

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

SHORELINE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009030733

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Tomales, California on May 26-28, and June 9-10, 2009. The parties submitted closing briefs on June 12, 2009, and rebuttal briefs on June 15, 2009. At the request of the parties, supplemental closing briefs were submitted on June 24, 2009.

Student was represented by attorney Margaret M. Broussard. Student's father (Father) was present throughout most of the hearing.

Shoreline Unified School District (District) was represented by attorney Jacqueline DeWarr Berryessa of the law firm of Lozano Smith. Dr. Stephen Rosenthal, District Superintendent, was also present.

Parents filed their request for due process hearing on March 17, 2009. On March 30, 2009, the parties requested a continuance of the due process hearing, and the continuance was granted for good cause on April 6, 2009. The matter was submitted on June 24, 2009.

The following witnesses testified during the hearing: Father, Adam Beshears, Elise Haugh, Barbara Grosso, Maxine McGinnis, Stephen Rosenthal, D.Ed., Maria Moleski, Ph.D., Nancy Wolf, Elizabeth "Lisa" Conlin, Cameron Dawn Kline, April Port, Betty Faulkner, Anne Harris, and Fred Gilardi.

ISSUES¹

(I) Did the District deny Student a free appropriate public education (FAPE) from March 17, 2007 through November 11, 2008 by failing to convene an Individualized Education Program (IEP) team meeting and make Student a FAPE offer?

(II) Did the District deny Student a FAPE since the November 12, 2008 IEP team meeting by procedurally violating the Individuals With Disabilities Education Act (IDEA) by:

- (A) Failing to make a FAPE offer;
- (B) Failing to have a regular education teacher present; and
- (C) Failing to develop goals and objectives?

(III) Is Student entitled to be reimbursed for the cost of an independent educational evaluation (IEE) of a neuropsychological assessment obtained by Student's parents?

Proposed Resolution

Student parents' (Parents) proposed resolution is that Parents be reimbursed for the cost of Student's nonpublic school placement from March 17, 2007 through the end of the 2008-2009 school year (including tuition and transportation); Parents should be reimbursed for the cost of an independent educational evaluation conducted by Dr. Maria Moleski; and the District be ordered to convene an Individualized Education Program (IEP) team meeting and place Student at Star Academy, a nonpublic school, for school year 2009-2010.

FACTUAL FINDINGS

Jurisdictional Facts and General Background

1. Student was born on September 5, 1998. During all times material, Student has resided within the District, which is a member of the Marin County Special Education Planning Area (SELPA). Student was found eligible for special education on September 21, 2005.

2. Parents noted that Student's language skills developed more slowly than other children. He did not begin speaking until the age of two and a half. At the age of three, Student and his family moved to Germany for one year. During play, Student would frequently use animal sounds to communicate with other children.

¹ The issues have been re-framed for the purposes of this decision.

3. Beginning August 28, 2003, Student attended Nancy Wolf's kindergarten class at the Inverness School, a District program, where he stayed for approximately one month. Wolf, who has been an elementary school teacher for 33 years, did not have a good memory of Student although she did not recall any serious concerns academically and did not feel he was academically delayed. She did testify that she normally requires two to three months to form an opinion as to the levels of a child's academic skills.

4. Shortly after Student entered kindergarten, Parents began to look for a school which they felt would be more suitable for Student's developmental stage and had a pace more suitable for him. On September 23, 2003, Student's mother (Mother) submitted an application to enroll Student in the two year kindergarten program at the Marin Waldorf School (Marin Waldorf) in San Rafael. In the application, Mother stated:

We want to develop [Student's] imagination and passion. More than any particular skill, school should develop a love of learning and exploration of the world and of the self as an individual. We see that the public school he just started does not really engage him and we believe that Marin Waldorf will be a better fit for his playful spirit.

5. On September 24, 2003, Wolf filled out a teacher recommendation form where she stated that: "[Student] is a bright child who participates in all activities. He verbalizes less frequently than 5 year olds that I have worked with." She also observed that Student "would benefit from the 'gift of time' before participating in the Inverness School Kindergarten."

6. Marin Waldorf utilizes an educational method developed by Rudolf Steiner's pedagogical model of child development. Among the features of a Waldorf education are that the teacher usually stays with a class throughout the elementary grades, academics are de-emphasized in the early grades, textbooks are not used as the children keep their own workbook, and learning is accomplished through activities such as art, music, gardening, and foreign languages. (Robert Mays and Sune Nordwall, *Waldorf Answers* (2004) www.waldorfanswers.org.) At Marin Waldorf, the child attends a two year kindergarten with the same teacher. Marin Waldorf's Lower School comprises grades one through four. Academics, including reading, are de-emphasized in the early grades.² Grades are not given at Marin Waldorf. Each student receives a yearly curriculum overview and student report which indicates how the student is doing.

7. During the two year kindergarten, Student appeared "dreamy" and had problems following directions. He would not always respond when his name was called, and had problems transitioning from one activity to another. Parents were advised to seek a special education evaluation from their school district. Father phoned the local elementary

² Third Curriculum Overview authored by Adam Beshears (Exhibit S-7).

school, West Marin School, requesting that the District test Student for auditory processing. He was told that the District would do a complete assessment of Student.

8. Linda Banks, an Educational Support person at Marin Waldorf, informed the District that the reason for referring Student to the District for assessment was that his reading and language development appeared delayed and that he was not picking up and processing verbal clues.

9. On or about May 23, 2005, the District presented an assessment plan to Parents, which was approved by them. Student was to be evaluated by a school psychologist in the areas of reasoning/cognitive abilities development and behavior/adaptive behaviors; a resource specialist³ in achievement, mathematics, and spelling and written expression; and by a speech and language pathologist (SLP) in oral language/auditory processing, articulation and oral peripheral examination.

The September 2005 Assessment

10. Student was initially assessed during September 2005 by Betty Faulkner, a school psychologist; Phil Jonick, a resource specialist; and Maxine McGinnis, a SLP. At the time of the evaluation, Student had just turned seven years of age.

Academic Evaluation

11. Academic testing was conducted by Philip Jonick, a resource specialist at the District's West Marin School. Jonick administered the Motor Free Visual Perception Test (Motor-Free); Beery Visual Development Test of Motor Integration (VMI); Lynwood Kindergarten Learning Evaluation (Lynwood); Wide Range Achievement Test (WRAT); and the Woodcock Reading Mastery Test (WRMT). In the Lynwood, Student could only name and give sounds of six of the 26 letters, had difficulty with sound blending of letters and syllables, demonstrated poor number skills, could only count from one to 11, and was unable to identify numbers when shown randomly. Jonick only administered the visual-auditory portion of the WRMT, which showed that Student demonstrated a visual memory skill and an additional oral comprehension ability to recall vocabulary with language meaning. Jonick was unable to administer the WRAT because of Student's difficulty in identifying letters, let alone sight words. Student scored a perceptual age of four years-nine months on the Motor-Free and five years-eight months on the VMI. Jonick noted that Student had significant weakness in areas of visual discrimination and memory, visual-motor integration, and auditory processing (memory, sequencing, and sound blending). Jonick concluded the results showed evidence of a learning disability in visual processing and auditory processing skills.

Speech Language Evaluation

12. Maxine McGinnis has a B.S. in speech pathology and an M.S. in audiology. She has been a SLP since 1980 and has been with the District as a SLP since 1992. In addition to a SLP credential, she holds a clinical rehabilitation service credential and a

³ A resource specialist is a credentialed special education teacher who provides individual or small-group remedial-type instruction.

community college certificate for adults with hearing problems. She assessed Student by administering the Test of Auditory Comprehension of Language (TACL), Peabody Picture Vocabulary Test (PPVT-III), Illinois Test of Psycholinguistic Abilities (ITPA-3), and the Language Processing Test. In the subtests of the TACL, Student scored in the ninth percentile on vocabulary, 50th percentile in grammatical morphemes (where the child selects a picture which depicts a sentence which had been read to him), and the ninth percentile on elaborated phrases and sentences. The PVVT-III tests for receptive vocabulary at the single word level, and Student scored in the 27th percentile. In the ITPA-3, which measures the use and understanding of spoken language, Student's percentile scores were 37 in spoken analogies, nine in syntactic sentences, nine in morphological closure, nine in spoken vocabulary, two in sound deletion, and 25 in rhyming sequences. Student's percentile scores in the Language Processing Test were 44 in associations (age equivalent score of six years-11 months), 10 in categorizations (age equivalent of five years-two months), nine in similarities (age equivalent of five years-two months), and a 79 in differences (no age equivalent was reported). Although McGinnis failed to state whether Student met the eligibility criteria for special education as language or speech disorder, she did report to the IEP team that he did not because he failed to score at or below the seventh percentile in two subsets of two standardized tests.

13. Elise Haugh, a SLP was a designated expert for Student. Haugh has a B.A. and M.A. in speech pathology. She is a licensed speech pathologist and possesses certificates of clinical competency from the American Speech, Language and Hearing Association, and advanced strategies intervention model trainer. She is credentialed by the State of California as a speech, language and hearing specialist, in pupil personnel services, resource specialist, and learning handicapped services. She has been a practicing speech pathologist since 1969 and the special services coordinator for the Roseville Union High School District since 2002. Although she did not assess or meet Student, Haugh reviewed the September 19, 2005 written assessment report by McGinnis as well as the September 21, 2005 and November 12, 2008 IEP documents. Haugh noted that the McGinnis report was incomplete in that it did not contain any recommendations or observations of Student during testing, as well as a failure to interview Parents to further locate potential problem areas which may be observed at home. Based on Student's low scores and the teacher reports, Student should have been evaluated in the areas of articulation, oral motor, pragmatics, fluency and proximity. Because of Student's reported academic difficulties, including those in mathematics, McGinnis should have administered the Boehm Test of Basic Concepts, which is designed to measure how a child, of eight years or younger, understands words and their meanings. Additionally, she opined that McGinnis should have attempted to gain more data regarding Student's vocabulary development, listening skills and expression to fully evaluate Student. Haugh concluded that the District speech and language assessment was incomplete; although it was clear that Student's low scores indicate that he had unique needs in speech and language. The ALJ found Haugh to be well qualified and gave great weight to her testimony.

Psychological Assessment

14. Betty Faulkner conducted the psychological assessment. Faulkner is a licensed educational psychologist and holds a pupil personnel services credential. She received a M.A. in Counseling and School Psychology. She was a school psychologist for the Sonoma County Office of Education from 1981 through 1984. Since 1984, Faulkner has been employed as a school psychologist with the Marin County Office of Education. In conducting her evaluation, she interviewed Father, reviewed comments from Student's kindergarten teacher, observed Student at Marin Waldorf, and administered standardized tests. The tests administered were the Wechsler Scales of Intelligence for Children, 4th Edition (WISC-IV), Behavior Assessment System for Children (BASC), Du Paul ADHD Rating Scale –IV (Du Paul), Bender Gestalt, Draw-A-Person, and Draw-A-Family.

15. During his interview, Father reported that Student had difficulty focusing, following through on tasks, and listening. Ms. Rader, Student's kindergarten teacher, commented that Student's auditory processing may be a problem and he had trouble completing more than one task at a time. She also reported that Student could barely write his name after two years in kindergarten. During her observation at his Marin Waldorf first grade class, Student followed his teacher's instructions, engaged with other children, and was able to work both independently and in a group.

16. The WISC-IV is used to assess the general thinking and reasoning skills of children ages six to 16. There are five composites which are scored: Verbal Comprehension, Perceptual Reasoning, Working Memory, Processing Speed, and the Full Scale (often referred to as the IQ score) which is derived from the other four scores. Student's standard scores⁴ were a 67 in the General Ability Index with composite scores of 71 in Verbal Comprehension, 75 in Perceptual Reasoning and 65 in Processing Speed. Faulkner notes that Student's scores reflect emerging skills and an uneven development. She did believe that Student's low IQ score and Verbal Comprehension scores did not provide an accurate summary of Student's potential as his performances on subtests of the Verbal Comprehension Composite showed a wide spread and he had only just turned seven years of age, which is when a child's IQ begins to stabilize.

17. The BASC rating scales were administered to both parents and Rader. Student scored in the "clinically significant" range in externalizing problems by Mother and teacher (Father had Student in the "at risk" range) and behavior symptoms index (again Father had him in the "at risk" range). In subtests, the teacher scored Student in the "clinically significant" range for atypicality, withdrawal, attention problems and adaptability; and Mother scored Student in the "at risk" range for depression. The kindergarten teacher scored Student in the "clinically significant" range in atypicality, withdrawal, and attention problems. Rader also scored Student in the "at risk" range in adaptability. Father scored Student in the "clinically significant" range in conduct problems, withdrawal, and attention problems. Father also scored Student in the "at risk" range for adaptability. Mother scored Student in the "clinically significant" range for hyperactivity, aggression, attention problems,

⁴ A standard score of 90-119 indicates average intellectual ability. Low average is 80-89 with 70-79 being classified as well below average. Scores of 69 and below are considered intellectually deficient. (Groth-Marnat, Handbook of Psychological Assessment, 4th ed. (2003) p.143.)

conduct problems, social skills, and leadership. Both Father and Rader scored hyperactivity in the “average” range. Mother’s scores in the “at risk” range were in atypicality and withdrawal. The results of the Du Paul were similar with Mother placing Student in the “significant” range for inattentiveness. The teacher and Father did not rate Student as significant for inattentiveness, and all three did not rate Student’s behavior as hyperactive.

18. Student was at the three to four year level (second percentile) in the Draw-A-Person and the four year level (fifth percentile) in the Draw-A-Family test, both of which measure cognitive development and fine motor skills. Student’s fine motor development skills were found to be delayed as he scored a developmental age of five years-four months to five years-five months on the Bender; and at the five year-five months level on the VMI, which places his motor development behind by about one and half to three years.

19. In her written report, Faulkner noted that “[b]ased upon the information obtained by the assessor the specific eligibility was unable to be determined,” and that Student’s “testing indicates both auditory and visual processing problems, but the school nurse has not yet given him a hearing or vision test to determine if his hearing and vision are normal.” Faulkner concluded that “[t]he IEP team will need to discuss how to best meet [Student’s] needs in the least restrictive environment.” Faulkner then recommended that (1) Student’s hearing and vision be tested within the year; (2) to pair auditorily-presented material with a visual presentation; (3) Student should sit in front of the classroom; (4) his teacher needs to offer help when Student asks for help or appears confused; (5) grant Student extended time to complete assignments and tests; and (6) homework should be modified if it is too difficult for him to understand.

20. Student called Maria Moleski as an expert. She is a certified school psychologist, and a licensed educational psychologist and clinical psychologist in private practice specializing in child and adolescent neuropsychology in Sacramento, California since 2003. She received a B.S. in psychology and a Ph.D. in educational psychology/clinical neuropsychology. Moleski conducted an extensive evaluation of Student in 2009. She opined that Faulkner’s 2005 evaluation was incomplete in that there should have been follow-up as to why Student scored an IQ of 60. She felt that the assessment was incomplete. She also believed that Faulkner should not have utilized the WISC-IV as Student was known to be developing slowly and the WISC-IV is designed for children aged seven and above. Moleski testified that the Wechsler Primary and Preschool Scale of Intelligence (WPPSI), which is designed to measure IQ for children up to seven years, should have been used. Moleski noted that although Student was eligible by age for both the WISC-IV and WPPSI, it is better practice to utilize the WPPSI for a low functioning child. Additionally, since Student had a low IQ score and “passable” adaptive behavior scores, Faulkner should have explored whether Student’s low IQ was because of language deficits since the WISC-IV is very verbal.

September 21, 2005 IEP Meeting

21. Parents were aware of their rights under the IDEA. Father admits he was given a copy of the Notice of Procedural Safeguards at the IEP meeting, outlining Student’s and Parents’ rights under the Individual with Disabilities Education Act (IDEA), although no one

explained the document or IDEA rights and procedures at the meeting. Father, who has a Bachelor of Fine Arts from the University of Washington and has been a technical writer and is presently in the real estate investment business, testified that he would have read them at the time, although he has no specific present recollection.

22. On September 21, 2005, an IEP team meeting took place at the West Marin School to review the recent assessments, determine whether Student was eligible for special education, and to propose an IEP, which would include an offer of placement and services. The IEP team comprised Father, Faulkner, Jonick, McGinnis, and Dan Broderick, the District administrative designee for special education. The IEP team reviewed the results of the recently completed assessments. McGinnis reported that Student did not meet eligibility for Speech and Language Impairment because he failed to score at or below the seventh percentile in two subsets of two standardized tests. Faulkner reviewed her assessments and noted that Student was not eligible under the category of Specific Learning Disability based on a significant discrepancy between his ability and achievement; but she recommended that Student be found eligible under that category due to Student's low academic skills. The IEP team also noted that Student had weaknesses in auditory processing and phonemic awareness. The team failed to discuss or adopt any goals or objectives for Student. The IEP team offered Student placement in a general education class in a District elementary school with Resource Specialist assistance four days per week for 45 minutes each day. Additionally, the IEP team offered accommodations of extended time to complete Language Arts assignments, give directions in a variety of manners, increase verbal responses, extend time for tests, and taped books. The team did not discuss or review any alternate placements. Father declined the offer and elected to retain Student at Marin Waldorf.

Appropriateness of the September 12, 2005 FAPE Offer

23. Federal and state law require that an IEP contain certain information. An IEP must contain annual goals and objectives, which are benchmarks, based on the child's areas of need, present levels of performance to assist in measuring progress on the goals, and a proposed program, including placement, services and accommodations, specially designed for the child to address all his needs and calculated to provide him with educational benefit. In adopting goals and objectives, an IEP team must identify the child's unique needs. Once the goals are adopted, the team then determines what is needed in the way of services to accomplish these goals. Once services are determined, the team would examine placement options to determine which placement would best address the child's needs.

24. The September 12, 2005 IEP, on its face, is not appropriate. It fails to contain any goals and objectives whatsoever. Student, based upon the SLP evaluation, had demonstrated needs in the area of speech and language since Student scored at the 10th percentile or less in eight of the 12 subtests administered. Yet, the proposed IEP fails to offer any speech and language therapy services.⁵

⁵ Haugh testified the IEP was insufficient as the results of McGinnis' testing clearly showed that speech and language was an area of need, and the IEP team failed to develop any goals and objectives or even offer services in this area.

The 2005-2006 School Year

25. Student entered first grade in the class taught by Adam Beshears.⁶ The class was also taught by five others who taught specialized classes including Spanish and German; handwork (knitting); games, gymnastics and sports; eurythmy (harmonious movement); and music. Student was never a behavior problem, was receptive to what the teacher said, and was a hard worker. Beshears and the five aides found Student to be “dreamy” and distracted. Student had great difficulties in language arts and mathematics. He greatly struggled to understand numbers and their processes as well as letters and phonemic awareness. Student did show improvement and made “amazing strides” after receiving tutoring by Ann Porcelly, but he still “is not without his learning differences and challenges.” Beshears, with assistance from Marin Waldorf’s special education specialist, Linda Banks, incorporated Faulkner’s recommendations by having Student sit in front, repeat instructions, extend extra time for assignments, and use visuals to accompany an auditory presentation.

The 2006-2007 School Year

26. Students in the second grade at Marin Waldorf are in the “very beginning of reading.” The classes develops a bank of sight words, strongly use phonics to decode unknown words, increases fluidity in reading throughout the year, as well as increase their level of comprehension and retention of what they read. In writing, the class moved from printing the alphabet to cursive writing. They learned to write sentences, basic punctuation, capitalization rules, and spelling. Mathematics continued to be taught through manipulatives, games, and mental math. Second graders worked on large numbers, multiplication tables (1 through 12), and the concepts of borrowing and carrying.

27. In the annual report, Student’s specialized teachers observed that Student worked well with groups, was social with his peers, was well behaved, learned to be more attentive, and followed directions. Manette Teitelbaum, the Handwork (knitting) teacher, noted that Student had difficulty learning new processes, worked slow, but waited patiently for help. Student received additional assistance from Robin White who tutored him in language arts and mathematics. Beshears observed that Student began to make strides towards understanding the printed and cursive alphabets. Student began the school year with “roughly scrawled printing;” but he ended the year with “impressively formal cursive” writing. In reading, Student was able to make “fairly good use” of phonics to decode unknown words, but his repertoire of sight words “needs significant improvement.” Student struggled with reading comprehension and could only incompletely retell a story he had read with assistance. In mathematics, though Student had a greater sense of numbers and the basic processes, he did not master the concepts of place value, borrowing, and carrying. Beshears concluded that Student “will continue to need support” during “the long road” ahead.

⁶ Beshears received a B.A. in Education from Texas State University. He then attended two year training in the Waldorf method and two internships of four weeks each before teaching at Marin Waldorf. Beshears does not have a California teacher credential.

The 2007-2008 School Year

28. In language arts, Marin Waldorf third graders continue their mastery of cursive writing and punctuation, capitalization rules, and spelling. The class is taught paragraph structure (indentation, topic sentences, descriptive sentences, and conclusion) so that they can produce independent one to two paragraph compositions by the end of the school year. This requires students to have a greater need to understand words including how the words are used and what the words mean. Reading is taught in combination with language arts and comprehension is stressed. In mathematics, the class goes deeper into the four processes, and long division and long multiplication are introduced and practiced. Additionally, the class is introduced to mathematical measures of time, length and liquid as well as conversions and differing number bases.

29. Though Student made progress in third grade, he was still behind his peers, even with continued tutoring, and the gap between them continued to widen as the material studied became more complicated. Though Student showed improvement in his reading skills, he did not know sight words. The result was Student's reading speed, fluidity, and comprehension was hindered. In language arts, Student's ability to independently write was hindered by his poor grasp of the parts of speech and his difficulty in forming sentences. Student once again found mathematics challenging as he continued to have great difficulty in understanding the processes and concepts of long division and long multiplication, even though he saw a tutor, Robin White, weekly. Student's teachers described him as "dreamy," slow working, distracted, and he had trouble following instructions. Beshears observed that Student's processing difficulties made it "difficult for him to hear information and fully understand it." Beshears consulted with another experienced Waldorf teacher, Kristine Deason, as to what strategies to employ to assist Student (front row seating, repeating instructions, extra time, and visual accompaniment to oral instructions). These proved unsuccessful. Beshears recommended that Parents have Student reassessed by the District "so that we can devise a plan for his next steps of development."

The October 2008 Assessment

30. Father contacted the District and requested that Student, now in the fourth grade, be reassessed. On September 10, 2008, the District forwarded to Parents an assessment plan calling for evaluations by a school psychologist, resource specialist, and a SLP. The form indicates that the assessment may consist of evaluations in the areas of Academic Performance in reading, written language and mathematics; Health Status; Cognitive Ability; Receptive and Expressive Language; and Perceptual Skills. As to the Receptive and Expressive Language portion, a SLP was to administer the Comprehensive Assessment of Spoken Language (assesses receptive and expressive language skills for children ages 5-21), Language Sample, Test of Auditory Processing Skills (assesses auditory memory, comprehension, discrimination, and reasoning), Phonological Awareness, and Lindamood Auditory Conceptualization Test. Father signed the Consent for Assessment and

Prior Written Notice on September 24, 2008, and a second copy on September 26, 2008.⁷ Both forms indicate that Father “received a copy of my rights and hereby given my permission for any of the above assessments to be done.” At the time of the assessment, Student was 10 years-two months of age and the second month of the fourth grade. Student was never assessed by the SLP.

Academic Evaluation

31. Elizabeth “Lisa” Conlin, a resource specialist from the West Marin School, conducted the academic evaluation. She has a B.A. in Music Education and has a single subject certification as well as a multiple subject certification in addition to special education credentials. Conlin was a music teacher for two years prior to becoming a special education and resource specialist with the District, where she has been for two years. Conlin reviewed the 2005 assessment reports, interviewed Beshears, interviewed Parents, and observed Student during class at Marin Waldorf. She also administered the Jordan Left-Right Reversal Third Revised Edition (Jordan); Wide Range Achievement Test, Revision 3 (WRAT-3); Beery Buktenica Development Test of Visual-Motor Intervention (VMI); and the Woodcock-Johnson III Tests of Achievement, Extended Battery (WJIII ACH).

32. On September 26, 2008, Conlin observed Student in Beshear’s class. Student was engaged, hard working, cooperated with peers, and was able to follow the teacher’s instructions. She also observed Student during the three times she administered testing and found him to be cooperative, patient, slow working although he did not appear frustrated.

33. The Jordan assesses visual reversals of numbers, letters and words and is associated with learning and reading disabilities. Student scored “below normal limits” in the third percentile with a developmental age under five years. The VMI tests visual-motor integration which is the degree to which visual perception and finger-hand movements are coordinated. Student was in the average range and in the 47th percentile.

34. Student’s academic levels were measured by the WJIII ACH and the WRAT-3. In the WJIII ACH, Student scored in the “average” range in oral language (Standard Score (SS) of 97, 41st percentile, and Age-Equivalent (A-E) of 9 years-seven months (9-7); oral expression (SS 100, 51st percentile, A-E 10-2); listening comprehension (SS 93, 33rd percentile, A-E 9-2); basic reading (SS 91, 28th percentile, A-E 8-4); written expression (SS 97, 42nd percentile, A-E 9-8); and phoneme/graphic knowledge (SS 90, 25th percentile, A-E 8-2). He scored in the “low average range” in broad reading (SS 84, 14th percentile, A-E 8-4); reading comprehension (SS 88, 21st percentile, A-E 8-5); and academic applications (SS 84, 14th percentile, A-E 8-4). Student was in the “borderline” range on mathematical reasoning (SS 71, 3rd percentile, A-E 7-5); academic skills (SS 77, 6th percentile); academic fluency (SS 76, 6th percentile, 7-11); and academic knowledge (SS 78, 7th percentile, A-E 7-7). Student scored in the “deficient” range for broad mathematics (SS 66, 1st percentile, A-E 7-6); and mathematical calculations (SS 63, 1st percentile, A-E 7-5). The WRAT-3 was

⁷ Both forms are identical except for the date of signing.

given to corroborate the results of the WJIII ACH. Student scored in the “borderline” range in reading (SS 72, 3rd percentile, Grade Score (GS) of second grade three months (2-3)) and arithmetic (SS 76, 5th percentile; GS 3-6). He scored in the “average” range in spelling (SS 92, 27th percentile, GS 3-6).

35. Conlin concluded that while Student had deficits in reading, his reading skills were not significantly below his language abilities. She found that Student lacked an understanding of fundamental math skills as a result of his difficulty in learning basic math facts. She found that Student could work independently, but that he requires guidance and instruction. Student required extended time to complete assignments or to be given shortened assignments. Student should also receive “remediation in mathematics to give him the foundational skills he now lacks in order to be able to progress to math work that presumes and requires these skills, concepts, such as coin values.”

Psychological Assessment

36. Faulkner conducted the psychological assessment reviewing the 2005 assessment; interviewing Dr. Chris Lind-White, Student’s behavioral pediatrician; observing Student at Marin Waldorf; and administering the WISC-IV, Le Page Benson Sentence Completion Test (Le Page), and ADHD Rating Scale IV-School (ADHD-IV) version. Student was observed during his German lesson. Student twisted and turned at first but seemed to pay attention. After about 20 minutes, Student got out of his seat and began playing with a paper. After the teacher took the paper away, Student played with his braces which disrupted the class. Beshears informed Faulkner that this was a “bad day.” Faulkner did not conduct another observation.

37. Faulkner interviewed Dr. Lind-White who had performed an ADHD screening and ruled out ADHD. Dr. Lind-White felt that Student had significant memory issues, impaired active memory and poor ability to follow instructions. Although the testing administered by Dr. Lind-White was not scored, he felt that Student’s visual motor integration had improved significantly. Student tended to find multiple step tasks difficult such as math. Because Student did not understand game rules if complicated, he tended to engage in imaginative stages of play and tended to play with younger children in games like tag. Faulkner administered the ADHD IV to Student’s teacher, Beshears. Student’s scores demonstrated that he did not have ADHD. Thus, the ADHD-IV did not indicate that Student had ADHD and confirmed Dr. Lind-White’s opinion.

38. Student scored a General Ability Index⁸ in the low average range with a standard score of 82 in the 12th percentile. Student’s composite scores were in the “borderline” range in perceptual reasoning (SS 75, 6th percentile) and working memory (SS 74, 4th percentile). In verbal comprehension subtests, he scored in the “extremely low

⁸ The General Ability Index consists of a six subtests of the verbal comprehension and perceptual reasoning composites. (Jerome M. Sattler, *Assessment of Children*, Fifth Edition, 2008, p.514.)

range” in processing speed (SS 65, 12th percentile), and in the “low average” range in verbal comprehension (SS 89, 19th percentile). In the verbal comprehension subtests,⁹ Student had a scaled score of seven in similarities (which had a test age equivalent of eight years-two months (A-E 8:2) and was in the 16th percentile); seven in vocabulary (A-E 8:6, 16th percentile); and a nine in comprehension (A-E 9:6, 37th percentile). In the perceptual reasoning composite subtests, Student had scaled scores of eight in block design (A-E 8:2, 25th percentile), seven in picture concepts (A-E 7:10, 16th percentile), and four in matrix reasoning (A-E 6:6, 2nd percentile). Student’s scaled scores in the working memory subtests were seven in digit span (A-E 7:2, 16th percentile) and four in letter-number sequencing (A-E 6:2, 2nd percentile). On the processing speed subtest, Student’s scaled scores were three in coding (A-E less than 8:2, 1st percentile) and four in symbol search (A-E less than 8:2, 2nd percentile).

39. Faulkner recommended that the IEP team find Student eligible for special education under the category of Specific Learning Disability in Math since “[t]here is a severe discrepancy between [Student’s] WJ-III math scores and his Verbal Comprehension,” and that he has a processing disorder in visual processing speed. Faulkner also concluded that Student “does not appear to have ADHD” according to observation and test results from the ADHD IV plus teacher feedback. She recommended that Student be asked to repeat back instructions to check for comprehension; use pictures, gestures and demonstrations to accompany oral directions or longer messages, extend time on assignments and tests, teachers and parents should have a lot of patience and practice with him because of his sequential reasoning deficits.

Appropriateness of the October 2008 Assessments

40. Haugh testified that the following demonstrated that Student required a speech and language assessment: (1) the 2005 McGinnis assessment report where Student scored lower than the 10th percentile on eight of 12 tests, (2) parental and teacher reports that Student continued to struggle following instructions, (3) difficulty in communicating, including fluency and sequencing and creating sentences, and (4) teacher continued to find that Student still did not know sight words and relied on decoding while reading. Even the District’s own expert, Cameran Dawn Kline, a school psychologist,¹⁰ testified that she would recommend that a speech and language assessment be done. Kline also acknowledged that it is possible that Student’s scores would be even lower than the 2005 ones as his deficits could worsen over time without remediation. Thus, it is essential that in order to adopt an appropriate IEP, an IEP team would require information as to Student’s present levels in all areas of suspected need.

⁹ Scaled scores in WISC-IV subtests of 8 to 12 are in the normal range.

¹⁰ Kline has been a school psychologist since 1997. She has a B.S. in psychology and an M.A. in counseling. In 1990, she received a school counseling credential. She received her school psychologist credential in 1997. She is employed by the Marin County Office of Education.

41. Moleski also testified that Student needed to be assessed by a SLP based on all factors including his 2005 scores on the McGinnis assessment. She also noted that Conlin, as a resource specialist, used academic achievement tests (WJ-III ACH) to measure Student's oral language skills. Moleski opined that a special education teacher is not qualified to look at speech and language needs, and secondly, it is bad practice to utilize academic achievement tests in this manner.

42. A school district is required to assess a child in all areas of suspected disability. Here, parental concerns coupled with teacher comments and the 2005 SLP assessment clearly demonstrated that speech and language was an area of suspected disability. Since the District failed to complete the proposed SLP assessment, the 2008 assessment was not appropriate.

The November 12, 2008 IEP Meeting

43. On October 1, 2008, Mother was given a Notification of IEP Meeting, which she signed the same day. The notification states that an IEP team meeting, per Parents' request, would be held on November 12, 2008 at 3:15 p.m. at the West Marin School. The form also indicates that the following were invited to attend: Conlin, resource specialist; Faulkner, psychologist; Beshears, designated as regular education teacher; and Anne Harris, principal of West Marin.

44. On November 12, 2008, an IEP team meeting was convened. In addition to Parents, attendees were Harris, Faulkner, Conlin, and McGinnis.¹¹ The meeting lasted between 90 minutes and two hours. Though a speech and language evaluation had not been done pursuant to the assessment plan, McGinnis attended because she would do a speech and language evaluation if Student would enroll in the District. The team reviewed Faulkner's written report dated November 11, 2008, Conlin's November 10, 2008 written report, and Marin Waldorf annual reports on Student for the years 2006, 2007, and 2008. There was no discussion why a speech and language evaluation was not done. The team agreed that Student was eligible for special education under the category of Specific Learning Disability in the area of mathematics problem solving based upon the discrepancy in Student's scores on achievement tests and the WISC-IV. The team also identified the discrepancy as being directly related to Student's visual and auditory processing disorder. Harris described the resource specialist program at West Marin. Harris discussed placing Student in a fourth grade general education class at West Marin with an unspecified amount of time in the Learning Center, a resource specialist program. Though Conlin had drafted two proposed math goals, neither these nor any proposed goals in any other area were discussed. Parents were not presented with any alternative placement options within the District or through the SELPA which may have been appropriate for Student. Parents were not satisfied with the only placement discussed and inquired if services would be available if Student remained at

¹¹ Conlin had contacted Beshears by phone and requested his attendance at the IEP meeting. Beshears informed her that it would be difficult for him to attend. He left a voicemail message for Conlin stating that he could not attend prior to the meeting date.

Marin Waldorf. They were told that no such services were available. Feeling that they had no other options, they elected to keep Student at Marin Waldorf. At the suggestion of Harris, Parents signed the IEP document and checked the box that stated: "I agree that the District has offered my son a free appropriate public education. However, I am voluntarily placing my son/daughter in a private school."

45. The District contends that an offer of placement and services was tendered to Parents at the IEP meeting, which is denied by Student. District contends that the offer, which was reflected in a March 30, 2009 letter from the District superintendent to Student's counsel, was placement in a general fourth grade class at the West Marin School with a math push-in aide, daily for 60 minutes each session, math pull-out with a RSP teacher twice per week for 45 minutes each session, and English/Language Arts pull-out with the RSP teacher 270 minutes per week four days per week. Conlin testified that the March 30, 2009 offer was developed by her with assistance of Harris in consultation with a general education teacher. Conlin stated that had an offer been made at the November 12, 2008 IEP meeting, it would have been this or something similar. Also, April Port, a program manager from the SELPA, testifying on behalf of the District, admitted that she was not sure what the current FAPE offer was after reviewing the November 12, 2008 IEP documents. Thus, the District failed to make a FAPE offer to Student either formally or informally.

February 13, 2009 meeting at Marin Waldorf

46. Student continued in the fourth grade class of Beshears. Throughout the school year, Parents met with Beshears to discuss Student's on-going problems. On February 13, 2009, Parents met with Beshears and Deason about Student. Beshears reported that Student's struggles continued with memory and sequencing, and Student's grammar skills continued to be weak as he omitted punctuation and did not break up his thoughts into sentences. In math, Student was operating at around the second grade level as he did not understand concepts even when taught one-to-one. He used an "imitative style of understanding" which is reflective of a much younger stage of development. Student continued to struggle with his communicative skills as he was unable to express his thoughts and verbalize his questions, frustrations, or need for help. Socially, Student was becoming more isolated from his peers because of his communicative difficulties and his younger style of play. Student appeared more frustrated and become disengaged. Beshears and Deason recommended that Student needed a small class setting offering concentrated time of one-on-one assistance to remediate Student's difficulties. Parents were told that Student would not be invited to return to Marin Waldorf for the next school year.

Moleski Assessment

47. Moleski conducted her evaluation on March 19, April 9, and April 21, 2009. At the time of the evaluation, Student was 10 years, seven months of age. Parents did not request an independent education evaluation from the District prior to the assessment. The

District only became aware of the assessment following the filing of Student's due process complaint.¹²

48. In conducting her evaluation, Moleski reviewed the 2005 and 2008 IEP documents; the McGinnis assessment from 2005; a May 2007 evaluation report by Theresa Searcy, a private licensed occupational therapist retained by Parents; the Faulkner 2008 assessment report; Conlin's 2008 academic assessment report; notes by Beshears of the February 13, 2009 meeting with Parents; and interviews with Student and Parents. Additionally, Moleski administered the following standardized tests: Reynolds Intellectual Assessment Scales (RIAS); California Verbal Learning test-Children's Version (CLTC-C); Clinical Evaluation of Language Fundamentals-4th Edition (CELF-4); Delis-Kaplan Executive Functioning System (D-KEFS); Expressive Vocabulary Test-2nd Edition (EVT-2); Gray Oral Reading Test (GORT-4); NEPSY-2nd Edition (NEPSY-II); Peabody Picture Vocabulary Test-4th Edition (PPVT-4); SCAN-C Test for Auditory Processing Disorders in Children-Revised (SCAN-C); Test for Everyday Attention for Children (TEA-CH); Test of Praxis; Test of Word Reading Efficiency (TOWRE); Woodcock Johnson Tests of Achievement –III (WJ-III ACH); AIMSweb Curriculum Based Measurement Probes (CBM); Adaptive Behavior Assessment System-Parent Form (ABAS); Child Behavior Checklist-Parent Rating Scale; Depression Inventory for Youth; Anxiety Inventory for Youth; Anger Inventory for Youth; Disruptive Behavior Inventory for Youth; and Self-Concept Inventory for Youth.

49. Student's intellectual ability was assessed with the RIAS, which consists of three indexes: verbal intelligence, nonverbal intelligence and composite intelligence (which provides an estimate of general intelligence). Student's composite intelligence index standard score of 89 places him in the "low average" range with a percentile of 23. His verbal intelligence standard score of 88 also was in the "low average" range and the 21st percentile, while Student's standard score of 92 in nonverbal intelligence was in the 30th percentile and in the "average" range.

50. Student was given the WJ-III ACH, CBM, GORT-4, and the TOWRE to measure his level of academic achievement. Student's scores ranged from "very low" to "average." His performance on reading tasks was strong, with his reading fluency in the "average" to "high average" ranges and his word reading fell in the "average" range. Student's reading comprehension performance varied from "low average" to "average" according to the task demands, with spelling and written expression "average." He did have significant difficulties in mathematics with his scores ranging from "very low" to "low average," with his work speed being very slow.

51. Neuropsychological functioning consists of five areas: attention and executive functioning, language processing; memory and learning, visuospatial and visuo-perceptual processing and sensorimotor functioning. Moleski utilized five subtests of the NEPSY-II

¹² The District superintendent testified that he first learned that Parents had an IEE done when he was handed a copy at the mediation session in this case.

and the CVLT-C to assess this area. Student's immediate verbal memory was directly related to the complexity of the information. His immediate memory for stories was within "normal" range, but his memory for words was impaired, which suggested that he utilized context to recall verbal information. Student's verbal memory for both complex and simple information was "impaired" after a delay. When given verbal information paired with visuals (names and faces), Student's performance was "impaired" even after several attempts. He did show strength in visuospatial and visuoperceptual processing where he had scoring in the "average" to "high average" ranges. He also scored within "normal" limits in sensorimotor functioning.

52. Attention and executive functioning was measured by three subtests of TEA-CH and four subtests of D-KEFS. Student demonstrated "impaired" attention as he had great difficulty sustaining attention over time, auditory and visual selective attention, and engaging in tests of divided attention. In executive functioning, he demonstrated significant problems with behavioral inhibition, vigilance, mental flexibility, sequencing, planning and organization, and self-monitoring.

53. Language functioning and processing was assessed with the EVT-2, PPVT-4, SCAN-C, and subtests of the CELF-4, NEPSY-II, RIAS, and D-KEFS. Language processing components include auditory processing and receptive comprehension of language, abstract concept formation, simple and complex expressive language ability, understanding syntactic structure, and verbal fluency. Moleski concluded that Student has "significant language processing problems." In the CELF-4, Student scored three standard deviations lower than his ability level. He scored at the first percentile or below in the CELF-4 Index Scores with standard scores of 56 in core language (.2 percentile), 64 in receptive language (1st percentile), 61 in expressive language (.5 percentile), 62 in language context (1st percentile), and 63 in language memory (1st percentile). In the subtests, Student scored at or below the second percentile in all subtests except word classes-total (5th), word classes-receptive (9th), and word classes-expressive (5th). On the PVVT-4, Student had a standard score of 98 which placed him in the 45th percentile. He was in the 16th percentile with a standard score of 85 in the EVT-T. Thus, Student demonstrated relative strength in semantics/vocabulary, but he showed impairments in processing phrases, sentences, prepositions, and other concept words. He did show strength at knowing names of single concrete objects, but he was impaired in all other areas. He also demonstrated fluency difficulties as well as expressive syntax and mild articulation problems. In auditory processing, he scored in the "normal" range except in the filtered words subtest of the SCAN-C, which measures the ability to "fill in" auditory information when part of the information is omitted. Student had a standard score of 81 (10th percentile) in the composite but scored in the one tenth of one percentile in filtered words, which is within the "disordered" range.

54. In socioemotional/behavioral functioning, Father was given the CBCL, which is a checklist. Results indicated that Student has "borderline significant" social problems. Student was given several inventories for depression, anxiety, anger, disruptive behavior, and self-concept. He was in the "average" range on all.

55. Moleski's diagnosis was mixed receptive-expressive language disorder (315.32);¹³ attention-deficit hyperactivity disorder, predominately inattentive type (314.0); mathematics disorder (secondary to language processing disorder)(315.1); and learning disorder not otherwise specified (315.9). She also noted that "unremediated language deficits that have resulted in moderate to severe problems in social and academic functioning." Moleski also opined that Student may, in addition to "learning disabled," be eligible for special education under the categories of "language impaired" and "other health impaired" (for ADHD). Moleski's recommendations included that Student (a) be placed in a special day class designed for the communicatively handicapped consistent with his intellectual level and not include children with moderate to severe conduct/behavioral problems; (b) start a trial of medication therapy for ADHD; (c) be evaluated by an audiologist; (d) receive one-on-one therapy from a SLP; (e) receive one-on-one instruction in mathematics using visual aids and encompassing remediation in addition, subtraction, multiplication and division; and (f) use by the classroom teacher of visual aids and other techniques.

56. Moleski conducted a complete evaluation. The ALJ found her well qualified and her testimony persuasive.

Remedies

57. Student proposes as appropriate remedy that Parents be reimbursed for all costs incurred in attending Marin Waldorf, including tuition and transportation, and that the District be ordered to fund all costs for him to attend the Star Academy, a nonpublic school. The District position is that it is not liable to Student; but if it is, then the appropriate remedy is order further assessments and a new IEP team meeting to determine an appropriate placement within the SELPA.

Reimbursement claim

58. The distance from Student's home to Marin Waldorf in San Rafael, California is 19 miles. Student claims that he is entitled to be reimbursed for the cost of a round trip of 76 miles per day.¹⁴ Student failed to introduce any evidence as to the actual number of days that Student was in attendance at Marin Waldorf. The ALJ estimates that Student would have attended Marin Waldorf for 90 days during this time period.

59. Student has submitted evidence that the annual tuition at Marin Waldorf was \$13,490 for school year 2006-2007; \$14,162 for school year 2007-2008; and \$15,688.25 for school year 2008-2009.

¹³ All numbers indicate the diagnosis code listed in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (2000) published by the American Psychiatric Association.

¹⁴ The ALJ takes official notice that the IRS permitted rate for car travel is 58.5 cents per mile.

60. The Moleski assessment totaled \$4,130.

Appropriateness of Marin Waldorf

61. Parents may be entitled to reimbursement for the costs of placement or services that they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate and replaced services that the school district failed to provide. The placement is considered “appropriate” if it meets the child’s needs and provides the child with educational benefit; however, the placement need not meet all requirements of the IDEA.

62. Marin Waldorf was an appropriate placement for Student. Student clearly received educational benefits from his placement at Marin Waldorf as evidenced by the annual reports and results of Conlin’s 2008 academic assessment, especially as compared to the 2005 assessment. Marin Waldorf implemented the recommendations made by Faulkner in her 2005 assessment; provided tutoring in mathematics and language arts; and Student’s teacher, Beshears, consulted with the school’s education specialist, Linda Banks, a special education teacher. Although behind the progress made by his peers, Student still made measurable progress each academic year.

Prospective placement

Star Academy

63. Star Academy (Star) is a certified, nonpublic school in San Rafael designed to serve children with disabilities. There are approximately 44 students at Star ranging in age from eight to 18. Star students have a variety of disabilities including ADHD, processing problems, speech and language problems, anxiety, reading difficulties, and social issues. None of Star students are classified as mentally retarded. Typical classes comprise 12 students and three teachers to allow for individualized attention. Speech and language is given, where needed, on a one-to-one basis, but speech and language remediation is integrated into the class curriculum. Star hopes to be able to remediate a student’s learning problems within a two to four year period so as to permit the student to return to a general education class.

64. Star admission procedures require a neuropsychological evaluation of the student, review of his health reports, parental interviews, and at least three visits to the school. During the visits, the student participates in Star class activities so that the student can be evaluated by Star teachers. Additionally, the student is evaluated by a reading specialist from Linda-Mood Bell. Student went through this process beginning in March 2009. Student was accepted to the Star program commencing in the 2009-2010 school year.

Potential SELPA placements

65. April Post has been in special education since 1976, first as a teacher and since 1989 as a program manager for the SELPA. She has a B.A. and M.S. and possesses California credentials in special education, resource specialist, and administration. Port is the author of the SELPA handbook. When a district does not have an appropriate placement for a disabled child, the district can refer the child to a SDC in another district which is a SELPA member. If there are no appropriate placements available, the SELPA will then attempt to place the child in a certified nonpublic school which may be appropriate. As part of her duties, Port is frequently consulted to find such placements. Port was requested by the District's superintendent to see if there are SDCs which may be available within the SELPA which may be appropriate. Port testified that she found three potentially appropriate placements, all of which she observed:

(a) The Dixie School, in the Dixie School District, has a nine student SDC for grades four and five. The class is taught by a teacher and aide. Academic levels of the students vary between the first and fourth grades. There are opportunities for the SDC students to mainstream with their typically developing peers.

(b) The Hamilton School in the Novato Unified School District has an SDC class of 11 students in the third through fifth grades. The class is taught by a teacher and an aide. The class appeared well organized. All students mainstream for physical education and music, while others can mainstream in regular education classes depending on their academic levels.

(c) The San Ramon School, also in Novato, has a 12 student SDC where all the students are eligible for special education under either severe learning disability or speech and language impaired. Mainstreaming occurs in physical education and science classes. This class was on a lower academic level than the other two.

Expert testimony on prospective placement

66. Moleski, as indicated in Factual Finding 55, recommends that Student be placed in a SDC for communicatively handicapped children and given speech therapy services and accommodations.

67. Student's speech and language expert, Haugh, testified that Student needs to be in a small class where he can receive remediation in mathematics and English/language arts. She believes that a regular education fourth grade class would move at too fast a pace for Student to keep up. She disagrees with Student's other expert, Moleski, that Student should be in a communicatively handicapped class as it would be too restrictive for him.

68. Kline, District's expert, testified since Marin Waldorf has no set curriculum, it is difficult to grasp what academic progress that Student has made. She opined that Student should be placed in a general education classroom with support as appropriate in the least restrictive environment. She also believes that Student would benefit from a group speech therapy in a pragmatic group.

LEGAL CONCLUSIONS

1. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S. Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof as to all issues.

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)

3. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, "related services" are referred to as DIS services. (Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), 458 U.S. 176 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized

instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra*, 458 U.S. 176, 201.)

5. An IEP is a written document that is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) It also must be reasonably calculated to enable the student to receive educational benefit. (*J.W. v. Fresno Unified School District* (E.D. Cal. 2009) 611 F.Supp.2d 1107.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

6. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with student's IEP. (20 U.S.C. § 1401(9).)

Issue I: Did the District deny Student a FAPE from March 17, 2007 through November 11, 2008 by failing to convene an IEP team meeting and make Student a FAPE offer?

7. Student contends that because the District committed various procedural and substantive IDEA violations during the assessments conducted in September 2005 and at the September 21, 2005 IEP meeting that the IEP offered at that meeting is not valid.

8. Due process complaints filed after October 9, 2006, are subject to a two-year limitations period with limited exceptions. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 300.511(e)(2006); Ed. Code, § 56505, subs. (l) & (n).) No evidence was presented that any exception applied. The effect of the statute of limitation on this matter is that any violation of the IDEA at the September 21, 2005 IEP meeting is in effect barred.

9. A school district is not required to continue developing IEPs for a disabled child who no longer attends its schools. (*MM ex rel DM v. School District of Greenville County* (4th Cir. 2002) 303 F.3d 523, 536.) Nor is a school district required to convene an IEP meeting or develop an IEP where the parent has not consented to a previously offered IEP. (*Parent v. Cabrillo Unified School District (June 5, 2009)* Cal. Ofc. Admin. Hrngs Case no. 2008120207.)

10. Here, Student is attempting to litigate issues which the statute of limitations precludes from being litigated. Parents were given their IDEA rights and were aware of them (Factual Finding 21) which operates as a waiver of any irregularities. Student was voluntarily enrolled at Marin Waldorf (Factual Findings 4-6) and his parents elected for him to remain there when they refused to consent to the District's FAPE offer at the September 21, 2005 IEP (Factual Finding 22).

Issue II: Did the District deny Student a FAPE since the November 12, 2008 IEP meeting by procedurally violating the IDEA by:

(A) *Failing to make a FAPE offer;*

11. Student contends that the District committed a procedural violation of the IDEA when it failed to tender a formal offer of FAPE to Student. The District contends that Parents were told the essence of the placement and services that the District was proposing and that this complies with the IDEA.

12. “The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses to initiate or change the educational placement of a disabled child.” (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Smith*.) The school district is required to formally offer a single, specific program. (*Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107.) The formal written offer alerts parents to serious consideration of the school district’s proposed placement, services and accommodation being offered. (*Redding Elem. Sch. Dist. v. Goyne* (E.D. Cal. 2001) 2001 WL 34098658, *4.) A “school district cannot escape its obligation under the IDEA to offer a formally an appropriate educational placement” (*Smith, supra*, 15 F.3d at 1526), and the “school district’s failure to make a formal offer of public placement constitutes a per se denial of FAPE.” (*Goyne*, 2001 WL 34098658, at *5.)

13. The District failed to make a formal written offer of FAPE to parents at the November 12, 2008 IEP meeting. The District may have discussed placement within the West Marin School, but the IEP team failed to discuss the level of services and accommodations which were being offered. (Factual Conclusions 43, 44, and 45.) This had the effect of impeding Parents’ right to participate in the IEP process.

(B) *Failing to have a regular education teacher present;*

14. Student contends that the District failed to have in attendance a regular education teacher as required by the IDEA. District avers that the presence of Harris, the school principal, is adequate since she was aware of the fifth grade curriculum.

15. A properly constituted IEP team is in the best position to develop an IEP that suits the peculiar needs of the student. (*R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 946 (*Napa Valley*.) Education Code section 56341, subdivision (b)(2), provides that an IEP team shall include “[n]ot less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment.” The regular education teacher shall, “to the extent appropriate,” participate in the development, review, and revision of the pupil’s IEP. (See also, 20 U.S.C. § 1414(d)(B)(iii).) The regular education teacher should be a teacher who is, or may be, responsible for implementing a portion of the IEP. (*Napa Valley, supra*, 496 F.3d at 939.) This statutory requirement that a regular education teacher be part of the IEP team is a mandatory, and not merely technical, as a regular teacher, who is or may be the pupil’s teacher, may have insights or perspectives that

aid in the formation of an IEP, including “the extent to which a disabled student may be integrated into a regular education classroom and how the student’s individual needs might be met within that classroom.” (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 860-861 (*Deal*)). This requirement is designed to facilitate meaningful parental discussion at the IEP team meeting. (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321(a)(2) (2006); Ed. Code, § 56341, subd. (b)(2).) As such, this “structural defect prejudices the right of a disabled student to receive a FAPE.” (*M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 648.)

16. Based on Factual Findings 43, 44, and 45, District conducted the November 12, 2008 IEP team meeting without the participation of a general education teacher who may implement the IEP. Parents did not agree to the absence of a general education teacher. The primary purpose of the meeting concerned the establishment of an IEP for Student, including potential placement in a general education class at West Marin School. Because of the absence of a general education teacher, Parents did not have access to a general education teacher’s input into such matters as to whether such a placement was appropriate and in what manner RSP services could be administered. District’s failure to have a general education teacher, who may implement the IEP, present at the IEP meeting precluded Parents from being able to meaningfully participate in the meeting, and thereby, it constitutes a denial of FAPE.

(C) *Failing to develop goals and objectives?*

17. Federal and state law generally require that the IEE contain the present levels of the child’s educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child’s needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.320(a)(2)(i)(ii) (2006); 34 C.F.R. part 300, Appendix A, Q.1 (2006); Ed. Code § 56345.) The appropriateness of placement can only be examined by looking to the implementation of the goals and objectives. In developing an IEP, the IEP team shall consider the strengths of the child, the results of the initial evaluation or the most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area of which a special education student has an identified need, the IEP team must develop measurable goals that are based upon the child’s present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

18. Based on Factual Findings 44 and 45, District failed to discuss or consider goals and objectives at the November 12, 2008 IEP team meeting. The failure to discuss goals and objectives precluded Parents from being able to fully participate in the IEP process, thereby constitutes a denial of FAPE.

Issue III: Is Student entitled to be reimbursed for the cost of the independent psychological assessment?

19. “Independent educational evaluation” means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student. (34 C.F.R. § 300.502(a)(3)(I) (2006).)

20. A parent has the right to an IEP at public expense if the parent disagrees with an evaluation obtained by a school district. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) Federal law states that a parent has the right to an IEE at public expense “[i]f a parent *requests* an independent education evaluation at public expense.” (34 C.F.R. § 300.502(b)(2)(1) (2006) (emphasis added).) When such a request is made, the school district must either file a due process complaint requesting a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2)(i) and (ii) (2006).) Thus, a parent is required to make a request to the school district for an IEE.

21. Based on Factual Finding 47, Parents are not entitled to be reimbursed for the Moleski evaluation as Parents failed to make a request to the District for an IEE.

Compensatory education

22. When an LEA fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371 (*Burlington*); 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of IDEA.” (*Ibid.*)

23. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at 369-71; *Forest Grove School District v. T.A.* (2009) 557 U.S. ___, 129 S.Ct. 2484, 2493-2494 (Forest Grove).) Parents may receive reimbursement for their unilateral placement if the placement met the child’s needs and provided the child with educational benefit. (*Deal, supra*, 392 F.3d at 855.) However, the parents’ unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14.) A pupil need not have already received special education in the public school district in order to be awarded reimbursement for a private placement. (*Forest Grove School District v. T.A., supra*, 129 S.Ct. at 2496.) Prospective placement in a private school may be an appropriate award where a family lacked the resources to

unilaterally place the child in a private school and request reimbursement. (*Draper v. Atlanta Independent School System* (11th Cir. 2008) 518 F.3d 1275, 1286.)

24. Based on Factual Findings 40 through 45 and Legal Conclusions 11 through 18, Parents are entitled to be reimbursed for the cost of Student attending Marin Waldorf from December 1, 2008 through the end of the 2008-2009 school year. Based on Factual Findings 58 through 63, Parents' costs were \$9,112.98 for tuition and \$4,001.40 for transportation. Based on Factual Findings 40 through 42, the District shall pay for assessments in the areas of speech and language and audiology.

ORDER

1. Student's claims under Issues I and III are denied.
2. Student's claims under Issues 2(a), 2(b), and 2(c) are hereby granted.
3. Within 45 days of the date of this decision, the District shall reimburse Parents the sum of \$13,114.98.
4. Within 21 days from the date of this decision, the District shall convene an IEP team meeting to determine an interim IEP for Student taking into consideration the recommendations contained in Dr. Moleski's May 23, 2009 neuropsychological evaluation and the May 23, 2007 occupational therapy fine motor evaluation by Theresa Searcy. If at all possible, the District should include Dr. Moleski and Elise Haugh as part of the IEP team.
5. The District shall cause to have Student evaluated by a speech and language pathologist and an audiology specialist. The District shall contract with Elise Haugh to conduct the speech and language assessment, or if that is not feasible, another nonpublic agency speech pathologist.
6. Within 60 days of the date of this decision, the District shall convene an IEP team meeting to formulate an IEP for Student including reviewing all evaluations, adopting goals and objectives, and determining placement, services and accommodations to meet all of Student's unique needs.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student was the prevailing party on Issues II(a), II(b), and II(c). The District prevailed on Issues I and III.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: August 3, 2009

/s/

ROBERT F. HELFAND
Administrative Law Judge
Office of Administrative Hearings