

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012040846

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), heard this matter on September 11, 12, and 13, 2012, in Los Angeles, California.

Student's mother (Mother) represented Student. Mother attended all days of hearing. Student attended the hearing on September 12, 2012.

Patrick Balucan, Attorney at Law, represented the Los Angeles Unified School District (District). Marla Willmott and Jamee Zipkoff, District Specialists from the Department of Compliance Support and Monitoring, attended the hearing on September 11 and September 12, 2012, respectively. Diana Massaria, Coordinator from the Department of Compliance Support and Monitoring, attended the hearing on September 13, 2012.

A Spanish-language interpreter, Paula Carreon, was duly sworn and present throughout the hearing to provide Mother with simultaneous translation of the proceedings, and to provide English-language translation of Mother's testimony and witness examination.

Student filed his request for due process hearing (complaint) on April 20, 2012. District notified OAH that it was not served with the complaint at that time, and moved to reset the due process hearing schedule. On May 9, 2012, OAH granted District's request, and issued an order resetting the due process hearing schedule. On June 18, 2012, pursuant to District's request, and for good cause shown, OAH continued the due process hearing in this matter to commence on September 11, 2012. On September 13, 2012, based upon the stipulation of the parties, the matter was continued for receipt of written closing arguments. On September 27, 2012, District submitted a written closing argument. Student did not

submit a written closing argument. Upon receipt of District's written closing argument the matter was submitted and the record closed.

ISSUES¹

1. Whether District denied Student a free and appropriate public education (FAPE) by failing to provide an independent psychoeducational evaluation (IEE) at public expense.

2. Whether District denied Student a FAPE during the 2009-2010 school year, commencing April 20, 2010, the 2010-2011 school year and the 2011-2012 school year, by failing to provide him with sufficient assistance in algebra.

3. Whether District denied Student a FAPE, during the 2009-2010 school year, commencing, April 20, 2010, the 2010-2011 school year, and the 2011-2012 school year, by failing to provide sufficient support for him to develop intellectually in areas other than algebra, including English-language arts.

4. Whether District denied Student a FAPE during the 2009-2010 school year, commencing, April 20, 2010, the 2010-2011 school year, and the 2011-2012 school year, by failing to address Student's psychological and emotional needs that impacted his academic achievement.

5. Whether District denied Student a FAPE during the 2011-2012 school year by failing to provide him his transcripts from Franklin High School upon transfer to Fremont High School in fall 2011.

6. Whether District denied Student a FAPE during the 2011-2012 school year by ending classes on April 25, 2012.

¹ The prehearing conference (PHC) was held on August 29, 2012. At the PHC, the ALJ considered District's motion to dismiss. District moved to dismiss Student's issues which addressed matters outside the two year statute of limitations. (Ed. Code, § 56043, subd. (r)). District also moved to dismiss Student's issue that he was subject to discrimination for filing previous due process hearing requests, on the ground that it was outside OAH's jurisdiction, which is limited to IDEA-related matters. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a); *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) The ALJ granted District's motion to dismiss. The remaining issues were reorganized consistent with the chronology of events and modified for clarity.

FACTUAL FINDINGS

Jurisdiction and Background Information

1. Student is a 19-year-old young man, who, at all relevant times, resided with his parents and siblings in the District.² Beginning in fall 2008, Student attended District's University of Southern California Math, Science, and Technology Magnet (USC MaST). On October 22, 2009, during his ninth grade year, Student was assessed and found eligible for special education under the eligibility category of other health impairment, primarily due to behaviors commonly associated with attention deficit hyperactivity disorder (ADHD). Student left USC MaST, and enrolled in another District magnet school, Franklin Magnet, from February 2011 through June 2011. Some time in mid to late September 2011, Student enrolled in Fremont Math and Science Magnet (Fremont Magnet). In June 2012, Student graduated from Fremont Magnet with a general education high school diploma, after which he was no longer a pupil of District.

2. Student possessed above average cognition and was capable of learning California standards-based general education curriculum. Student's ADHD traits impacted his access to education by impeding his attention and organizational skills. Student also had a history of frequent tardiness and absences.

3. Student and Mother insisted that he be placed in District's magnet schools. District magnet schools, like USC MaST, Franklin Magnet, and Fremont Magnet, provide rigorous college preparatory curriculum, including academic curriculum for classes referred to as "A-G" classes, which qualify pupils for admission to colleges in the University of California (UC) and California State University (CSU) systems. Students are not required to complete "A-G" classes to graduate from high school.

² Student was over 18 at the time Mother filed the due process hearing request on his behalf. As an adult, Student was the holder of his educational rights and, unless he was deemed incompetent, under California law, which he was not, was the only individual authorized to make educational decisions. (Ed. Code, §56041.5.) Accordingly, Mother did not have standing to make educational decisions for Student, including, filing for due process. With Student's authorization, Mother could represent him as his advocate. At the PHC, Mother failed to provide any evidence that Student authorized her to act on his behalf as his advocate. For this reason, the ALJ issued an Order to Show Cause (OSC) as to why the case should not be dismissed and ordered Mother and Student to appear at a specified time prior to the commencement of the hearing to provide evidence of Student's authorization for Mother to proceed on his behalf. When Mother and Student did not timely appear, the ALJ dismissed the due process hearing request, but set aside the dismissal when Mother appeared, and Student, appearing by telephone (contrary to the ALJ's orders), authorized the due process hearing request, and authorized Mother to proceed on his behalf.

4. To graduate high school with a regular high school diploma, all pupils must obtain 230 credits from a range of academic and nonacademic coursework. All pupils must obtain passing course grades, or letter grades between A and D, to receive credit towards graduation.

5. To satisfy the admission criteria for UC or CSU schools, pupils must achieve a grade of C or better in algebra, and other academic courses.

6. Student was required to pass algebra 1. He was also required to pass algebra 2, or in place of algebra 2, geometry or advanced applied math. In addition to specified math courses, to receive a regular high school diploma, Student was required to pass: world history, United States history, ninth and 10th grade English, 11th and 12th grade literature and composition, biology, physical science (physics or chemistry), visual or performing arts, and economics. In addition to the academic requirements for a regular high school diploma, Student needed passing units in electives, applied technology, physical education (PE), health and life skills.

Student's attendance at USC MaST

7. The USC MaST regular school calendar year began in September and ended in June.

8. Student failed Algebra 1A and 1B in his ninth grade 2008-2009 school year at USC MaST. Student also failed English 9A and 9B, and PE. Student passed Biology A, with a "C," and Biology B, with a "D," two semesters of Creative Writing, with a "D," and two semesters of Web Development, with a "D" and "B," respectively.

9. On October 22, 2009, after Student entered his 10th grade year, District convened Student's initial individual education program (IEP) meeting, which was comprised of all necessary IEP team members including Mother. Based upon results of Student's psycho-educational assessment, the District identified Student's unique needs. In the area of reading, the team identified deficits in reading and comprehending grade-level expository and narrative text with expression and fluency. In the area of writing, the team identified deficits in organizing the main idea and supporting details, and recommended that Student be assisted. In the area of math, the team did not identify deficits, as Student was proficient in math according to his results on the California Standardized Test (CST), as he performed addition with regrouping into the thousands, calculated two-digit multiplication problems, added two-digit positive and negative integers, and correctly solved four-digit division problems. In the area of prevocational skills, the team identified deficits in organizing class folders, assignments, and class notes, and recommended he be assisted and instructed. Based upon its view of Student's unique needs, District developed several goals, including reading and writing goals, and a social-emotional goal used in tandem with his counseling sessions to complete assignments, be on time and prepared for class and follow class rules. District also developed reading and writing goals.

10. At that IEP meeting, District offered the following placement and services: (1) continued placement in a general education curriculum at MaST High, with resource specialist (RSP) support for reading, writing, and prevocational skills in a “pull out” service model, one to five times per week, for a total of 105 minutes; and (2) counseling and guidance by the school psychologist, one time per week, for 30 minutes on a pull-out basis. District also offered Student the following instructional accommodations: (a) assistance organizing work; (b) breaking down long term assignments into smaller increments; (c) additional time to complete reading and writing assignments; (d) graphic organizers to organize multi-paragraph writing assignments; (e) repeated directions; (f) preferential seating; (g) peer tutor/peer assistance for classwork and assignments; and (h) shortened assignments that do not modify the standard being taught and assessed.

11. On March 16, 2010, during his 2009-2010 tenth grade regular school year, Student passed the California High School Exit Exam (CAHSEE), which was also a requirement to be issued a regular diploma. Student received a score of proficient in both English language arts and math.

12. In his 2009-2010 10th grade school year, Student received passing grades of “D” in Algebra 1A and Algebra 1B. Student received passing grades in other academic courses including: Math Prep, with a “C,” Geometry A and Geometry B, with “D’s,” Modern World History B with a “C,” English 10A, with a “D,” and Forensic Science with a “C.” Student also received passing grades in electives, PE, and College “SAT” Preparation, where he obtained a “B.” With the exception of his algebra teacher, his teachers considered his effort to be unsatisfactory in his academic courses.

13. During his 2009-2010 10th grade school year, Student failed English 10B, and Modern World History A.

14. Student continued at USC MaST for the first semester of the 2010-2011 school year. On October 14, 2010, all required members of the IEP team met, including Mother, to review Student’s progress from the last IEP and to develop Student’s annual IEP. Student met his counseling goal by demonstrating responsibility for completing assignments, being on time, and being prepared, 75 percent of the time. Student was absent or tardy on a frequent basis, although his attendance improved from the previous IEP. Student did not meet his writing goal due to his difficulty with initiating his assignments without one-on-one assistance and prompting, and organization. Student could spell and express his ideas with reasonable clarity. In mathematics, District IEP team members concluded that Student did not need additional academic support, as he demonstrated that he comprehended the subject matter well and actively participated in class. However, Student needed to improve his organizational skills, planning and tardiness. He also needed to avoid careless calculation mistakes on tests and quizzes.

15. The District IEP team developed several goals at the October 14, 2010, IEP team meeting: a behavior goal for Student to use available time to work on assignments and organize materials, or read, without teacher prompting on three of four occasions; a

counseling goal to work on completing assignments at school and home, reducing tardiness, increasing class participation and organization of materials to class; a reading goal to improve Student's vocabulary and understanding of the figurative and literal meanings of words from the core literature; and a writing goal, to improve Student's expository writing.

16. At the October 14, 2010, IEP team meeting, District offered the same placement and services as it had the previous IEP: (1) continued placement in a general education curriculum at MaST High, with resource specialist (RSP) support for reading, writing, and behavior (instead of prevocational skills) utilizing the same "pull out" service model, one to five times per week, for a total of 105 minutes; and (2) counseling and guidance by the school psychologist, one time per week, for 30 minutes on a pull-out basis. At that IEP, District offered Student similar instructional accommodations offered at the previous IEP: (a) assistance organizing work; (b) breaking down or "chunking" of assignments; (c) additional time to complete reading and writing assignments; (d) graphic organizers to organize multi-paragraph writing assignments; (e) repeated directions; (f) preferential seating; and breaks. In addition, District offered a behavior support plan (BSP) to address Student's poor organization and planning, increase work production, and reduce lost instructional time. The BSP included frequent teacher prompting, with strategies, including learning notebook organization, following schedules and routines and self-advocacy by requesting breaks.

17. At the October 14, 2010, IEP team meeting, District also completed an Individual Transition Plan (ITP) for Student. Student reported that he was interested in enrolling in a two or four year college, but otherwise was undecided as to what his interests were at the time of the ITP. At the time of the IEP, Student had not completed any transition activities, including a training, employment, or community activity. The ITP directed Student to go online and explore vocational programs and colleges, and identify their cost and location; attend a field trip to explore community services; complete a career interest survey and list the results; and practice time management skills when adhering to a daily schedule.

18. At the October 14, 2010, IEP team meeting, the IEP team reviewed the credit requirements for graduation and presented Student with an Individual Graduation Plan (IGP) which listed all the general education course and credit requirements for a regular diploma.

19. Mother disagreed with District's October 14, 2010, IEP offer, as she believed the District ignored the fact that Student suffered from migraine headaches. She also objected to pulling Student out from class for his 30 minute counseling sessions because it caused him to miss class and be tardy. She was concerned that Student was wrongfully designated as tardy, when in fact he had to leave school for private family counseling appointments. In addition, she wanted Student to have more competitive classes. She wanted the District to develop a plan to recover "A-G" classes, more RSP services, and a transition plan. Despite her disagreement with District's offer, she agreed to its implementation.

20. During the 2010-2011 school year, Student took the CST, improving his English language arts score from below basic to basic.

21. During his 2010-2011 11th grade school year, Student took Algebra 1A again and failed. Student also failed English 10B, Spanish, and United States History (20th Century). Student received passing grades in most academic courses including: Math Prep, with a "C;" Geometry, with a "D;" Physiology A, with a "C;" Physiology B, with a "D;" Genetics, with a "C;" Contemporary Composition, with a "C;" and English 9A, with a "D."

22. During summer 2011, Student attended District's Jordan High School to repeat one semester of ninth grade English, so that he could recover credits necessary for graduation. Student's summer session class ended on August 2, 2011. Student failed ninth grade English.

23. Student enrolled in Fremont Magnet for the 2011-2012 school year. Fremont Magnet's regular school calendar year began in July 2011, referred to as the "C" track calendar. Its first semester classes ended in late October 2011, and its regular school calendar year ended in April 2012. Fremont Magnet was located on the premises of Fremont High School. Fremont High School had a traditional school calendar, with classes beginning in September and ending in June, referred to as the "A" track calendar.

24. Fremont Magnet operated on a block schedule, meaning that assigned classes were not scheduled every day, but were provided less frequently, anywhere from one to three days weekly, depending on the week, and for longer duration, approximately 90 minutes.

25. Student enrolled in Fremont Magnet in mid to late September, late in the first semester. At the time Student elected to enroll in Fremont Magnet, Student and Mother were fully informed of Fremont Magnet's tracking system and calendar and block schedule. Mother and Student were warned that Student's late start could seriously impact his grades.

26. Student was still considered an 11th grader when he enrolled in Fremont Magnet because he had not obtained passing grades in all courses required to matriculate to the 12th grade. Student was assigned a counselor, Barbara Orozco, who was responsible for assigning Student's classes. Ms. Orozco reassigned Student to Algebra 1A, a course he had failed the previous school year. Ms. Orozco did not testify, and but it does not appear that she considered whether Student satisfied his graduation requirements for Algebra 1A before assigning him the class.

27. Student was placed in Algebra 1A, a first period class, which began 7:30 a.m. Ms. Phuong Nguyen, who testified at hearing, was Student's classroom teacher. Ms. Nguyen was well qualified to teach college preparatory algebra. She received her bachelor of arts with honors in math and science from California State University, Dominguez Hills. She possessed a preliminary teaching credential, but was in the process of completing her masters in math. She anticipated that she would be awarded her masters in December 2012, at which time, she would also obtain her permanent teaching credential. Ms. Nguyen

testified with sincerity and passion about her teaching responsibilities. She spoke seriously about her duties to teach, inspire, and close the achievement gap between pupils of different backgrounds and financial means, so that her pupils could access top colleges and universities. She demonstrated a clear recollection of Student and her efforts to reach and encourage him to achieve. She was a credible witness and her testimony was given great weight.

28. Ms. Nguyen's class was structured to provide direct support to each pupil. Ms. Nguyen's Algebra 1A class was small. Sixteen pupils sat in a semi-circle around Ms. Nguyen. Ms. Nguyen worked directly with Student, sitting next to him until she was sure that he understood the problem set and then returning to check on his progress.

29. When Student first joined Ms. Nguyen's class she was unaware that he was repeating Algebra 1A, but she could tell from working with Student that he had a working understanding of the subject matter. Ms. Nguyen had not been informed that Student was eligible for special education, and was not provided with his operative IEP. Ms. Nguyen discovered that Student had an IEP when she received notice of his October 2011 IEP team meeting.

30. Student attended Ms. Nguyen's class sporadically, and when he did so, he was generally extremely tardy. Student attended class the first week. After the first week, Student was either absent, or one hour late, which meant that, at most, he was in class for the last half hour of instruction. Since the class was on a block schedule, and did not meet every day, absence or tardiness was similar to missing multiple days of class instruction in a program that scheduled courses to meet for less time each school day.

31 Ms. Nguyen spoke with Student privately about his high absenteeism and tardiness. She strongly encouraged him to take responsibility for attendance, and to treat his schooling like a job, where he could be fired for failing to arrive on time and perform competently and diligently. Student was polite, but did not follow Ms. Nguyen's advice and continued to be absent or tardy.

32. Vanessa Nevarez³, a District resource specialist, and Student's special education case manager assigned to Student, who testified at hearing, was responsible for providing RSP services, facilitating IEP team meetings, and overseeing the implementation of IEP's. Ms. Nevarez possessed the necessary qualifications to provide RSP services to Student. She received a bachelor of arts in communication disorders, and a master of arts in special education, from California State University, Long Beach. At hearing she demonstrated her familiarity with Student's educational program and progress, and was careful to provide accurate information. In contrast, Mother, who testified at hearing, lacked clarity about events concerning Student, and her recollection of past events was even more

³ Ms. Nevarez is the current last name of Student's case manager. At the time of Student's enrollment and IEP her last name was Jimenez. For purposes of this Decision, she will be referred to as Ms. Nevarez.

suspect, in view of her misinterpretation of witness responses to her questions during the hearing. For these reasons, Ms. Nevarez's testimony was more credible, and given more weight than conflicting testimony from Mother, or from Student who also testified at hearing.⁴

33. Ms. Nevarez was familiar with Student's operative October 2010 IEP at the time Student began classes. During Student's first semester at Fremont Magnet, Ms. Nevarez co-taught Student's English class. She provided direct RSP services to Student as part of his English class. Ms. Nevarez provided services to Student the first day he attended his English class, and was able to address his deficits through accommodations provided in his previous IEP's, including, frequent checks for understanding.

34. Shortly after Student enrolled in Fremont Magnet, Ms. Nevarez scheduled Student's annual IEP, and sent notice accordingly. Student, now 18 years old, was given notice that he was a member of the IEP team. Mother was notified of the meeting but her attendance was no longer required. Ms. Nevarez did not arrange for Student to be reassessed. Student's triennial assessment was not due until October 2012.

35. The IEP team convened as noticed on October 14, 2011. District asked Student if he would like Mother to attend, and when he responded that he would, the IEP team contacted Mother and waited for her to arrive before proceeding.

36. In addition to Student and Mother, the IEP team members included Ms. Nevarez, Ms. Nguyen, and District special education coordinator, William Wagabaza, who also testified at hearing. Mr. Wagabaza was District's special education coordinator for District, a position he held for seven years. Before he became the District's special education coordinator, he work in a variety of teaching and special education positions in the District, including special day class instructor, and RSP teacher. Mr. Wagabaza was well qualified as a special education administer, with a bachelor of arts in the biosciences, a masters in special education, and several California credentials, including credentials in special education, and administration. Mr. Wagabaza was knowledgeable about Students' graduation requirements, District's responsibilities to Student when he turned 18 as holder of his educational rights, and appeared to have a clear recollection of his interactions with Mother during the 2011-2012 school year. As such, Mr. Wagabaza's testimony, was given greater weight, than the testimony of Student or Mother.

37. At the October 14, 2011, IEP team meeting, the IEP team reviewed Student's present levels of performance. In the area of reading, based upon a school-based reading assessment administered on October 7, 2011, the District concluded that Student's instructional reading level was ninth grade, and his reading comprehension equaled that of his peers. Student needed clarification after reading a paragraph to check for understanding, and needed to improve in the areas of poetry analysis and identifying literary devices. In the area of writing, Student was able to express himself, and write with reasonable clarity, but

⁴ Student's testimony is discussed below.

had not yet mastered grade level standards including writing responses to literature and supporting main ideas and viewpoints. In the area of math, Student had mastered some basic algebra skills, having taken the course three previous times, and was capable of doing the work, but made careless calculation mistakes, did not complete his work, and was off-task. In the area of social emotional and behavior, Student continued to demonstrate behaviors that impeded his academic progress including absenteeism, poor attitude toward academic tasks, sleeping or placing head down on desk, talking with peers, staring off, failing to complete class and homework assignments, and lack of preparation. Teachers reported that without constant prompting Student completed little to no work in his classes.

38. District developed goals in the areas of: behavior (to use available time to organize and complete assignments without prompting); social-emotional (identifying five factors that impede his academic progress, and five positive alternative behaviors to advance his academic progress); reading literature; and writing to analyze literature.

39. District made the following offer: general education placement at Fremont Magnet; for emotional support, one 30 minute counseling session weekly; for math, 215 minutes weekly of push-in RSP support in collaboration with the classroom teacher; and for reading and writing, 215 minutes weekly of push-in RSP support in collaboration with the classroom teacher. Similar to his previous IEP's, District offered a range of accommodations, including extended time, cueing to start classwork and to keep on task, testing in a small group if requested; alternative testing to check knowledge; preferential seating and scheduling; fewer correct responses to achieve the grade; sharing teacher's notes; providing outlines and syllabi, modeling the finished product; use of a calculator; check frequently for understanding. District also provided ongoing collaboration between the RSP case carrier and the teachers to identify which accommodations worked best. District offered general education supports including school-based tutoring after-school. District also developed a BSP to advance Student's ability to initiate and complete work.

40. As his advocate, Mother expressed her disagreement with the services District provided in algebra, and counseling. Mother complained that District failed to provide resources to Student in algebra 1 even though he failed the class several times. Mother noted that Student passed algebra 1 in eighth grade, "with a grade of 'B'." Mother also complained that District failed to provide Student with psychological help for his "shyness."

41. Student consented to the IEP.

42. At hearing, Mother insisted that the IEP that was introduced at hearing was not the same IEP that was presented at the meeting. Mother failed to provide any corroborating documentation for her testimony, and her testimony was discounted.

43. At hearing, Mother also claimed that at some unspecified time, she requested that District conduct an independent psychological reassessment of Student. She claimed that she provided a request in writing to Mr. Wagabaza through his secretary. Mr. Wagabaza disputed Mother's claim. Mother failed to provide any documentation supporting this claim.

During the hearing, Mother was given an opportunity to find documentary support for her claim. Finding none, she attempted to utilize the due process hearing request issue statement to support her claim that District ignored her request for an independent psychological reassessment.

44. At hearing, Mother also testified that she repeatedly went to Mr. Wagabaza's office to question why Student was placed in Algebra so many times, and to request that he be permitted to drop algebra. Mr. Wagabaza did not recall when Mother came to his office, but did recall her question, and his advice to her that she consult with Student's counselor, Ms. Orozco, who was responsible for his class assignments. There was no evidence that Mother raised the issue with Student's counselor prior to the IEP team meeting. Mother's comments at the IEP team meeting were vague, but from Ms. Nguyen's testimony and Mother's comments, it appears that Mother attempted to notify District that Student had already passed algebra. Mother only mentioned Student's eighth grade algebra course, mistakenly identifying his grade as a "B" instead of a "C." At the IEP team meeting Mother also requested more assistance for Student in algebra.

45. To pass Ms. Nguyen's class, Student was required to complete homework, quizzes and tests. Between 70 and 80 percent of the algebra 1 grade was based on quizzes and tests. The remainder of the grade was based on homework, classwork and behavior. Ms. Nguyen's pupils were required to keep a notebook where they could record classroom notes. Pupils could refer to the notebook during quizzes, but not the mid-term or final. Student did not maintain a notebook, and did not have one available to refer to during quizzes. Student did not complete classwork.

46. Student failed Ms. Nguyen's algebra 1 class. At hearing, Mother asked Ms. Nguyen, how he could fail if he was smart enough to master the subject. Ms. Nguyen told Mother that being smart was not enough. To achieve a passing grade, Student had to possess a work ethic and do the work, which he failed to do.

47. At hearing, Student testified about his frustration taking algebra 1 multiple times. He spoke of his experience in previous grades, and, and at times, it was unclear which year he was speaking about. Generally, Student believed he failed because he did not get enough help. According to Student he was mostly left alone during the school day in class or in a separate room to do the work. Student also complained that too much of his grade depended on quizzes and tests, and not the many class and homework assignments he was required to complete. Given his absences, tardiness, and observed lack of work ethic, Student's claim that the cause of his failure was insufficient assistance, was not credible, and his testimony was given less weight than Ms. Nguyen's testimony.

48. Student's first semester at Fremont Magnet ended on October 26, 2011, eight school days after the IEP. Student failed Algebra 1A, Chemistry A, and American Democracy. Student passed other academic courses including American Literature Composition (with a grade of C), and United States History (with a grade of C).

49. Student and Mother informed Fremont Magnet personnel that Student wished to graduate with his 12th grade peers. Student had failed many required academic and elective courses. In order to obtain the necessary units to graduate, District arranged for Student to begin the process of credit recovery so that he could graduate. Student began taking courses during winter break. Credit recovery courses generally consisted of self-guided independent study where Student completed work books which were reviewed, graded, and returned to Student to redo, if he did not correctly answer the assigned problems or work.

50. Student continued at Fremont Magnet for the remainder of the 2011-2012 school year. Based on the October 14, 2012 IEP, Student received more intensive RSP support during the remainder of the 2011-2012 school year. Ms. Nevarez implemented the RSP services specified in the October 14, 2011 IEP. She provided Student direct support in several subject areas, including English, and the math portion of chemistry.

51. In April 2012, shortly before the end of Fremont Magnet's school year, District administrators met with Mother and Student to review Student's credits, and to determine whether and how Student could complete all his required credits to graduate with his peers. In order for Student to graduate in 2012, District allowed Student to enroll in Fremont High School concurrently with his enrollment in Fremont Magnet.

52. Fremont Magnet's school year ended on April 25, 2012. In his final term at Fremont Magnet, Student received a "B" in English 9B and Chemistry, a "D" in English 10B, United States 20th Century History, and Economics, an "A" in Composition, and a "C" in Painting. Student received an "F" in Expository Composition and Advisory, an elective, where he was required to consult with Ms. Nevarez regarding his studies.

53. After Fremont Magnet's school year ended Student continued his studies at Fremont High School. Student achieved passing grades of "C" in Expository Composition and in the Principles of American Democracy, and an "A" in two classes of Peer Counseling.

54. Fremont High School's school year ended on June 27, 2012. Due to his dual enrollment and credit recovery, Student obtained enough credits to graduate with a regular high school diploma.

55. Student attended graduation with his peers and graduated from Fremont Magnet in June 2012.

56. At the time of the hearing, Student was unemployed. He intended to apply to community college, but had not applied.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Issue one: failure to fund an psychoeducational IEE at public expense

2. Student contends District denied him a FAPE when it ignored his request for an independent psychoeducational assessment. District disagreed and maintained that it never received the claimed request, and further, that it was under no obligation to conduct any psychoeducational assessment, with or without Student's request. District maintains that Student never made the request as required, or that if Student required a reassessment, it was not due until October 2012, after his graduation with a regular high school diploma. As discussed below, Student failed to meet his burden of proof on Issue one.

3. California special education law and the IDEA provide that 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.) Under the IDEA, eligible children with disabilities are entitled to a FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also 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.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

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

5. School districts have an obligation to assess and reassess pupils for special education eligibility and services. After the initial psychological assessment and determination of special education eligibility, school districts are obligated to reassess pupils every three years (referred to as the triennial assessment), or more frequently, but not more than once yearly, if it appears where it appears that assessments are warranted by pupils' educational or related service needs. (20 U.S.C. § 1414 (a)(2)(A)(i)(B); 34 C.F.R. § 300.302(a)(1)) (2006)⁵; Ed. Code, § 56381, subd. (a)(1)(2).

6. School districts also are obligated to fund independent educational evaluations (IEE's) at their expense under specified circumstances. An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to request an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1) ; Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. §300.502(b)(4); Ed. Code, § 56329, subd. (c).) If the public agency files a due process complaint notice to request a hearing, and the final decision is that the agency's evaluation was appropriate, the parent still has the right to an IEE, but not at public expense. (34 C.F.R. § 300.502(b)(3).)

7. Eligibility for special education and related services terminates when a special education pupil graduates from high school with a regular high school diploma. (34 C.F.R. § 300.102(a)(3)(i)); Ed. Code, 56026.1. subd. (a).)

8. Here, as set forth in the statute described in Legal Conclusion 6, Student could request an IEE at public expense when he disagreed with a District assessment. However, Student failed to meet the threshold requirement of the statute, because after its initial psychoeducational evaluation in October 2009, District was not obligated to assess Student again until October 2012, barring circumstances requiring an earlier assessment. Student graduated in June 2012 and District's obligations to Student terminated at that time. If Student continued as a pupil, which he did not, his triennial evaluation would have been due in October 2012, after the operative period of Student's due process hearing request. As such, Student did not meet his burden of proof on this issue because he failed to substantiate his claim for an IEE with evidence of his disagreement with an assessment conducted by the District and subsequent request for an IEE.

9. In addition, Student failed to meet his burden of proof that District was required to conduct any assessment, even assuming he intended Issue one as a request for a District assessment, not an IEE at public expense. Student failed to provide any independent evidence demonstrating that he requested an independent psychoeducational assessment, or any assessment, during the two year statutory period applicable to his claim. Specifically,

⁵ All references to the Code of Federal Regulations are to the 2006 amendments.

Student failed to provide documentary or reliable testimonial evidence that he made a request at any time after the statutory period commenced during the 2009-2010 school year, the 2010-2011 school year or the 2011-2012 school year. Mother's testimony that she provided a written request to Mr. Wagabaza, through his assistant, was not supported by any document. Her attempt to support her testimony by the complaint, filed in April 2012, further undermined her credibility because the complaint as framed did not constitute a request, and she only produced the complaint to support her claim after failing to find documentary support for her testimony that she provided Mr. Wagabaza written notification. Further, Student failed to provide any evidence that District would have been on notice that he required a new psychoeducational assessment to address his unique needs. Student's strengths, deficits and challenges were well known and remained constant throughout the statutory period.

10. In sum, Student failed to meet his burden of proof that District denied him a FAPE by not funding a psychoeducational IEE at public expense, or otherwise conducting a psychoeducational reassessment. (Legal Conclusions 1-9, and Factual Findings 1-56.)

Issue two: failure to provide sufficient assistance in algebra.

11. As to Issue two, Student contends that he was denied a FAPE, because during the statutory period District failed to provide sufficient assistance in algebra. District disagrees, and maintains that Student failed to provide any evidence demonstrating District denied him a FAPE by not providing sufficient assistance in algebra. Specifically, District contends Student failed to provide any evidence that Student's IEP's were inappropriate and that District was required to provide more assistance than it did to raise Student's algebra grade.

12. Legal Conclusions one, three, four and seven, are incorporated herein by this reference.

13. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

14. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p.1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 93 F.2d 1031, 1041.)

Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*)

15. A regular high school diploma is conferred on pupils who have met all local and state high school graduation requirements. (Ed. Code, 56026.1, subd. (b).) To receive a regular high school diploma a pupil must satisfy the academic standards required by the State of California of general education pupils, and not alternative degree standards qualifying a pupil for a certificate or a General Educational Development credential (GED). (Ed. Code, 56026.1, subd. (c).)

16. As to Issue two, Student did not meet his burden of proof that District denied him a FAPE by not providing him with sufficient support in algebra during the 2009-2010 school year, during the relevant statutory period, or after April 20, 2010. At Student's initial IEP team meeting in October 2009, District determined that Student did not require RSP support in algebra. The evidence shows Student was provided with other support for him to access his education, including counseling, and accommodations, and Student received passing grades in Algebra 1A and Algebra 1B. Student may have not achieved grades which qualified him for admission to college within the UC or CSU system, but he did achieve enough to satisfy his high school graduation requirements. As set forth in Legal Conclusion 13, to meet its obligation to provide Student a FAPE, District was not required to guarantee Student grades which satisfied the admission requirements of California's top universities and colleges. As demonstrated by the evidence, Student participated in a general educational program which satisfied California standards, and provided him some educational benefit.

17. As to Issue two, Student did not meet his burden of proof that District denied him a FAPE by not providing him with sufficient support in algebra during the 2010-2011 school year. Student bases this claim on the fact that Student had to repeat Algebra 1A because, at the October 2010 IEP team meeting, District did not offer additional support for algebra. However, the evidence showed that District did offer accommodations, counseling, and a BSP to address behaviors which impacted his academics, and that the sole rationale for Student to repeat Algebra 1A was to improve his grade so that he could qualify for admission to colleges in the UC and CSU system. As Mother's comments at the October 10, 2010 IEP team meeting make plain, Mother wanted Student to satisfactorily complete UC "A-G" classes, and "competitive" courses. District respected Mother's request by continuing to offer Student the more rigorous MaST magnet program. Although Student failed Algebra 1A, he demonstrated that he could pass a math course without RSP assistance, by passing math prep, and geometry.

18. As to Issue two, Student failed to meet his burden of proof that District denied him a FAPE during the 2011-2012 school year by failing to provide him adequate assistance in algebra. As in the 2010-2011 school year, Student was not required to take algebra in his 12th grade year as Student had already taken, and passed, algebra in his 10th grade year, and satisfied California academic standards for graduation. District was not obligated to improve Student's grade so that he could fulfill the "A-G" requirements for admission to UC or CSU. Student did not demonstrate that he was committed to improving his grade. The evidence

established that Student failed his algebra class not because he did not receive sufficient assistance, but because he elected to enroll late in the semester, was either absent or tardy, and when present, did not put in the effort required to complete his work and pass quizzes and tests. Student's absenteeism or tardiness was compounded because Fremont Magnet was on a block schedule and lessons were concentrated in fewer classes. Although Student did not receive RSP support in algebra, the evidence showed that, when present, he received direct support from his teacher within a small, structured class setting, as evidenced by the credible testimony of his teacher, Ms. Nguyen. Student did not provide any evidence that he studied for quizzes or tests, or maintained the notebook Ms. Nguyen required.

19. In sum, as to Issue two, Student failed to meet his burden of proof that District denied him a FAPE, by failing to provide him sufficient assistance in algebra. (Legal Conclusions 11-18, and Factual Findings 1-56.)

Issue three: failure to provide sufficient assistance in other academics.

20. As to Issue three, Student contends that he was denied a FAPE because during the statutory period, District failed to provide sufficient assistance to develop him intellectually in other academic subjects, including English. District disagrees, and maintains that Student failed to provide any evidence that he was denied assistance to develop intellectually in his academic subjects, including English. As discussed below, Student failed to meet his burden of proof on this issue.

21. Legal Conclusions 12 through 15, are incorporated herein by this reference.

22. As to Issue three, Student failed to meet his burden that District denied Student a FAPE during the 2009-2010 school year, commencing on April 20, 2010. The evidence showed that District developed an initial IEP which provided for a range of supports to advance Student's reading and writing performance, inclusive of accommodations and RSP support in English language arts. Student failed to provide any evidence that the RSP support, accommodations and counseling services offered were not appropriate or implemented. Student passed the CAHSEE, scoring a grade of proficient in English language arts and math. Significantly, aside from Student's algebra teacher, his teachers rated his effort in academics as unsatisfactory. Student's failing English 10B, without more, does not satisfy Student's burden of proof that he was denied a FAPE in the 2009-2010 school year in his academic subjects.

23. As to Issue three, Student failed to meet his burden that he was denied a FAPE during the 2010-2011 school year in his academic subjects. Again, aside from Student's grades, he failed to provide any evidence that the October 2010 IEP was inappropriate, including RSP services in reading writing and behavior, and accommodations. The evidence showed that District took steps to address Student's academic issues. Specifically, District added a BSP to improve Student's use of his instructional time. In addition, District reviewed Student's credit requirements and developed an IGP for Student so that would understand District credit requirements for the regular diploma, and what courses he needed

to take and pass in order to graduate on time. The evidence showed that Student's grade on the CST in English language arts improved, despite him failing one semester of English.

24. As to Issue three, Student failed to meet his burden that he was denied a FAPE during the 2011-2012 school year in his academic subjects. District's October 2011 IEP offer increased the RSP support to student. District provided Student with RSP services in his English language arts classes, and for the math portion of his chemistry, which District provided from the first day at Franklin Magnet. Although Student's reading level was not grade level, District's administration of a district-wide reading assessment identified Student's reading level, and areas that needed work. Consequently, District increased his RSP services. Even though Student received "F's" in Chemistry and American Democracy in his first semester, in addition to Algebra 1, the evidence showed that Student started the semester very late, and was absent or tardy the majority of the time. Given these factors, Student's failing grades, alone, did not establish that District failed to provide an appropriate program. Significantly, during the 2011-2012 school year, Student recovered all his failed grades, and graduated with a regular diploma.

25. In sum, Student failed to meet burden of proof that he was denied a FAPE in Issue three because District did not provide him the support he needed in his intellectual development in areas other than algebra, including English language arts. (Legal Conclusions 20-24 and Factual Findings 1-56.)

Issue four: failure to address Student's psychological and emotional needs.

26. Student claims that District denied Student a FAPE by failing to address Student's psychological and emotional needs. The issue as presented in Student's complaint was unclear, and at hearing, Student failed to state with clarity how District failed to address his psychological and emotional needs, but it appears from the hearing testimony that Student's psychological and emotional challenges were due to Student's failing grades in algebra. District denies Student's claim, and maintains that its offer of counseling with behavior supports were appropriate. As discussed below, Student failed to meet his burden of proof on this issue.

27. Legal Conclusions 12 through 15, are incorporated herein by this reference.

28. As to Issue four, Student failed to meet his burden of proof that District denied him a FAPE by failing to address his psychological and emotional needs during the 2009-2010 school year. Student was the subject of a previous due process proceeding and decision which covered the two year statutory time period prior to November 25, 2009, including the appropriateness of an October 2009 initial IEP. As set forth in that final decision, Student failed to meet his burden of proof for his claim that District denied Student a FAPE in the October 2009 IEP, by failing to offer appropriate services to address his emotional needs. A decision in an IDEA due process hearing is entitled to conclusive effect. California Education Code section 56505, subdivision (h), provides, "A hearing conducted pursuant to this section shall be the final administrative determination and binding on all parties." It is

enough that the previous judgment includes any prior adjudication of an issue 'that is determined to be sufficiently firm to be accorded conclusive effect.' (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 312.) Accordingly, as Issue four was the subject of a final decision concerning the appropriateness of the offer of emotional services in the annual IEP of October 2009 IEP, under the doctrine of *res judicata*, Student cannot litigate the same IEP offer of psychological and counseling services again.

29. As to the 2009-2010 school year, Student also failed to meet his burden of proof that either District failed to provide the services offered, or that at some point after the IEP, District was on notice that Student required more services and failed to reconvene the IEP team and offer additional services. Student provided no evidence that Student required more counseling services that year, after the offer was made. On the contrary, Student passed algebra that year, confirming that any emotional problems Student were successfully addressed by District's offer of services, and was not otherwise impeding his access to education.

30. As to Issue four, Student has failed to provide any support for his contention that District failed to address his psychological or emotional needs during the 2010-2011, or 2011-2012 school year. Student's sole support for this issue is his claim that he was disheartened by his repetitive and failed attempts to pass algebra, not any other subject area. Student's reaction is understandable and expected, but not sufficient, without more, to meet his burden of proof that District denied him a FAPE by failing to provide psychological or emotional support for him to access his education, particularly algebra. Based upon the uncontroverted description of Student's unique needs in his IEP's, Student required assistance in organization and planning to access his education. District offered 30 minutes of counseling per week to work on goals related to his performance in class. District also offered a BSP to work on behaviors which frustrated Student's focus. Moreover, Student passed most of his academic classes, without repeating them, so it appears District's interventions, specifically the counseling services and BSP, worked for most of his classes. During the 2011-2012 school year he recovered the credits from classes he had initially failed.

31. In sum, Student failed to show how insufficient psychological or emotional supports impeded his access to education during any of the school years at issue. (Legal Conclusions 26-30, and Factual Findings 1-56.)

Issue five: failure to obtain transcripts from Franklin High School upon transfer to Fremont High School in fall 2011.

32. Student claims that District denied Student a FAPE by failing to obtain Student's high school transcript from his previous school when he transferred to Fremont Magnet in fall 2011. On its face, Student's claim is vague, but in view of Student's Issue two, it appears that Student is claiming that he repeated algebra 1 because District failed to timely obtain Student's course history. District maintains that Student failed to provide any

evidence that Fremont Magnet did not have the necessary documents to provide Student a FAPE upon his enrollment at Fremont magnet.

33. Legal Conclusions 12 through 15, are incorporated by this reference.

34. The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

35. As to Issue five, Student provided no evidence of a procedural or substantive violation of the IDEA during the 2011-2012 school year as a consequence of District's purported failure to obtain Student's transcripts from his previous schools at the time he enrolled at Fremont Magnet. There was evidence that Fremont Magnet personnel was not aware of Student's complete algebra course history at the time Student enrolled in fall 2011, approximately one month before the semester ended. However, Student failed to establish that Fremont Magnet's failure to consider Student's full high school record resulted in a denial of FAPE before his annual IEP. Ms. Nevarez had Student's operative IEP and implemented it as soon as Student arrived. While it is true that Student had already satisfied his algebra requirement to graduate with a regular diploma, Student's history in algebra suggested that he repeated the class to improve his grade in order to attempt to fulfill the admission requirements for UC and CSU. There was no evidence that Student's inability to raise his algebra grade in fall 2011 was caused by any failure by the District to review his transcript, but instead, the evidence showed that his grade was due to his late enrollment, absences and tardiness. There was no evidence that the failure of District to obtain Student's transcript resulted in a denial of FAPE at his October 2011 annual IEP. Ms. Nevarez diligently scheduled the IEP within 30 days of Student's enrollment. At the IEP, Student was offered additional RSP support for math, which he relied upon to pass chemistry, and graduate with a regular diploma.

36. In sum, Student failed to provide any competent evidence that District required Student's high school transcript to implement his operative IEP upon his enrollment in Fremont Magnet, and offer him a FAPE at the October 2011 IEP team meeting. (Legal Conclusions 32-35, and Factual Findings 1-56.)

Issue six: denial of FAPE by ending classes on April 25, 2012.

37. Student claims that he was deprived of a FAPE because he did not get a full school year of classes. District maintains that Student is wrong about the school calendar,

and failed to provide a cognizable claim under the IDEA. As discussed below, Student failed to meet his burden of proof on this issue.

38. Legal Conclusions 12 through 15, and 34 are incorporated by reference herein.

39. As to Issue six, as clearly demonstrated at hearing, Student's Mother, in her capacity as his advocate, did not understand the tracking system at Fremont Magnet, even though District personnel explained it to her and warned her that Student would be enrolling late in the semester, due to Fremont Magnet's "C" track. Student had previously been on the "A" track, where the school year follows a more traditional September through June, calendar. The evidence was uncontroverted. Fremont Magnet was on "C" track, and the school year began in July and ended in April. There was no evidence that Student's school year was shorter on the "C" track, and that he was deprived of instructional days as a result of Fremont Magnet's school year calendar system. On the contrary, the evidence showed that Student received more instructional days when he took advantage of Fremont High's "A" track to successfully complete coursework so that he could graduate with his peers in June 2012.

40. In sum, there was no evidence supporting Student's Issue six. (Legal Conclusions 27-40, and Factual Findings 1-56.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

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

