team meeting to review Student's eighth grade IEP and make a new offer of FAPE prior to February 2009, constituted a procedural violation of IDEA. The legal ramifications of that procedural violation will be discussed in the Legal Conclusions below.

Tutoring Costs Paid for by Student's Mother

61. Student's mother spent a total of \$2,645 between May 4, 2008, and February 23, 2009, paying for tutors to assist with Student's studies. Student's mother paid \$1,825 to Joshua Rosenberg to provide tutoring to Student related to biology between May 4, 2008, and January 17, 2009. Rosenberg holds a preliminary single subject teaching credential in biological sciences. During the hearing, Student mother indicated that she sought reimbursement of the \$225 she spent for tutoring sessions by Rosenberg between May 4, 2008 and May 28, 2008, because that was during the time ALJ Lepkowsky's case was under submission, so Student's mother had been unable to seek those costs during ALJ Lepkowsky's case. During that hearing Black testified that she attempted to implement the IEP *after* the District received ALJ Lepkowsky's decision, so it is apparent that the problems that ALJ Lepkowsky noted in her decision were ongoing while the case was under submission. The evidence supports a finding that these tutoring costs should be reimbursed.

62. The remaining costs for Rosenberg were incurred during the end of the 2007 – 2008 school year (Student's ninth grade year) after the issuance of ALJ Lepkowsky's decision, one session on August 14, 2008, immediately before the start of the 2008 – 2009 school year, and the rest during the 2008 – 2009 school year. The propriety of reimbursement for these and the other tutoring expenses will be discussed in the Legal Conclusions below.

63. Student's mother paid \$370 to William Adams to provide math tutoring to Student between November 2, 2008, and February 23, 2009. Adams holds a preliminary single subject teaching credential in mathematics. Although some of these costs were incurred after the IEP process had begun again (on January 26, 2009), the evidence at hearing showed that no final IEP offer was made by the District until February 2009, so these costs are properly sought.

64. Student's mother paid \$450 for Nancy Woolway to provide language arts tutoring to Student on December 30, 2008, and January 3 and 10, 2009. These tutoring services by Woolway were separate from the services Woolway provided at District expense during the summer of 2008.

LEGAL CONCLUSIONS

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)
2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)
3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)
4. The centerpiece of a child's special education program is the IEP. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592].) A district must have an IEP in effect for each special needs pupil at the beginning of each school year. (Ed. Code, § 56344, subd. (c); 34 C.F.R. § 300.323(a) (2006).) An IEP is a written document that includes statements regarding a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subs. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: 1) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); 2) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); 3) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and 4) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and districtwide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)
5. There are numerous procedural requirements for development of an IEP, including requirements for certain district employees to be members of the team that develops the IEP (Ed. Code, § 56341; 34 C.F.R. § 300.321 (2006)), a requirement for parental participation in the development of the IEP (Ed. Code, § 56341.5; 34 C.F.R. §

300.322 (2006)), and a requirement that the parents agree to the IEP before any services are provided to a pupil in accordance with that IEP. (Ed. Code, § 56346, subd. (c), (d); 34 C.F.R. § 300.300(b) (2006).) The required participants in the IEP meeting include, but are not limited to: at least one regular education teacher of the child, at least one special education teacher of the child, the parent, and a school administrator familiar with the special education programs available in the District. (Ed. Code, § 56341, subd. (b); 34 C.F.R. § 300.321(a) (2006).)

6. A district must hold an IEP meeting to review the student's IEP periodically, but not less frequently than annually, "to determine whether the annual goals for the pupil are being achieved, and revise the [IEP], as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (Ed.Code, §§ 56341.1, subd. (d); 56380.)

7. In addition to the required annual meeting, a child's IEP team "shall meet whenever any of the following occurs...(b) the pupil demonstrates a lack of anticipated progress" or when the parent or a teacher requests a meeting. (Ed. Code, § 56343.)

Did the District deny Student a FAPE by failing to timely conduct a review of Student's IEP and write a new one, including appropriate goals, services, supports and accommodations?

8. As discussed in Factual Findings 1 – 60 above, the evidence supports a finding that the District held only one IEP team meeting to review and revise Student's IEP between May 28, 2008, and January 26, 2009. The meeting lasted only two hours and did not even establish present levels of performance for Student. Only *after* this case was filed did the District begin the IEP process again.

9. Relying on the case of *Student v. Poway Unified School District* (2007) OAH consolidated case numbers N2007040130/N2007040694, the District contends that it was not required to complete the IEP by the annual review date, just to begin the meeting. The District argues that it did, in fact, begin Student's annual IEP team meeting on October 6, so there can be no violation based on the District's failure to hold a timely meeting. The District also contends that the District was in compliance with ALJ Lepkowsky's order, because her decision did not specify what the IEP team meeting to be held within 45 days was supposed to accomplish. According to the District, if ALJ Lepkowsky's order did not specifically state that the District must hold a meeting to review and revise the IEP within 45 days, then such a meeting was not required. Instead, the District contends that the June 2008 IEP meeting was sufficient to comply with ALJ Lepkowsky's order.

10. The District is correct that it was in technical compliance with ALJ Lepkowsky's order, and no findings are made herein that the District violated that order. The District is also correct that, in general, there is no requirement that a review IEP must be completed by the annual review due date.

11. However, the District misses the key issue of this case. As discussed in Factual Findings 31 – 33 and Legal Conclusions 6 – 7, the problem here was the failure to hold a meeting to revise an IEP that should have been reviewed and revised long before October 6, 2008. The District was still relying upon an IEP developed at the start of Student’s eighth grade year when Student was in 10th grade. Because the District had not held a procedurally proper IEP team meeting at the start of Student’s ninth grade year, there was no valid annual review in October 2007. When ALJ Lepkowsky’s decision alerted the District to the lack of a valid FAPE offer in ninth grade, the District should have held an annual review IEP as soon as possible or at least by the start of the 2008 – 2009 school year, whether or not ALJ Lepkowsky’s decision specifically ordered the District to do so. The District then compounded that problem by failing to timely complete the October 6, 2008 IEP, once it was begun.

12. As discussed in Factual Findings 13 – 33, the District had numerous “red flags” that should have warned the District that another IEP team meeting was required by law. The District had ALJ Lepkowsky’s findings that the ninth grade offer was invalid because it was the result of predetermination, so Student’s annual IEP meeting was overdue. The District had Black’s May 2008 progress report showing Student’s lack of progress on some of his IEP goals. The District had ALJ Lepkowsky’s order that a new IEP meeting be held within 45 days. The District knew the difficulty Black had trying to implement the stay put IEP in the current high school setting. All of these should have led the District to attempt to hold another IEP meeting as soon as possible after the receipt of ALJ Lepkowsky’s decision, but certainly by the start of the new school year in August 2008. Even if the District did not have the staff to conduct such a meeting during the summer, by August 2008, Woodard had been hired and could have attended an IEP meeting.

13. There is no evidence that Student’s mother prevented the District from holding a meeting. Instead, the District chose to wait until October 2008 to hold the meeting.

14. As discussed in Factual Findings 34 – 60, after the start of the 2008-2009 school year, the District had even more indication that an IEP meeting was necessary to review and revise Student’s IEP. Woodard admitted that he was unable to work with Student on the goals and objectives in the IEP. Even if the District is correct that the actions of Student’s mother prevented Woodard and other staff members from implementing the IEP, that should have been a further indication that a new IEP team meeting was necessary. If teachers are unable to implement an IEP, the appropriate action is to hold a new IEP team meeting to discuss the IEP in light of the new circumstances.

15. As discussed in Factual Findings 44 – 46, Woodard’s departure from the District did not provide an excuse for the District’s failure to continue the October 6, 2008 IEP meeting. Even if Woodard and Black were unwilling to attend a continuation IEP meeting on any of the four dates proposed by Student’s mother, there were other special education teachers or providers who could have attended the meeting. The law requires that the meeting be attended by: “[n]ot less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child.” (34 C.F.R.

300.321(a)(3) (2006).) The District made no effort to see if another special education teacher or provider of Student could attend the meeting in place of Woodard or Black. The District did not even attempt to contact Student's mother about the issue. A parent should not be required to file a request for a due process hearing in order to obtain a current IEP for her child.

16. The evidence supports a finding that the failure to hold a timely meeting to review and revise Student's IEP constituted a procedural violation of IDEA. The next question is whether that procedural violation gave rise to a substantive denial of FAPE.

17. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

18. In the instant case, the failure to hold a timely IEP meeting significantly impeded the ability of Student's mother to participate in the decision making process regarding the provision of a FAPE to her son. Attendance at and participation in IEP meetings are the heart of a parent's opportunity to participate in the decision making process. Without an IEP meeting, there was no opportunity to participate.

19. In addition, as discussed in Factual Findings 49 – 64, above, the evidence supports a finding that the failure to hold a complete and timely IEP meeting caused a deprivation of educational benefits for Student. Without an IEP team meeting, Student was educated in high school using an IEP program and services designed for a middle school pupil. The important issues of self-advocacy and socialization were not addressed at a high school level and Student made no progress in those areas. Without an IEP team meeting, the District was unable to address the inability of District staff to work on the goals in the IEP. The need to review and update a pupil's IEP at least annually is recognized by law. (Ed. Code, § 56341.1, subd. (d).) The "stay put" provisions of the law (Ed. Code, § 56505, subd. (d)) are designed to protect a child during a dispute with a district – a stay put IEP was never intended to take the place of a proper IEP review and revision.

20. The District's failure to hold a timely IEP meeting to review and revise Student's eighth grade IEP resulted in a substantive denial of FAPE. Student has prevailed on the first issue in Student's due process hearing request.

21. Student's second issue – that the District committed a procedural violation of IDEA by failing in a material respect to implement the October 2006 IEP – covers the same time period as the first issue. The sole remedy sought by Student's mother for both procedural violations is reimbursement of the \$2,645 Student's mother spent for private tutors to assist Student with his studies from May 2008 to February 2009. As discussed below, the District's denial of FAPE for failure to hold a timely IEP meeting is sufficient to support an order for full reimbursement to the parent.

22. Under these circumstances, there is no need to address or decide Student's second procedural issue. Even if Student prevailed on that issue, it would provide no additional remedy. Student now has a signed IEP and can move forward with his education under that IEP.

Student's Mother is Entitled to Reimbursement for the Cost of the Private Tutors

23. If a district denies a pupil a FAPE and the parent is required to spend money to remedy the situation, the parent may be entitled to reimbursement of those expenses. (*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].) Reimbursement is an equitable remedy. In the instant case, as discussed in Factual Findings 49 – 64 above, the District's failure to hold a timely IEP meeting and update Student's program prevented Student from making progress on one or more of his IEP goals, prevented Student from requesting his IEP accommodations when they were not provided, hindered the District staff in their efforts to work with Student on his IEP goals, and led to increased stress and anxiety for Student. By providing tutors to work with her son, Student's mother helped to relieve Student's anxiety and helped to supplement the instruction the District was attempting to provide under an outdated IEP. The District could have remedied the situation at any time by conducting an IEP review and revision, but chose not to do so, despite legal requirements and numerous "red flags" that such a meeting should be held (including an ALJ's order to hold a meeting).

24. The evidence supports a finding that an award of the full amount of reimbursement sought by the parent is appropriate in this case. The District should have started the IEP process as soon as it received ALJ Lepkowsky's decision which alerted the District that no valid ninth grade IEP meeting had been held. Until the District held a proper and complete IEP meeting and made a proper offer of FAPE, Student's mother had no means of addressing the deficits in her son's program other than through private tutors. The reimbursement amount sought by Student's mother is very reasonable. The balance of equities in this case calls for full reimbursement to the parent of the money spent to pay for the tutors.

ORDER

The District shall pay Student's mother \$2,645 as reimbursement for her expenses within 60 days of the date of this order.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: Student prevailed on the sole issue decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: April 22, 2009

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings