

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

RIVER SPRINGS CHARTER SCHOOL,

OAH Case No. 2015110494

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RIVER SPRINGS CHARTER SCHOOL,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015120807

**DECISION**

Student filed her Due Process Complaint on November 9, 2015. River Springs Charter School filed its Due Process Complaint on December 22, 2015. Student was granted leave to file her Amended Complaint on December 28, 2015. The parties stipulated to consolidating the cases, and on January 8, 2016, the Office of Administrative Hearings consolidated the cases, with Student's case designated as the primary case and the case upon which the decision deadline would be calculated. OAH continued the hearing at the parties' request on February 12, 2016.

Administrative Law Judge Kara Hatfield heard this matter in Temecula, California, on May 10, 11, 12, 17, 18, 19, and 26, 2016.

Attorneys Timothy Adams and Philip VanAllsburg represented Student. Parents attended all days of the hearing. Student did not attend the hearing.

Attorneys Deborah Cesario and Jim Sanft represented Charter. Dr. Kathy Cox, Charter's Director of Special Education, attended the hearing on May 10, 11, 12, and 26, 2016. Debra Daniel, Charter's Assistant Superintendent, attend the hearing on May 17, 18, and 19, 2016.

On the last day of hearing, the matter was continued at the parties' request until June 22, 2016, so the parties could file and serve written closing arguments and response briefs. Closing arguments and response briefs were filed, the record was closed, and the matter was submitted on June 22, 2016. Also on June 22, 2016, the parties' agreed to and OAH granted a 14-day continuance for the issuance of the decision for good cause.

## ISSUES

### Student's Issues

Did Charter deny Student a free appropriate public education by failing:

- A) to offer Student appropriate placement in the October 14, 2014 individualized education program, specifically a nonpublic school;
- B) to offer Student appropriate related services in the October 14, 2014 IEP, specifically<sup>1</sup> specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training;
- C) to offer Student appropriate placement in the May 27, 2015 IEP, specifically a nonpublic school;
- D) to offer Student appropriate related services in the May 27, 2015 IEP, specifically specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training;
- E) to offer Student appropriate placement in the November 19, 2015 IEP, specifically a nonpublic school;
- F) to offer Student appropriate related services in the November 19, 2015 IEP, specifically specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training; and
- G) to respond to Parent's February 12, 2015 request for an independent educational evaluation in the area of psychoeducation without unnecessary delay?

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<sup>1</sup> At the prehearing conference, Student specified the related services she contended Charter inappropriately failed to offer or did not offer at a sufficient level. These categories were specified as applying to all three IEP's in dispute.

Charter's Issues<sup>2</sup>

- 1) Did the November 14, 2015 IEP offer Student a FAPE, such that the IEP may be implemented without parental consent if Student returns to Charter or a public school?
- 2) Was Charter's October 15, 2014 psychoeducational assessment appropriate<sup>3</sup> under the Individuals with Disabilities Education Act, such that Student is not entitled to an independent educational evaluation at public expense?
- 3) Are Charter's criteria for independent educational evaluations appropriate, such that Charter is not required to reimburse Parents for the IEE they obtained?<sup>4</sup>

SUMMARY OF DECISION

Student contends her auditory and attention processing disorders significantly impact her ability to benefit from instruction in a general education environment and that she requires specialized academic instruction all day every day for her academic courses. She alleges that Charter denied her FAPE by failing to offer an appropriate placement and appropriate related services in each of the IEP's Charter developed in October 2014, May 2015, and November 2015. Student also contends Charter unnecessarily delayed either paying for the IEE Student requested with Dr. Karen Conway or filing to defend its October 2014 triennial psychoeducational assessment or the distance and/or cost criteria it applied to IEE's.

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<sup>2</sup> At the hearing, Charter withdrew its issue regarding the August 2015 assessment plan based on Parents having signed it.

<sup>3</sup> At hearing, Student stipulated there was no dispute regarding the academic achievement component of Charter's psychoeducational assessment.

<sup>4</sup> While Charter's issue as simply stated in the Order Following Prehearing Conference might be understood as calling for an advisory opinion, Charter's complaint asserted that the dispute regarding Charter's IEE criteria related specifically to Student's request that Charter pay for the IEE conducted by Dr. Karen Conway, which Charter contended did not comply with Charter's IEE criteria for distance and cost. The issue as stated in this Decision is the issue presented in Charter's complaint and framed in the Order Following Prehearing Conference. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Charter contends Student's October 2014, May 2015, and November 2015 IEP's were reasonably calculated to confer some educational benefit on Student and that Student in fact made progress on her October 2014 IEP goals. Charter contends Student's disabilities were not so significant that they required anything more than general education classes supplemented with one hour a week of group specialized academic instruction and some accommodations from October 2014 through November 2015, and that Student's IEP's in October 2014 and May 2015 offered her FAPE with respect to placement and related services. Charter also contends Student's disabilities were not so significant that they required anything more than general education classes supplemented with a couple hours a week of specialized academic instruction and some accommodations starting in November 2015, with some additional hours a week of specialized academic instruction to relieve Parents because Mother complained about Student having difficulty completing work at home, and that Student's IEP in November 2015 offered her FAPE. Finally, Charter contends its October 2014 psychoeducational assessment was appropriate under the IDEA and its criteria for IEE's were appropriate, such that Student is not entitled to reimbursement for the IEE by Dr. Conway.

Student met her burden of demonstrating that Charter denied her a FAPE due to Charter's failure to offer her appropriate placement, specialized academic instruction, and dyslexia services in the October 2014, May 2015, and November 2015 IEP's. Student also met her burden of demonstrating that Charter did not fund Student's IEE or file to defend its October 2014 psychoeducational assessment or IEE criteria without unnecessary delay.

Due to Student successfully demonstrating unnecessary delay in Charter filing to defend its October 2014 psychoeducational assessment and its IEE criteria, the legal adequacy of that assessment itself was not considered. Charter did not successfully demonstrate that its criteria for IEE's are appropriate because the cost criteria were calculated by an impermissible method. And due to Student successfully demonstrating the inadequacy of the November 2015 IEP regarding the amount and type of specialized academic instruction, Charter did not meet its burden of proof regarding the appropriateness of that IEP.

Student is awarded reimbursement for the IEE by Dr. Conway and tuition at and transportation to The Prentice School from May 2015 through June 2016, and compensatory education in the form of Charter funding her attendance at The Prentice School for the fall 2016 semester.

## FACTUAL FINDINGS

### *Background*

1. Student was 13 years and seven months old at the time of hearing. At all relevant times, she lived with Parents in a primary residence in Riverside County.

2. Student had difficulties in school since kindergarten, which she attended in another school district. She was retained in kindergarten, and she and her brother, who was 11 months younger than she, had been in the same grade ever since. Student's brother had not demonstrated any difficulties with learning, and for many years served as an example to Parents of what a typical child in Student's grade was able to accomplish and how much time it took for a typical child to complete grade-level work. Despite demonstrating what her teachers called positive learning behaviors, Student had difficulty with vocabulary, decoding, reading comprehension, and literary analysis in second grade. Early in third grade, her teacher reported Student's difficulties in reading comprehension, spelling, grammar, memorization of math facts and understanding multi-step or word problems. She struggled with memorization. Eventually Student was assessed and found eligible for special education and related services due to having specific learning disabilities in basic reading skills, reading comprehension, and mathematics reasoning due to an auditory processing disorder, specifically in the area of working memory.

3. Parents did not see improvement in Student's abilities under the IEP provided by the other school district in the 2011-2012 school year, so they decided to enroll Student and her brother in Charter for the 2012-2013 school year, fourth grade.

4. Charter was authorized by the Riverside County Office of Education as a county-wide benefit charter school and it functioned as its own local educational agency.<sup>5</sup> Charter was one of 23 local educational agencies (including two other charter schools operated by a non-profit parent corporation, Springs Charter Schools, Inc.,<sup>6</sup> 20 local school districts, and the Riverside County Office of Education Special Education Division) that were members of the Riverside County Special Education Local Plan Area. Charter was authorized to operate and serve students who resided in Riverside County and any adjacent county; Charter had physical "student centers" in Riverside and San Bernardino Counties. However, because Charter was authorized by the Riverside County Office of Education, Charter students were deemed to reside in Riverside County, regardless of the traditional school district in which their home was located.

5. Charter was authorized as an "independent study, personalized learning" charter school. All Charter students were considered to be on an independent study program, also called homeschooling. Attendance was based solely on an independent study contract, and was not based on the time a student "spends in the seat," in a classroom. Students earned credits by turning in completed work packets, and they earned credits at the pace at which they submitted the work. But under the independent study umbrella, Charter had several

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<sup>5</sup> At the hearing, the parties stipulated that there was no dispute that Charter operates the same as a local educational agency and that there was no need for discussion regarding the Education Code sections pertaining to charter schools.

<sup>6</sup> The three charter schools operated by Springs Charter Schools, Inc. serve a total of approximately 7,500 students.

programs. Some students were taught by their parents, and were at home all the time. Charter assigned these students a general education credentialed teacher to meet with parents to review instruction plans, but the parents were a student's instructor. Some students were at home all the time, but a general education credentialed teacher provided instruction via the internet.

6. Charter had several physical "student centers," also called academies, where instruction was provided by general education credentialed or special education credentialed teachers in what looked like a traditional classroom. Some student centers exclusively served students who were in full-time parentally taught or online programs and provided "enrichment classes," such as art or science. Other student centers provided instruction by credentialed teachers two, three, four, or five days a week, based on which program a student's parents selected when they applied to attend Charter. Some student centers offered classroom instruction only two, three, or four days a week, and there were three locations that offered classroom instruction five days a week (one was a high school only). Even students who attended a student center five days a week and received all their instruction from Charter's teachers were regarded as independent study/homeschool students because that is what Charter is authorized to provide under the charter documents.

7. Charter's Director of Special Education Dr. Kathy Cox testified to explain how Charter handles education for students eligible for special education and related services, but her testimony was not consistent. Her initial testimony was that for students with an IEP, Charter looked at how to implement the services needed, such as specialized academic instruction or related services like speech therapy, within the construct of the particular independent study program the parent selected. Special education and related services were only provided at student centers, and could be provided on a push-in or pull-out basis. If a parent agreed to it, a parent could bring a student to a student center on a home study day to get the services. Charter offered placement and services based on a child's unique needs, the areas of need, the present levels of performance, the goals written, the types of goals, and the services required to implement those goals. Charter based its offer of special education and related services on how Charter could best implement those goals, taking into consideration the parent-selected mode or location of instruction the student was enrolled in. Students who received specialized academic instruction from Charter had services ranging from a consult model to multiple hours each day, multiple days a week. The academies did not have what would be commonly referred to as special day classes, but some students received specialized academic instruction close to 50 percent of the time, in either a group or individual environment, although their IEP's did not label that service as resource support program, resource specialist program, or a special day class. The thrust of Dr. Cox's original testimony was that Charter developed and offered a program of special education and related services largely based on the time allocation a parent preferred between home-based and Charter facility-based instruction.

8. On redirect, Dr. Cox modified her testimony. Rather than reiterating her testimony that offers of special education and related services were heavily guided by what type of independent study program a parent had selected for a student, Dr. Cox asserted that

if a student eligible for special education and related services required a placement or service that neither Charter nor the two other charters in the Springs Charter Schools, Inc. group could provide, such as a five hours a day, five days a week, special day class, Charter would seek out a school district near the student's home who might have a program the student required and purchase a place in that district to provide those services to the student. Charter claimed it would offer and provide a student with the type of special education program the student required, regardless of what Charter program (full homeschool, online, or some days a week at an academy) a parent had enrolled the student in.

9. Parents enrolled Student in Charter's Mosaic program, with Student attending a Charter academy for full day instruction on Mondays, Wednesdays, and Fridays, and home study on Tuesdays and Thursdays. During third grade, Student had grown increasingly aware of her learning difficulties and differences from other students and her self-esteem declined as she experienced teasing and bullying at her former school district; she had a high stress level dealing with those unpleasant peer interactions. Parents selected the three days a week instructional program so that if Student was harassed at school on Monday she could stay home and complete her work and emotionally recover before returning to school on Wednesday, and so forth. In fourth grade, it was estimated that students would spend four to six hours completing their homework. Student required around six hours to complete her work, not including time for breaks. During fifth grade, the 2013-2014 school year, the work was much harder and Student required seven to eight hours to complete her work on home study days.

10. Student's 2011 psychoeducational evaluation from her prior school district indicated she had average cognitive abilities, based on a Fluid-Crystalized Index of 107 on the Kaufman Assessment Battery for Children, 2nd edition. But her academic functioning, measured by the Kaufman Test of Educational Achievement, 2nd edition, indicated she was below average for students in her grade (rather than her age because she had been retained) in total based on a Comprehensive Achievement Composite of 80. She scored at the lowest score for the average range in one category, below average in six composite categories, and in the lower extreme for one category. With this information and other data Charter received when Student enrolled at Charter, Charter developed an IEP for Student for the 2012-2013 school year, which is not at issue in this case. Again in October 2013, Charter developed an IEP which is not at issue in this case, which covered most of Student's fifth grade year and the first two months of sixth grade. The October 2013 IEP contained five goals, and Student received two sessions of 45 minutes each, for a total of 90 minutes a week, of specialized academic instruction in a group. Student went to the academy on her home study days for this specialized academic instruction.

11. At the end of the spring semester of fifth grade, Parents received the second progress report on the five goals of Student's October 2013 IEP. She was described as making progress on the goals, but the following concerns were noted: she tended to get off topic when she did not refer back to her graphic organizer when writing; she had a hard time remembering which steps to follow in math problems, but when she was reminded of the steps she got back on task; she struggled to figure out what the math word problems were

asking, and the teacher recommended that she draw pictures; and in her language arts work, she did well reading a list of high frequency words, but struggled with spelling.

*2014-2015 School Year*

OCTOBER 15, 2014 PSYCHOEDUCATIONAL ASSESSMENT AND IEP

12. In the fall 2014 semester, Student continued to attend an academy for full day instruction three days a week and completed home study two days a week. Student's academy classes had approximately 20 to 30 students and one teacher. The work load increased in sixth grade, and while Student's younger brother took his sixth grade home study packets to his room and completed them on his own in three to four hours,<sup>7</sup> Student and Mother worked together for eight to ten hours almost every home study day. Student's difficulty with reading required Mother to read the directions for assignments aloud to her, repeatedly read the content to her, and explain the content of readings to her. Mother felt she could not walk away from Student, because Student could not understand any of the work on her own. Sometimes Student's younger brother tried to help her with her home study packets, and he would read and try to explain material to her. On October 8, 2014, Mother and Student's special education teacher Ms. Gard emailed each other about Student's upcoming IEP team meeting and some additional accommodations Ms. Gard suggested adding to Student's IEP. Mother reported, "We are really struggling at home. The workload is weighing on her . . ." [ellipses in original].

13. During the first two and a half months of sixth grade, before her October 15, 2014 IEP, Student's scores for completing her home study packets were almost always the maximum number of points available, being marked as A's and A-'s. She also commonly scored the maximum number of points available on classwork, which was often noted to have been completed in a group or with a partner. But her quiz and test scores revealed difficulties she was having. On her first history test on September 19, 2014, she scored 13 out of 30 points, an F. That test had been read aloud to her. On her first science test on October 10, 2014, she scored 25 out of 32 points, a C+. That test was open book and open note, the questions were read aloud to her, and it was taken in a small group setting. In language arts, her first test on September 19, 2014 was scored at 5 out of 11 points, an F. Her next test on October 6, 2014 was scored at 8/11 points, a C-. On October 10, 2014, her first spelling test score was 9 out of 20 points, an F. In math, her first test was on September 19, 2014 and her score was 2 out of 20 points, an F. She was allowed to retake the test on October 6, 2014, after concepts were reviewed in class and the original test was sent home with corrections to be used as a study guide; her retake score was 5 out of 20 points, still an F.

14. Charter conducted a psychoeducational evaluation of Student in preparation for her October 2014 IEP. Student's special education teacher Ms. Gard administered the

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<sup>7</sup> Mother perceived her son as being a little fast.

academic achievement portion of the assessment, and Charter's school psychologist, who was no longer employed by Charter at the time of the hearing, conducted the cognitive assessment and other components of the psychoeducational assessment.

15. As part of Charter's triennial assessment, Mother completed a Health & Developmental Parent Questionnaire. In response to the question about whether Student had ever been examined by particular specialists other than a pediatrician or family doctor, Mother reported "yes" regarding "Psychologist/Counselor" and where prompted to "describe problems," she reported Student had been identified as having dyslexia.<sup>8</sup> Where asked "how is your child doing with academic work at school," Mother responded Student "struggles to keep up, to understand the material." Where asked what "special problems" Student was having in school, Mother indicated, "School work takes a long time. We have to verbalize a lot, then do a rough draft." Mother reported Student was "good" at "getting along socially."

16. During testing with the school psychologist, Student had difficulty sitting still. She fidgeted in her seat, rolled her chair across the room, went underneath the desk, discussed topics that were not pertinent to the assessment at hand, and during tasks with a time constraint, appeared frequently distracted. Although she had good interpersonal skills, adequate speech/language skills, showed conscientious effort, cooperated with the examiner, had a realistic confidence in her ability, was persistent with tasks, needed minimal encouragement, had good organization in problem solving, and demonstrated a normal activity level, she also appeared inattentive at times, displayed restlessness, displayed a short attention span, appeared distractible, and behaved impulsively. Because of Student's behaviors, the school psychologist cautioned that the results of the assessment provided a good overall estimate of ability, but had to be interpreted in light of her behaviors throughout the assessment process.

17. Charter used the Wechsler Intelligence Scale for Children, Fourth Edition to evaluate Student's intellectual abilities. Her scores varied greatly among composite categories. Her Verbal Comprehension Index composite score was 98, in the average range. Her Perceptual Reasoning Index composite score was 112, in the high average range. Her Working Memory Index composite score was 68, well below average. Her Processing Speed Index composite score was 75, below average. Her Full Scale IQ was therefore 88, in the low average range. The school psychologist noted that due to the severe discrepancy between indexes, Student's full-scale score was not a good representation of her ability; the best estimate of Student's cognitive functioning was in the Global Ability Index, a composite of her verbal and nonverbal reasoning ability. Her Global Ability Index was 105, in the average range. The results indicated that when tasks requiring attention and focus in timed settings or tasks involving short-term memory are not confounding her ability, Student demonstrated intelligence at the level of other peers her age.

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<sup>8</sup> Although Charter's Psychoeducational Report included the information Mother reported about Student's uncles on both sides of the family having dyslexia, the report failed to include the information Mother shared that Student herself had dyslexia.

18. Another instrument used in the assessment confirmed Student's difficulties in attention and memory revealed in the Wechsler. Although Student's score on the Memory Scale of the Test of Auditory Processing Skills, Third Edition, was in the average range, in contrast to her memory score on the Wechsler, the school psychologist explained that fluctuations in memory are often times associated with limitations in attention.

19. Student's special education teacher Ms. Gard administered the Woodcock Johnson III Normative Update Tests of Achievement. Ms. Gard summarized that Student's overall level of achievement was low. Her ability to apply academic skills was within the low average range, but her academic skills and fluency with academic tasks were both within the low range. The Woodcock-Johnson III publisher-generated Parent Report explained the categories assessed and Student's rating in each category, compared to other students in her grade (sixth) nationally. Her total achievement, defined as a comprehensive measure of reading, math, and writing achievement, including basic reading skills, reading comprehension, math calculation skills, math problem-solving, spelling, and production of written sentences, was limited. Student did not rate as average in any category. She rated as limited to average in seven categories, limited in seven categories, and very limited in three categories. The Table of Scores reported that for most cluster scores and subtests, Student's grade equivalents were in the early-third to mid-fourth grades, with some grade equivalents in the mid-second, such as for spelling and math fluency, and late-second, for brief writing. Her brief achievement and broad achievement scores were comparable to third grade, third month and third grade, fifth month respectively.

20. Charter's assessment concluded that Student had an attention processing deficit and auditory processing disorders in the areas of working memory and phonological processing. She was functioning well below grade level in almost every area and had average to limited, or lower, performance in all academic areas. However, when Student's special education teacher provided Parents with the psychoeducational report two days before the IEP team meeting, she commented that Student had only two areas of need, basic reading skills and math calculation. She stated, "We will be able to reduce her service time to once per week." Fifteen minutes later Mother responded that she was concerned about potentially cutting Student's specialized academic instruction time and that she wanted to discuss it at the IEP team meeting.

21. Student's October 2013 IEP had contained one goal in reading, one goal in writing, one goal in language arts, and two goals in math. By October 2014 she met her goals in reading, language arts, and the math goal for breaking multi-step word problems into simpler parts to correctly solve them. Student partially met her goal in writing and the math goal for identifying single and multi-step math problems and determining when and how to break down a problem into simpler parts. For the October 2014 IEP, the unmet writing and

math goals were carried forward, and new goals were drafted for spelling and vowel teams,<sup>9</sup> for a total of four goals.

22. Charter reduced its offer of specialized academic instruction in a group setting to one session of 60 minutes a week. Charter rationalized this reduction purely on the numbers: as part of the October 2013 IEP, Student was offered 90 minutes a week of specialized academic instruction to address five goals; at the October 2014 IEP the number of goals was reduced to four, and the amount of specialized academic instruction was correspondingly reduced.

23. Charter described the educational setting in the IEP form by specifying that Student would not participate in the general education environment for basic reading, writing, and math skills, because she needed specialized academic instruction in reading, writing and math to access and progress in the core curriculum. However, in summarizing the educational setting Charter was offering Student, the 60 minutes of specialized academic instruction did not have any impact in the calculation, and Charter indicated that its offer was for Student to be in the general education environment 100 percent of the time.

24. In the area of behavior and social skills, Mother perceived Student to emotionally struggle with her school work and the amount of it, and that she continued to lose confidence in her abilities and be self-conscious about her learning differences. Mother understood Student had just two friends and later only one friend at school. Mother believed Student's learning differences isolated her from her classmates and that she was not good at approaching and interacting with her peers. At the time of the October 2014 IEP team meeting, Student's teachers at Charter did not perceive Student to be having emotional or behavioral difficulties, and believed she had friends at school, was liked by her classmates, and did not have challenges with peer interactions. Mother had reported in an email one week before the IEP meeting that Mother and Student were "really struggling at home" and that "[t]he workload is weighing on her," but at the IEP team meeting Mother did not raise concerns about Student's behavior or social skills.

#### STUDENT'S LACK OF PROGRESS UNDER THE OCTOBER 15, 2014 IEP AND PARENTS' INVESTIGATION OF A DIFFERENT SCHOOL

25. Student continued to attend an academy for full day instruction three days a week and completed home study two days a week. On one of her home study days, she came to the academy to receive 60 minutes of group specialized academic instruction.

26. Parents felt Student was falling farther and farther behind after the October 2014 IEP. Mother's experience was that Student was incapable of completing any of her home study school work independently. Student could complete some math, but

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<sup>9</sup> Vowel teams are combinations of vowels like ie, ai, ay, ea, ee, and oa, and diphthong patters like ie, oi, oo, and ou.

Mother had to walk her through it, and later Student could repeat the steps herself alone after one instruction. But in her other subjects, Student could not read the instructions and Mother could not walk away from her, and Student could not continue to the next problem on the page without someone pointing and directing her to do the next one. Student told Mother that in the classroom they were talking “jibber-jabber,” and didn’t understand the lessons.

27. On December 12, 2014, Mother emailed each of Student’s teachers the same email, reporting that Student had been really struggling with her school work, that Mother and Student had to work together to get through each assignment and often spent eight to ten hours on home study days trying to finish all the work, and sometimes also spent time on weekends. Despite all the time and effort, they sometimes struggled to complete all the assignments and that particular week, it had been impossible. Mother shared it had been very draining for them both, and Mother felt despite all the effort that was going into her school work, Student was not making progress or learning things that would prepare her for life outside the classroom. Mother explained that Student’s independent reading level was around fourth grade, and therefore all of her sixth grade assignment lists and current grade level materials had to be read to her. Mother informed Charter she was starting Student on the Barton reading system, which she described as “a language program proven to help dyslexic students.” The program would require five hours a week. Mother also informed Charter that Student was taking an online course of Cogmed, which she described as “a memory program proven to help with attention, memory, and recall.” That program required three to five hours a week. Mother requested Student’s teachers to drastically cut her workload on home study days so Student would have time to participate in the interventions Mother procured and asked them if they thought it would be better for Student to be fully home schooled.

28. Student’s social studies and English language arts teacher, Mr. Jaime, replied and complimented Student for completing many of her assignments. He told Mother Student’s “assignments can be modified in the places you feel would benefit her learning in the best way possible.” He instructed Mother to make a note of it on any assignment she modified. Student’s science teacher, Ms. Garcia, replied and thanked Mother and Student for their hard work. She acknowledged that in the past Mother had modified some assignments and noted that fact on the work itself, and stated Mother could continue to do that however she felt would best benefit Student’s learning. She wrote some suggested ways to modify assignments, such as shortening the amount of writing Student had to do for science projects, current events, and notes. She said Student could verbally respond to science questions and Mother could sign that she had gone over them with her. Student’s math teacher, Ms. Cole, replied and acknowledged that Mother and Student were feeling overwhelmed. She stated she did not want Mother and Student working for so many hours on home study days, and that she wanted Student to be motivated and not discouraged. She proposed switching math programs to one that would go at Student’s pace, and Student would continue doing the same work as the rest of the students were doing in class, but on her home study days she could do the other self-paced math program.

29. Mother was frustrated that Charter's teachers were not more specific about modifying Student's work and left it up to Mother. Mother doubted her knowledge and ability to make appropriate modifications because she regarded herself as "a mom with one semester of college."

30. In early January 2015, Parents found and contacted The Prentice School, a private as well as State-certified nonpublic school in Santa Ana, California. Prentice served students who learn differently, and had four programs on one campus. The programs were a private, non-profit general education school with elementary, junior high, and high school programs,<sup>10</sup> and the nonpublic school to serve children with disabilities.<sup>11</sup> As a nonpublic school, Prentice was approved by the California Department of Education to provide specialized academic instruction to students with mild to moderate disabilities, and to provide several related services. The core of the instructional program at Prentice was the Slingerland methodology, which Prentice's principal Greg Endelman described as a tried-and-true, evidence-based practice based on direct, systemic, multi-sensory instruction. The Slingerland methodology was an Orton-Gillingham multi-sensory approach. Prentice followed the California State standards and at the time of the hearing was transitioning to the Common Core standards.

31. A student could attend Prentice either as a private school student or as a student placed in the nonpublic school program by the student's district of residence through a master contract entered into between Prentice and the placing district. Students who were not placed by their district of residence did not receive services related to implementing, monitoring, reporting about or further developing any IEP the Student might have already had. Privately placed students received instruction using the Slingerland methodology and Prentice educated those students in a manner Prentice believed would support the student to learn despite their learning differences, in accordance with choices a student's parent would make from the menu of additional services available, such as speech therapy. But students placed in Prentice's nonpublic school by a district of residence were assigned a case carrier who was a credentialed special education teacher and a student's program was provided in conformity with the IEP developed by the district of residence.

32. Parents toured Prentice on January 12, 2015, and Student was offered a three-day visit at the school, which she completed on January 27, 28, and 29, 2015. At the completion of the visit, Prentice offered Student enrollment.

33. At the end of January 2015, Parents received the first progress report on the goals from the October 2014 IEP. Mother wrote to Student's teacher Ms. Helvey expressing

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<sup>10</sup> At the time of hearing, Prentice was authorized to serve but did not have any high school students.

<sup>11</sup> At the time of hearing, Prentice had only one student enrolled in the nonpublic school program.

concern that it indicated Student was not making progress. Ms. Helvey responded that she had seen a lot of progress in Student, especially recently, stating Student was “growing in confidence and ability daily.” She described working with Student the day before during something called ST Math, modeling a process for Student, and then Student was able to repeat and explain the process to Ms. Helvey. But, Ms. Helvey observed, “[u]nfortunately all the growth I see in class doesn’t always add up to meeting all the goals set for a student.” Ms. Helvey added Student’s special education teacher Ms. Gard to the email thread and asked her if she believed Student’s goals had been set too high and if they needed to decrease the demands and take smaller steps. No evidence was provided as to any subsequent communications on these topics.

34. As evidence of the progress Charter contended Student was making under the placement and services offered in the October 2014 IEP, Charter submitted many of Student’s work samples from November 2014 through April 2015, or as Student wrote it herself, “*Aperl 14, 15.*”<sup>12</sup>

35. On December 15, 2015, Student took a history quiz on the rise of later civilizations, on which she scored 14 out of 20 points. In one fill-in-the-blank prompt, she correctly responded that the “*Astecs*” lived a nomadic life. On the same page, the prompt required an explanation and description of the belief in Animism and who believed in it. Student received one out of three points for responding, “The belief of *Animisom* is god. The *Astects beleved* in this” [no final period in original]. She did not correctly write the word Animism when the model for the word was directly above the line on which Student wrote. On the next page, Student was prompted to draw, label, and explain the “sign” that the Aztecs found a good settlement. Although the correct spelling of the word Aztecs was on the page, Student did not use the model to correct the prior two times she wrote it incorrectly on the prior page. Student drew a picture and, as required, explained that it was “*A egol seting* on a *catis* with a *snak* in its *moth.*”<sup>13</sup>

36. On January 21, 2015, Student took the history test on the spread of civilizations. She scored 16 out of 25 points, a D. She took the test with her textbook and the questions were read aloud to her. The first part of the test provided a list of 15 words that Student needed to write onto lines below for fill-in-the-blank prompts. Student correctly matched only six words into the 15 slots. Her other 10 points came from naming and drawing five things used for trade during the time period of the textbook chapter: “*solet*” (likely salt), gold, slaves, food, and water. Student’s poor spelling even when a model was available, poor punctuation, and inability to demonstrate substantive knowledge related to the chapter contradict Charter’s characterization of Student as making meaningful progress.

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<sup>12</sup> In quoting Student’s work, italicized portions denote spelling or grammar errors in the original.

<sup>13</sup> An eagle sitting on a cactus with a snake in its mouth.

37. One area in which Charter asserted Student made progress was in her reading fluency, as measured by a system called DIBELS, Dynamic Indicators of Basic Early Literacy Skills. Student began working with a different special education teacher in January 2015, Crystal Vu. Ms. Vu did weekly progress monitoring using DIBELS from February 3, 2015 through April 14, 2015. DIBELS expected sixth grade students to read aloud approximately 120 words per minute. Ms. Vu presented Student with passages to read as much and as accurately as she could within one minute. Ms. Vu sometimes presented Student only one passage, sometimes two, and sometimes three. When multiple passages were presented, Ms. Vu calculated an average of the words-per-minute Student read that day and used that to assess progress. Eight samplings of data over ten weeks were recorded. Charter characterized the following data as evidence of “progress,” but Student’s average reading rate did not change: First sample – 87 and 76 words per minute; Second sample – 55 and 80 words per minute; Third sample – 80 and 89 words per minute; there was no data the following week; Fourth sample – 74, 69, and 77 words per minute; Fifth sample – 73 and 94 words per minute; Sixth sample – 71, 61, and 95 words per minute; there was no data the following two weeks; Seventh sample – 99 words per minute; Final sample – 60 and 77 words per minute. Student’s oral reading rate varied among passages even on the same day, but overall the evidence was not persuasive and Charter did not prove that Student’s reading rate improved.

38. Charter also tracked Student’s reading fluency using a program called REWARDS that included pre-test and post-test scores for multisyllabic words read aloud, measured by Student’s special education teacher. Charter claimed this program demonstrated that Student made progress. On October 16, 2014, Student read 15 words in one minute, 8 of them correctly. Student read 36 word parts in that minute, 18 of them correctly. After more than four months of specialized academic instruction at a rate of one hour a week, on March 17, 2015, Student read 20 words in one minute, 12 of them correctly. Student read 51 word parts in that minute, 38 of them correctly. Charter noted that her accuracy improved from 50 percent to 75 percent. However, her words per minute as well as her correct words per minute increased at a rate of about one word per month of service. This was insignificant progress.

39. Charter was pleased to explain that Student had been scoring 100 percent on her spelling tests and produced three tests from March 2015. Student was successfully spelling words involving “ea,” “ai,” and “o-e” vowel teams, such as team, sea, leaf, train, brain, bone, home, and note. These words were at a much lower grade level than sixth grade. These spelling words related to Student’s goal, but not to the sixth grade curriculum, and while these test scores are arguably relevant to her vowel team goal, these “perfect” scores did not demonstrate progress in the curriculum.

40. Some of the undated home study worksheets for math indicate the kind of workload reductions Mother and the math teacher had emailed about back in December 2014. On one page, Mother noted that the work had been “modified” in that Student was told to choose three out of five problems to complete; on another, Mother noted the work had been modified and Student completed four out of eight problems.

41. On March 2, 2015, Student took a math test on ratios and proportional relationships. She was allowed to use notes, a study guide, a calculator and a multiplication chart, which were accommodations listed in her October 2014 IEP. She scored 7 out of 12 points. In the grade book, her teacher noted, "Great job [Student]!". Her score was later changed to be 9 out of 12 points. The accommodations provided to Student were intended to allow Student to demonstrate her knowledge of the subject matter unimpeded by her disabilities. Her test score did not demonstrate satisfactory advancement with her coursework.

42. On April 7, 2015, Student wrote three paragraphs about her Easter. One paragraph included this: ". . . my PaPa came in and *sead* 'OK, your mom woke me up so *lets go hinting!*' *Me* and [brother] jumped off the *chouch* and ran into the *houes* to *grad* our *daskst* and ran outside. *I foned adout* 16 eggs and the *frst dasket* I *fined* was my baby *sisters* then my *Basket* and last [brother]'s *Basket*." After years of minimal special education services from Charter, Student was still only minimally able to write about her life.

#### NOTICE OF INTENT TO PLACE STUDENT AT THE PRENTICE SCHOOL

43. On April 20, 2015, Parents, via counsel, provided written notice to Charter that they did not believe Student's October 15, 2014 IEP provided Student a FAPE and Student intended to enroll at The Prentice School and seek reimbursement from Charter for the cost of the program, any related services and transportation.

44. On April 27, 2015, Charter, via counsel, replied to Parents' attorney with prior written notice that Charter did not agree to fund an educational program for Student at Prentice, but would consider doing so at an IEP meeting scheduled for May 27, 2015.

#### MAY 27, 2015 IEP TEAM MEETING AND OFFER

45. Student's last day at Charter was May 1, 2015. She began attending Prentice on May 4, 2015. She attended school five days a week, from 8:10 a.m. to 3:00 p.m., with Thursday being about one hour shorter. There were approximately 16 students in each of her classes, some of which were mixed sixth, seventh, and eighth grade classes with students grouped by ability level or grade level. Student stayed an hour after school two days a week for Homework Club, and with supervision she was able to complete her homework at school. Student used audio textbooks for some classes.

46. At some point, Charter's Director of Special Education Dr. Cox, general education teacher Mr. Jaime, and special education teacher Ms. Vu went to Prentice to observe Student in her classes. They saw two classrooms in 45 minutes, and then had a 20 minute meeting with the principal Mr. Endelman and a program specialist. Dr. Cox, Ms. Vu, and Mr. Jaime's testimony did not include a date on which the visit occurred. Ms. Vu described the visit as occurring during the 2014-2015 school year. Mr. Jaime's recollection was that Charter's visit to Prentice was before the May 27, 2015 IEP team meeting. However, Student's independent evaluator Dr. Karen Conway recalled being

vaguely aware that a team from Charter was at Prentice on the same day that she was there to observe Student, they arrived as she was leaving or something like that and their paths crossed in some way; her observations of Student at Prentice occurred on June 1, July 16, and October 15, 2015. The notes of the May 27, 2015 IEP team meeting do not reflect that Charter had observed Student at Prentice by the time of the meeting. Charter likely observed Student at Prentice on June 1, 2015, after the May 27, 2015 IEP team meeting.

47. Charter calculated Student's grades for the spring 2015 semester based on the work Student had submitted up to the time she left Charter. Because of her largely perfect points totals for group classwork and for having submitted home study packets, her lower scores on the infrequent quizzes and tests did not drag down her grades. She received A's in life skills and special interest, B+'s in science and math, a B in history, and a C- in language arts. Charter relied on these passing grades as evidence Student had made progress under Student's October 2014 IEP.

48. At the IEP team meeting on May 27, 2015, Charter teachers shared their perception that Student had made progress in reading fluency and in math before she stopped attending Charter. Charter's teachers found Student to be relaxed and comfortable when she was at school, but Parents reported Student had been anxious, nervous about the amount of school work, and when she did her school work she said she felt "like a squished sandwich." Charter proposed to conduct a social/emotional assessment and an assistive technology assessment.

49. The teachers at Charter predicted that if Student stayed at Charter, she would meet her writing goal within the time remaining before her next annual IEP.

50. Charter did not agree to place Student at Prentice, and made no changes to the October 15, 2014 IEP.

51. Student continued to attend Prentice, into the summer session. In July 2015, Parents purchased a home in Irvine to avoid the daily 80-mile round trip commute from Riverside to Prentice. The Irvine home was 12 miles from Prentice. Parents and their children stayed in the Irvine home during the week, and returned to the Riverside home on weekends.<sup>14</sup>

#### INITIATION OF INDEPENDENT EDUCATIONAL EVALUATION IN SPRING 2015

52. On February 12, 2015, Parents, via counsel, disagreed with Charter's October 15, 2014 psychoeducational assessment and requested an IEE at public expense.

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<sup>14</sup> Student's residency was not raised as an issue or defense and had no impact on this Decision.

53. On February 20, 2015, Charter, via counsel, telephoned and emailed Student's attorney asking to discuss Student's request for an IEE.

54. The next week, Student's and Charter's attorneys spoke. Charter proposed that an IEE be conducted by someone mutually agreeable to Charter and Parents. Student's attorney provided Charter's attorney three names,<sup>15</sup> and on March 6, 2015, Charter's attorney informed Student's attorney that only Dr. Perry Passaro was still under consideration by Charter. Charter's attorney included the names, addresses and phone numbers of six assessors<sup>16</sup> and requested that Student's attorney consider them. She requested an agreement upon an independent assessor within one week, suggesting that if Charter and Student had not reached an agreement by then, Charter would file for a "due process hearing wherein my client defends its assessment of" Student.

55. On March 10, 2015, Charter's attorney wrote to Student's attorney because she heard Parents had selected an independent assessor who planned to schedule an observation of Student at Charter "in the near future." Charter's attorney believed Parents were still open to the idea of mutually agreeing upon an independent assessor and she asked Student's attorney to confirm whether that was or was not true by the end of the next day. Charter's attorney attached to her email a list of independent assessors approved by the Riverside County SELPA.<sup>17</sup> She also indicated that Charter was willing to contract with Dr. Passaro if Student's attorney would provide his contact information and a copy of his curriculum vitae for Charter's "consideration and confirmation." Charter's attorney requested that if Parents had selected an independent assessor, Student's attorney should provide that assessor's information so Charter could decide whether to fund the IEE by that assessor or file for a due process hearing to defend its October 2014 assessment. She requested that information by the end of the next day. She provided contact information for any independent assessor to schedule an observation directly with a member of Charter's staff.

56. Three days later, Dr. Karen Conway went to Charter on March 13, 2015, to observe Student. Although she had coordinated with Charter staff for a date and time that would allow her to observe Student during instructional time, there was some change in schedule such that during the time Dr. Conway was scheduled to observe, the students in the social studies class were instructed to spend time on individual work. Student worked

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<sup>15</sup> There was no evidence regarding two of the names Student proposed, and whether they included Karen Conway, Ph.D.

<sup>16</sup> Only one of the six assessors named was on the Riverside County SELPA's Independent Evaluators List for 2014-2015, which was provided to Student's attorney four days later.

<sup>17</sup> Only one of the six assessors proposed in Charter's attorney's earlier email was on the Riverside County SELPA's Independent Evaluators List for 2014-2015.

independently on her laptop computer for about 20 minutes, and for the other 10 minutes of the observation Dr. Conway had been allowed, Student read a book. Dr. Conway requested to return for another observation.

57. On March 16, 2015, Charter's attorney wrote to Student's attorney to resolve the IEE issues. Charter agreed to fund an IEE consistent with the Riverside County SELPA's Independent Educational Evaluation Guidelines, which Charter provided Parents for the first time. The list of evaluators was again provided.<sup>18</sup> Charter's attorney indicated that because Parents had chosen an assessor more than 60 miles from Student's school, additional information was required and further, if Dr. Conway did not meet the Riverside County SELPA's IEE criteria and/or her rate exceeded the cost criteria established in the policy, which Parents had not previously been provided, Student's attorney needed to explain Student's unique circumstances that justified exceeding the criteria in the Guidelines for the distance and/or fees. Charter's attorney stated that if that information was provided, she would work with Student's attorney to secure an IEE at Charter's expense. Charter's attorney suggested that, alternatively, Parents could either choose an assessor on the SELPA's list or another evaluator who was not on the list but who satisfied all Guidelines criteria.

58. Dr. Conway observed Student at Charter again on March 23, 2015, for another 30 minutes. Students broke into small groups to prepare to give an oral presentation. Students then gave those presentations, and Dr. Conway observed Student and her partner give their presentation, and then observed other students give their presentations.

59. On April 27, 2015, Charter's attorney wrote to Student's attorney and referenced her March 16, 2015 correspondence and an email dated April 16, 2015, which was not introduced into evidence. Charter's attorney confirmed Charter had agreed to fund an IEE for Student, but Student's attorney had not provided "the required information set forth in the Riverside County SELPA's policies and procedures." Charter's attorney again requested that the "required documentation for payment for the IEE" be submitted.

60. No other testimony or documentary evidence regarding discussions or disagreement about Dr. Conway serving as the independent assessor was provided.

61. Dr. Conway was a licensed clinical psychologist in private practice and had her office in Studio City, a neighborhood in the City of Los Angeles. She held a Ph.D. in Child and Developmental Psychology, and was a Board Certified Behavior Analyst at the doctorate level (BCBA-D). She provided psychoeducational and neuropsychological evaluations for families and school districts. At the time of the hearing, she had contracts with Alhambra Unified School District and Beverly Hills Unified School District. In the past, she had contracts with Fontana Unified School District, Los Angeles Unified School District, and possibly others she could not remember while testifying. She had been an

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<sup>18</sup> It had been provided the first time on March 10, 2015.

assessor for the Westside Regional Center and conducted psychodiagnostic evaluations to determine eligibility for Regional Center services. She had evaluated students and disabilities for 30 years. She was deemed an expert in the fields of clinical psychology, neuropsychology, IEP's and program development, and service delivery to students with special needs.

62. Dr. Conway was asked to assess Student's overall level of functioning and diagnostic presentation to help secure an appropriate classroom placement in the least restrictive environment. Because Student had been assessed by Charter within six months before Dr. Conway began her assessment, she could not use the same instruments Charter had used to assess Student's cognitive ability and academic achievement levels due to the test/re-test effect. She administered the following standardized instruments: Woodcock-Johnson IV Tests of Cognitive Ability; Wechsler Individual Achievement Test III; Behavior Rating Inventory of Executive Functioning with scales provided to Mother, Charter teacher Mr. Jaime and Prentice teacher Shana Stanley; Behavior Assessment System for Children, Second Edition with scales provided to Mother and Charter teacher Mr. Jaime; The Conners 3rd Edition with scales provided to Mother and Charter teacher Mr. Jaime; and Test for Auditory Processing Disorders for Adolescents and Adults (SCAN-3C).

63. Dr. Conway continued her assessment in the summer and fall by observing Student at Prentice on June 1, July 16, and October 15, 2015. The results of her assessment were not shared with Charter until November 15, 2015. There was no evidence regarding when Parents or Student's attorney received Dr. Conway's written report.

#### CHARTER'S QUALIFICATIONS, LOCATION, AND COST CRITERIA FOR INDEPENDENT EVALUATIONS

64. Charter's qualification, location, and cost criteria for independent evaluations were those established by the Riverside County SELPA, to which Charter belonged. The SELPA, and therefore Charter, had a list of assessors who had been reviewed for their qualifications and willingness to provide independent evaluations at the cost capped by the SELPA. The list contained 16 psychologists, some of whom imposed geographic limitations,<sup>19</sup> month of year, and time of day restrictions. Some were located outside Riverside County, including in La Habra, San Marcos, Vista, and San Diego. Parents could choose any assessor on the list who was willing to conduct the assessment without regard to distance from the student's school district.

65. However, if Parents wanted to use an assessor who was not on the pre-approved list, they had to choose an assessor "located within a 60 mile radius of the" local educational agency of residence, unless prior written approval was obtained from the

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<sup>19</sup> For example, one psychologist who was located in Murrieta indicated he only served 11 of the 22 districts of the SELPA, and another indicated she served Riverside, San Diego, San Bernardino and Orange Counties, but did not service Murrieta.

local educational agency. Evaluators outside that area would be approved “only on an exceptional basis if the parents can demonstrate the necessity of using personnel outside the specified area.” The SELPA’s Independent Educational Evaluation Guidelines did not specify a reason for the distance restriction. Charter’s Director of Special Education claimed the distance restriction was because since Riverside County was so geographically broad, the SELPA wanted to ensure services could be done within a reasonable time and also with little impact on parents, the districts, and the assessors; the guideline was there to contain the time and cost involved in the assessment. This explanation did not make sense given that a Student in Blythe could select an assessor on the SELPA’s list from San Diego and if the assessor agreed to conduct the independent evaluation, the Palo Verde Unified School District would pay for it because the assessor was on the SELPA’s list, despite being 216 miles away.<sup>20</sup>

66. The written cost criteria called for Charter to pay an independent assessor a “routine and reasonable fee” that was “based on an average of a random sampling of fees charged by professionals providing the service in the [local educational agency’s] area.” Charter’s Director of Special Education, as a director of a member local educational agency, participated in the SELPA’s monthly Coordinating Council meetings and the Directors meetings. She was familiar with the process the SELPA followed to establish the routine and reasonable fee limits. Her testimony regarding the process did not contradict the written Independent Educational Evaluation Guidelines statement that the fee was based on an average of a random sampling of fees charged in the area. The routine and reasonable fee applicable to Student’s request for an independent psychoeducational evaluation, identified as an independent multidisciplinary evaluation, was \$3,500. The written cost criteria stated an “excessive fee” was one more than 25 percent higher than the routine and reasonable rate for an IEE, unless the local educational agency provided prior written approval. The criteria provided that parents would be allowed an opportunity to demonstrate to the local educational agency that unique circumstances justified an IEE reimbursement that did not fall within the criteria.

#### *2015-2016 School Year*

67. Student began seventh grade, the 2015-2016 school year, at Prentice. Prentice conducted some brief assessments of Student on August 20 and 21, 2015. The AIMSWeb scoring indicated that compared to students her same age nationally, Student’s achievement was average in math, below average in writing, and borderline in reading. The August 2015 assessment results were not shared with Charter before the November 19, 2015 IEP team meeting.

68. Student’s grades at Prentice as of October 26, 2015 were shared with Charter before the November 19, 2015 IEP team meeting. The grade reports reflected that Student was enrolled in English language arts reading, English language arts writing, literature, math,

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<sup>20</sup> Mileage from Blythe to San Diego calculated by Google Maps.

math lab, and a course called DIY with Ms. Stanley. She was enrolled in world history and life science with Ms. Garner, physical education with Mr. Flores, computers with Mr. Giuffre, and guitar with Ms. Gault. Her reading class was identified as modified, and all other classes were identified as being grade level courses.

#### DR. CONWAY'S EVALUATION OF STUDENT

69. The psychoeducational evaluation conducted by Dr. Conway began while Student was in sixth grade at Charter and concluded while Student was in seventh grade at Prentice. The cognitive skills and academic achievement measures were obtained in the spring of 2015, and the executive functioning and social/emotional assessments began in the spring of 2015 but were completed in October 2015 after rating scales were completed by one of Student's teachers at Prentice.

70. In the area of cognitive function, Dr. Conway was not satisfied with the result she obtained using the Woodcock-Johnson IV Tests of Cognitive Ability. Based on Student's profile, Dr. Conway would have preferred to use the Wechsler Intelligence Scale for Children, Fourth Edition, to assess Student, but could not due to Charter having used it to assess Student less than six months earlier. On the Woodcock-Johnson, Student obtained a standard score of 60, which placed her in the profoundly impaired classification compared to her same-aged peers. The Woodcock-Johnson was a highly reliable measure of intelligence quotient, but Dr. Conway believed that based on Student's 2011 standard score of 103 on the Kaufman Assessment Battery for Children, 2nd Edition and Student's 2014 composite score of Global Ability Index of 105 on the Wechsler, her score on the Woodcock-Johnson was an underestimate of her true cognitive abilities. Student's full scale IQ score on Charter's Wechsler was 88, but the Wechsler provided a table that showed how to remove scores reflecting areas of disability and recalculate an estimate of a student's cognitive abilities unimpaired by the disabilities, which was the Global Ability Index.<sup>21</sup> The Woodcock-Johnson did not allow an assessor to do that. Another explanation for the differences in Student's results between the two tests was that the Woodcock-Johnson was a binder for a student to read and work through things. The Wechsler was more interactive, multi-sensory and multi-modality, better suited to a student with the multiple disabilities Student had, including attention, auditory processing, and working memory. All of those disabilities had a negative impact on Student's general intellectual ability score. As had her prior school district's school psychologist in 2011 and Charter's school psychologist after the October 2014 assessment, Dr. Conway noted in her report that Student's deficits had probably caused a score that was lower than her true abilities.

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<sup>21</sup> According to Dr. Conway, the Wechsler technical interpretive, scoring and administrative manuals said that when a Global Ability score is calculated, it is common to see a score increase from the full scale IQ by five to six points. Student's score increased from 88 to 105, a 17 point differential, which was very large, not standard in the manual, and Dr. Conway has never experienced that herself. It caused her to question the score because it was outside what the manual said was standard for the Global Ability Index.

71. The Woodcock-Johnson indicated Student had relative strengths in the areas of oral language, reasoning skills, and short-term working memory. Her relative weaknesses were in quantitative reasoning, processing speed, and auditory processing. This was consistent with Charter's assessment and analysis, concluding Student had auditory and attention processing disorders.

72. Also on the topic of attention, Dr. Conway had Mother and Charter teacher Mr. Jaime complete rating scales for the Behavior Rating Inventory of Executive Functioning (BRIEF) during March and May 2015, respectively, along with rating scales for The Conners 3rd Edition. The BRIEF could serve as a screening tool for possible executive dysfunction. Executive function is a set of mental processes that connects past experiences with present actions; people use it to perform activities such as planning, organizing, strategizing, paying attention to and remembering details, and managing time and space. Both Mother's and Mr. Jaime's responses on the BRIEF revealed Student had difficulties with working memory, planning, organization, and initiating and completing activities and problem solving. Children with similar evaluations are often described as generally inattentive, and they may have secondary difficulty grasping the gist of new information and developing a plan of approach for future-oriented problem solving. Prentice teacher Ms. Stanely completed a BRIEF rating scale in October 2015 and none of the individual BRIEF scales were elevated. Dr. Conway's interpretation of the result was that Student's ability to self-regulate at a basic level had improved and she no longer demonstrated concerns with executive functioning.

73. The Conners was an instrument designed to assess ADHD and its most common co-morbid problems in young people. On all three measures of The Conners that assess for focus of attention, Mother, Mr. Jaime, or both indicated Student experienced difficulty with her ability to sustain focus for adequate lengths of time. These results were consistent with Student's low average score on the short-term memory subtests of the Woodcock-Johnson cognitive test battery, which required focus of attention. Dr. Conway concluded that Student met the criteria for a DSM-5<sup>22</sup> diagnosis of Attention Deficit/Hyperactivity Disorder, Predominately Inattentive presentation, Moderate.

74. Dr. Conway administered the Wechsler Individual Achievement Test, Third Edition, to evaluate Student's listening, speaking, reading, writing, and mathematics skills. Her scores on various subtests placed her in the average, low average, borderline, moderately impaired, impaired, and severely impaired classifications in relation to her same-age peers. Overall, her results indicated Student was performing below average for her age. Her relative strengths were in the areas of listening comprehension, reading comprehension, and written expression. Her relative weaknesses were in the areas of word reading, word

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<sup>22</sup> Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) of the American Psychiatric Association is the standard classification of mental disorders used by mental health professionals in the United States.

fluency, spelling, and math fluency. These results were also consistent with past academic achievement testing.

75. Dr. Conway assessed Student's social/emotional functioning via the Behavior Assessment System for Children, Second Edition. In March 2015 Mother had concerns about hyperactivity, anxiety, attention problems, activities of daily living, and functional communication, and in May 2015 Charter teacher Mr. Jaime had concerns about learning problems, withdrawal and problems with socialization, and study skills. In October 2015, Prentice teacher Ms. Stanley scored Student as normal regarding withdrawal, and reported Student was socially adept and at ease with her peers. Dr. Conway's interpretation of the results was that Student's behavioral and emotional concerns were improving.

76. Dr. Conway summarized Student's unique needs and evaluated the program in which she had been participating at Charter. She concluded that Student was impacted by multiple complex challenges and required a learning environment that could address all of her special needs, including academics and her social and emotional development. Student experienced barriers to learning in mainstream classrooms. Her disabilities in mathematics, basic and broad reading, written expression, attention, auditory processing, and short-term memory could only be effectively addressed by the provision of alternative teaching methods. Although Charter's October 2014 IEP offered many supplemental supports, some were only of short duration, such as seating close to the teacher two times daily for 60 minutes, small group instruction once daily for 30 minutes, and having directions simplified or clarified four times daily for 10 minutes, these accommodations were inadequate for Student to receive an appropriate education and access the curriculum. They contributed to Student's feelings of being different from her peers, and they were not in place for the entire time she was in the classroom, minimizing her opportunity for success. Dr. Conway believed Charter had not met Student's academic needs with the resources provided to her according to her IEP in a mainstream classroom setting. Student required special, multi-disciplinary interventions to access the curriculum and a general education program with accommodations was not an appropriate education for Student.

77. Dr. Conway recommended several things, including that Student: attend a school dedicated to serving students with a range of learning differences, with a particular focus on language-based challenges in reading and writing; receive individualized instruction to target Student's specific learning strengths and weaknesses; be educated in a classroom that did not exceed 12 students and would include students with a range of learning differences.

78. Parents filed a request for due process on November 9, 2015, challenging the October 2014 and May 2015 IEP's.

#### NOVEMBER 19, 2015 IEP TEAM MEETING AND OFFER

79. Charter held an IEP team meeting on November 19, 2015. Dr. Conway's report was provided to Charter the day of the meeting, and while Dr. Conway was available

by telephone to answer questions about her 28-page report, Charter did not know the report was finally available and did not have a school psychologist at the meeting who could review and discuss the report. The meeting was conducted via telephone, with representatives of Charter at Charter's office, and Parents at Prentice with principal Mr. Endelman and program specialist Ms. Passaro, who left the meeting when teacher Ms. Stanley arrived.

80. The team reviewed Student's progress on her goals from the October 2014 IEP, with Charter presenting information they believed represented her progress as of the time Student left Charter May 1, 2015. Charter characterized Student as having partially met her goals. Student's attorney disagreed that Student's performance constituted progress. Prentice teacher Ms. Stanley confirmed that the levels of performance Charter described through April 2015 were consistent with Student's performance as of November 2015.

81. The IEP team determined Student's areas of unique need were math calculation, math fluency, written expression, reading, organization, and self-advocacy, because Student was not consistent with asking her Prentice teachers for help when she needed it. Math fluency and self-advocacy were areas of unique need driven by requests from Parents. Charter did not have any baseline information regarding these areas and agreed to schedule another IEP team meeting to discuss baselines and develop goals in those two areas. Prentice's principal believed the information from Dr. Conway's report had recommendations that should have been considered, but Charter was unable to discuss the report because Charter received it the same day as the meeting. The team agreed to reconvene to discuss goals in math fluency and self-advocacy after Charter had the opportunity to review Dr. Conway's report.

82. Charter proposed six goals, addressing reading fluency, spelling, text purpose in writing, math expressions and equations, reading comprehension, and organizational skills.

83. To address the goals that had been proposed, Charter offered Student specialized academic instruction for 60 minutes, five times a week, with three sessions in an individual environment and two sessions in a group. Charter later explained that as it had done before in decreasing the amount of specialized academic instruction from 90 minutes a week to 60 minutes a week when Student's goals decreased from five to four, Charter was increasing Student's specialized academic instruction to 300 minutes a week in part because Student's goals increased from four to six (which ignored that Charter had agreed to develop goals in two additional areas but postponed discussion and made an offer anyway), and in part to help Mother who was believed to be complaining about having a hard time helping Student complete her work at home.

84. Parents argued for Student to be placed in a nonpublic school, specifically Prentice. Charter disagreed, citing the progress they believed Student had made under Charter's program through April 2015.

85. The meeting notes reflect another IEP team meeting was to be held to review baseline information Prentice would prepare regarding math fluency and self-advocacy goals and for the team to consider Dr. Conway's report. There was no evidence that another meeting was ever held.

86. Charter made its November 19, 2015 annual IEP offer without considering the information contained in Dr. Conway's report.

87. On December 4, 2015, Charter, via counsel, provided prior written notice to Student's counsel that Charter would not fund Student's placement at Prentice or provide reimbursement for placement at Prentice.

88. Charter also inquired whether Parents were still seeking reimbursement for Dr. Conway's independent evaluation. Charter again requested that Student provide the unique circumstances justifying exceeding the cost criteria guidelines of the Riverside County SELPA attached to Charter's March 16, 2015 letter. Charter indicated if Student did not respond in one week, Charter would file for a due process hearing to defend its October 2014 assessment and the November 2015 IEP.

89. Charter filed a due process request on December 22, 2015 regarding its offer in the November 2015 IEP and the October 2014 assessment and IEE criteria.

90. Student submitted an amended due process request on December 24, 2015, which OAH deemed filed on December 28, 2015, adding the November 2015 IEP to her claims.

#### *Dr. Conway's Testimony and Recommendations*

91. With respect to Charter's offers in the October 2014 and May 2015 IEP's, Dr. Conway believed they were inadequate because Student required specialized academic instruction at all times, not only for 60 minutes of the week.

92. With respect to Charter's offer in the November 2015 IEP, Dr. Conway again believed it was inadequate because Student required specialized academic instruction at all times, not only for five hours a week. She opined Charter's offered program would not allow Student meaningful access to her education. Due to Student's multiple learning disabilities, she believed without full-time specialized academic instruction, Student would not learn the other five hours of the day, five days a week. She stated that for students with learning disabilities, they might not reach performance at their grade level, but they could achieve their goals and make progress.

93. With respect to Student's claim that Charter failed to offer Student appropriate dyslexia services in each of the IEP's at issue, Dr. Conway defined "dyslexia services" as services provided to children with a variety of reading disabilities, and included teaching the child how to decode, how to do reading comprehension, and how to spell. There were

several methodologies that could be used to deliver instruction, including Orton-Gillingham, Slingerland, Lindamood-Bell, and Kumon. With respect to working with Student, Dr. Conway believed the accommodations Charter offered such as sitting closer to the teacher sometimes, having extended time for tests, and using a calculator were all well intended but Student required a methodology, not an accommodation. While accommodations could assist Student, because of her multiple disabilities what was missing from Charter's program was a teaching methodology, which involves the manner in which a student is taught. Dr. Conway believed sitting close or having more time on a test would not train Student to read information, memorize it, retain it, and regurgitate it. Student still needed to learn how to learn.

94. Dr. Conway's report recommended Student be placed at a nonpublic school, but her testimony painted a picture in which it would be possible for Student to receive a FAPE in a less restrictive environment. At the core of her description of what Student required to access the curriculum and make more than trivial progress was that Student needed specialized academic instruction all day, every day, in a small classroom – meaning no more than 12 to 15 students – along with similar students, meaning others with learning disabilities. Based on Dr. Conway's testing and observations of Student in the classroom at Charter, she believed Student was and would be distracted in a large classroom. Dr. Conway's testimony did not preclude the possibility that Student could benefit from a more intensive program of specialized academic instruction on a comprehensive public school campus either in a special day class environment or possibly even in a resource specialist program for many hours a day and some time in general education for peer socialization. Dr. Conway preferred the nonpublic school environment for Student because Student would likely not feel that she was different since all students at nonpublic schools have disabilities, and it might help her social/emotional status to not experience feelings of being different. However, this did not seem to be a sufficient basis from which to conclude that the only environment in which Student would have access to a FAPE was a nonpublic school.

95. Overall, Dr. Conway's testimony was very persuasive. Apart from her qualifications as a very experienced assessor who had worked at the request of both school districts and families, the overall tenor of her testimony did not appear to be advocating or urging for the outcome desired by Parents. While her report recommended placement at a nonpublic school and she was complimentary of the program at Prentice, she did not harp on it or emphasize it. What she repeatedly testified was that Student needed full-time instruction from a special education credentialed teacher in a small classroom (in comparison to typical public programs of 25 to 30 students) of similarly disabled students. The content of her testimony lent itself to the interpretation that it would be possible for Student to receive educational benefit in a public school so long as her program consisted of full-time specialized academic instruction for all academic subjects. The fact that she did not stress a need for placement at a nonpublic school, as Parents wanted, but emphasized her opinion that Student merely needed all-day-every-day specialized academic instruction lent credibility to her opinions on what Student required to receive a FAPE.

*Testimony of Charter's Expert Jenny Ponzuric*

96. The school psychologist who conducted Charter's October 2014 assessment was no longer employed by Charter at the time of hearing and Charter proffered Jenny Ponzuric, M.A., as an expert to explain Charter's assessment and Charter's offers and to dispute the opinion of Dr. Conway. Ms. Ponzuric held a clear Administrative credential, a Pupil Personnel Services credential as a school psychologist, a school neuropsychology post-graduate certificate, and was a licensed educational psychologist. She had worked for the Conejo Valley Unified School District as a school neuropsychologist and for the Ventura County Office of Education as the Director of Teacher Support Services. Six months before the hearing, she became a self-employed educational consultant. In her 13 years as a school psychologist, she estimated she had attended between 500 and 700 IEP team meetings.

97. Ms. Ponzuric had not directly assessed or observed Student or ever met her. Her preparation for her testimony involved reviewing the complete exhibit binders of Student and Charter and reviewing the testing protocols from Dr. Conway's evaluation. Without objection, she was deemed an expert in school psychology, neuropsychology, special education teacher qualifications, school psychologist qualifications, eligibility determinations, program development, and design and implementation of programs to students with disabilities.

98. With others focusing on Student's areas of weakness, Ms. Ponzuric highlighted Student's areas of strength, the categories in which she demonstrated average ability or achievement. Among them were her scores from the Woodcock-Johnson Tests of Achievement in the areas of story recall and directions. Ms. Ponzuric found that interesting because those subtests both required memory, but Student had lower scores on other memory tests. She identified that Student performed better with information in an auditory format than when she was required to read material herself. This indicated that it was important for Student's educational program to ensure accommodations would include her ability to hear information, such as having things read aloud to her, having access to audio books (which, interestingly, Charter did not provide), and finding other ways for her to access the information other students were reading.

99. Ms. Ponzuric noted Student's deficit in reading and other areas of academic weakness, such as struggling to read words, having poor fluency of reading, difficulties with spelling, and difficulties with math calculation, depending on which test one looked at, and with math problem solving. Ms. Ponzuric stated it was possible to remediate reading deficits, by identifying the specific areas of academic weakness regarding reading, which cognitive process was getting in the way of Student being able to read, and designing a program to help address those areas. Some areas could be remediated or addressed, for other areas research had not shown that the cognitive processing area could be fixed and a Student might always need accommodations. Memory was one area that might always need accommodation.

100. For students with difficulties in math calculation – the ability to complete math problems that don't involve language, such as word problems – Ms. Ponzuric described research-based strategies to address the deficit, including setting math facts to music, programs that added language and stories for Students to learn multiplication facts, and sometimes mass repetition worked for students to learn math facts, such as with flashcards or computer programs. Which method might be successful depended on the student.

101. Ms. Ponzuric agreed with the information Dr. Conway summarized from her testing results, but disagreed with some of Dr. Conway's interpretations. For example, Ms. Ponzuric did not agree that the difference in the BRIEF ratings by Charter teacher Mr. Jaime and Prentice teacher Ms. Stanley necessarily meant that Student improved since changing schools. Also, while she agreed with Dr. Conway's statement that it would not have been appropriate for Student to have a general education program only with accommodations, she did not think that accurately described the program Charter had offered Student in the October 2014 and May 2015 IEP's because Student was also provided 60 minutes a week of group specialized academic instruction. In attempting to discredit Dr. Conway's opinion in this way, Ms. Ponzuric herself disregarded the fact that this insignificant amount of specialized academic instruction had Charter calculate her time in the general education environment to be 100 percent.<sup>23</sup>

102. Ms. Ponzuric agreed with 10 of the 13 recommendations in Dr. Conway's report. She did not agree with Dr. Conway's first recommendation, placement in a nonpublic school, because she did not agree with Dr. Conway's statement that Student's needs had not been met at Charter. In her opinion, Student's report card grades, information from teachers, and information in a progress-on-goals document she had seen indicated that Student had made progress. She did not agree with Dr. Conway's seventh recommendation regarding class size, because she was confused about where the numbers for class size and student to adult ratio came from. She was not aware of research that suggested specific numbers for students with needs like Student's. Finally, she did not agree with Dr. Conway's eleventh recommendation, because it seemed to relate to Dr. Conway's administration of the Test for Auditory Processing Disorders and based on the protocols, Student was at the lowest score that was still passing. Ms. Ponzuric therefore did not understand why Dr. Conway would suggest referring Student to an audiologist to rule out an auditory processing disorder.

103. Ms. Ponzuric did not believe Student required small group instruction throughout her entire day, and relied on Student's grades as evidence that Student was making progress in her general education classes. She believed that 60 minutes per week of specialized academic instruction in a group environment was sufficient for Student to make progress towards her goals because she had made progress on her prior goals with more time, and in the October 2014 IEP she had fewer goals so less specialized academic instruction

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<sup>23</sup> Charter's closing argument calculated Student to be in the general education environment 95 percent of the time, but the IEP Charter prepared stated Student was in the general education environment 100 percent of the time.

time was adequate. She believed that 60 minutes a week was still a sufficient amount of specialized academic instruction in the May 2015 IEP because Student's grades and the pre-test/post-test sheet from the REWARDS program showed progress. She believed that one hour a day, three days a week of individual specialized academic instruction and one hour a day, two days a week of group specialized academic instruction was sufficient for Student to make progress on the goals developed for the November 2015 IEP because in looking at the goals written for that IEP in comparison to the prior IEP, it would require more time to work on them, and there were more goals than before. She agreed with Charter that Student did not require more than five hours a week of specialized academic instruction.

104. Ms. Ponzuric's testimony was less credible on individual points as well as overall. She endorsed everything Charter had done and proposed to do, with only one minor exception and one significant one. She recommended Student be provided audio books, which Charter had not done. And she did not agree that Charter had offered sufficient resource specialist consultation time to Student's general education teachers and to Parents in the November 2015 IEP, a major concession on her part. But in all other respects, she said exactly what Charter wanted her to say, even when, as analyzed below, the interpretation of the data was entirely shallow and self-serving. Her support for Charter's formulaic and cookie-cutter idea regarding having specialized academic instruction time go slightly down or up based on the number of goals drafted for a Student detracted from her credibility. While Ms. Ponzuric provided very clear technical explanations of, for example, what "math calculation" is, her opinions as to the adequacy of Charter's offers in the three IEP's in dispute were not persuasive.

#### *Other Evidence Relevant to the Issues and Remedies*

105. At hearing, Dr. Conway testified she charged Parents \$5,000 for the psychoeducational assessment she conducted, which included psychological testing, one observation at Prentice on March 11, 2015, before Parents placed Student there, and one observation at Charter on March 13, 2015. Dr. Conway charged an additional \$250 for one hour to observe Student a second time at Charter on March 23, 2015, because the first observation was not during instructional time despite Dr. Conway's efforts to arrange for that. Dr. Conway charged an additional \$375 for one and a half hours to observe Student at Prentice on June 1, 2015. Dr. Conway did not charge Parents for observing Student at Prentice again on July 16 and October 15, 2016. Dr. Conway did not charge Parents for travel time or for mileage related to any of her testing or observations. Parents paid Dr. Conway a total of \$5,625 for the independent evaluation.

106. Dr. Conway based her fee on what she understood to be the market value of her independent evaluation. Los Angeles Unified School District allowed \$5,500 for an independent psychoeducational evaluation, and she charged Parents a little less. She took into consideration what other counties charge in formulating her fee. She believed her rate was similar to what others doing the assessment would charge. She had never been paid less for this type of evaluation, but she had been paid as much as \$6,500. She regularly

conducted assessments in Orange, Riverside, Los Angeles and Ventura Counties and it was not unusual for her to travel more than 60 miles to conduct an evaluation.

107. Parents did not submit written invoices or receipts for payment to Prentice for Student's attendance from May 4, 2015 through the hearing in May 2016.<sup>24</sup> However, Mother's sworn testimony was that tuition was \$21,000 a year, there was an extra cost for the summer program, and that Student used to attend Homework Club twice a week but at the time of hearing attended Homework Club three times a week, at a cost of \$15 per session. Mother calculated the total amount paid to Prentice as \$26,000.

108. No witness testified as to what Student would require as compensatory education.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>25</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>26</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

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<sup>24</sup> Charter's closing argument referred to Student's Exhibit 29, which was not admitted into evidence during the hearing.

<sup>25</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>26</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [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.) The Ninth Circuit Court of Appeals (Ninth Circuit) has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof on Issues A, B, C, D, E, F, and G; District, as the complaining party, bears the burden of proof on Issues One, Two and Three.

*Student's Issue A: Placement Offer in October 15, 2014 IEP*

5. In Student's Issue A, Student contends Charter denied her a FAPE by failing to offer appropriate placement in the October 15, 2014 IEP. Specifically, Student contends her placement in a general education classroom and one hour a week of group specialized academic instruction was not sufficient to enable Student to make progress and gain educational benefit. Charter contends that because Student had made progress on more goals in her October 2013 IEP in the general education classroom with 90 minutes a week of specialized academic instruction, and because the number of goals was reduced in the October 2014 IEP, it was adequate to offer Student placement in the general education classroom "100 percent" of the time with 60 minutes a week of group specialized academic instruction. Additionally, Charter contends that it is an independent study program and it developed a special education program that fit within the Charter program Parents had chosen, which was for Student be in the Mosaic program in the general education classroom three days a week and at home two days a week. Both parties fully litigated the appropriateness of the placement actually offered by Charter, even though Student attempted to prove Student required placement at a nonpublic school, and Charter disputed that Student's preferred placement, a nonpublic school, would have been the least restrictive environment for Student.

6. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively 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 *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

7. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

8. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) However, students are expected to make progress towards their IEP goals and academic goals. "[T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (*Id.* at pp. 203-204.) IEP teams must review a student's progress at least annually and convene an IEP team meeting and revise the student's IEP as appropriate to address any lack of expected progress toward the annual IEP

goals and in the general education curriculum, where appropriate to address the student's lack of progress. (20 U.S.C. § 1414(B)(4)(A)(ii)(I).)

9. A student may derive educational benefit under *Rowley* if some of her goals and objectives are not fully met, or if she makes no progress toward some of them, as long as she makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with her abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130 (*Walczak*); *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *T.B. ex rel. Brenneise v. San Diego Unified School Dist.* (S.D.Cal, March 30, 2011, No. 08CV28–MMA (WMc)) 2011 WL 1212711, \* 5.) Whether a student has received more than *de minimis* benefit from his or her IEP must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.)

10. Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. For a student in a mainstream class, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak, supra*, 142 F.3d at p. 130.) A district need not guarantee that a student will make a month's academic progress in a month's instruction; a student may benefit even though her progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.) A student derives benefit under *Rowley* when she improves in some areas even though she fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P* (3d Cir. 1995) 62 F.3d 520, 530.) She may derive benefit while passing in four courses and flunking in two. (*Cypres-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481, *affd. as mod.* (5th Cir. 1197) 118 F.3d. 245.)

11. School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56031.)

12. Student established by a preponderance of the evidence that while placed in the general education environment for all but 90 minutes a week, Student made some progress on her goals from her October 2013 IEP, but the increased difficulty and workload of sixth grade was too much for Student to handle without an intensive duration and

frequency of specialized academic instruction. Student was documented to get off topic while writing, forget the steps to follow in math problems, not be able to figure out what math word problems were asking, and struggle with spelling. Before the October 15, 2014 IEP team meeting, Student was being given full credit for the home study packets she completed with assistance from her younger brother and Mother and full credit for classwork she completed in a group or with a partner. But her independently completed quiz and test scores were quite low, despite having testing accommodations such as tests being read aloud to Student, tests being taken with full access to textbooks and notes, and tests being administered in a small group setting to reduce distractions. When Student was allowed to retake a test after the content was reviewed in class and after using the corrected original test as a study guide, she still scored only 25 percent. At the time of the IEP team meeting on October 15, 2014, it was evident Student was not able to independently demonstrate that she was learning what was being taught in her general education classes.

13. Charter was aware Student was struggling to complete the home study packets even with extensive help and that the workload was too much.

14. Charter had the results of its triennial assessment, concluding that Student had average intelligence for her age, but also had auditory and attention processing disorders. Despite Charter giving her passing grades, the academic achievement testing of Charter's triennial assessment documented Student was functioning well below grade level in almost every area and had "average to limited," or lower, performance in all academic areas.

15. Charter unreasonably concluded that because Student had met three and partially met two of her goals from the October 2013 IEP with only 90 minutes a week of specialized academic instruction, Student was likely to receive some educational benefit from 60 minutes a week of specialized academic instruction because in the October 2014 IEP, Charter had developed only four, instead of five, goals. Charter disregarded Mother's disagreement with Charter's identification of Student as having unique needs only in the areas of basic reading skills and math calculations and Mother's disagreement with Charter's proposal to reduce Student's service time because of her supposedly reduced needs. Despite her average intelligence and ability, Student had significant specific learning disabilities in multiple areas and was far behind her same-grade and same-age peers in her academic achievement generally and in her reading ability specifically. Dr. Conway's report and testimony persuasively established that due to her abilities, disabilities, and level of academic functioning at the time of the October 2014 IEP, Student required specialized academic instruction many hours a day every day of the week in order for Student to access the curriculum and make meaningful progress.

16. While the starting point in identifying the least restrictive environment for a student is the presumption that a student will attend the public school that the student would attend if he or she were not disabled and will participate full time in the general education classroom environment with their non-disabled peers, special classes or separate schooling may occur when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The information developed from Student's incomplete progress on her writing and math goals from the October 2013 IEP, her performance in sixth grade on independently taken, accommodated quizzes and tests up until the October 15, 2014 IEP, Mother's reports of Student's struggles with the substance and quantity of work in sixth grade, and the results of Charter's psychoeducational assessment collectively indicated that, as Dr. Conway concluded, Student could not be satisfactorily educated in general education classes with supplementary aids and services. Whether specialized academic instruction is regarded as a placement or a service, Student proved she required all of her academic instruction to be provided through specialized academic instruction in a small classroom of students with similar disabilities, as stated in Dr. Conway's report and testimony. Thus, Charter's October 15, 2014 IEP placement offer denied Student a FAPE.

17. In summary, Student carried her burden of proof that Charter did not offer her an appropriate placement in the October 15, 2014 IEP.

*Student's Issue B: Specific Related Services Offer in October 15, 2014 IEP*

18. In Student's Issue B, Student contends that Charter denied her a FAPE by failing to offer appropriate related services in the October 15, 2014 IEP. Specifically, Student contends Charter did not offer sufficient specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training. Charter contends that because Student had made progress on more goals in her October 2013 IEP with 90 minutes a week of specialized academic instruction, and because the number of goals was reduced in the October 2014 IEP, it was adequate to offer Student 60 minutes a week of group specialized academic instruction. Additionally, Charter contends that Student's specialized academic instruction was addressing her challenges with reading, spelling, and writing, and she did not require behavior supports and services or social skills training.

19. As discussed above, based on the information known to Charter at the time of the October 15, 2014 IEP team meeting, Student required specialized academic instruction many hours a day every day to be satisfactorily educated. Charter's offer of 60 minutes a week of group specialized academic instruction was not reasonably calculated to confer educational benefit on Student.

20. The October 2014 IEP stated that Student would not participate in the general education environment for basic reading, writing, and math skills because she needed specialized academic instruction in reading, writing and math to access and progress in the core curriculum. Student's challenge to the IEP's offer of related services in the category of dyslexia services is bound up with the challenge to the quantity of specialized academic instruction, in that Student contends Charter did not offer her sufficient instruction in how to decode, how to do reading comprehension, and how to spell. While attacking methodology might be one approach to contesting the dyslexia services provided, Student's primary complaint with Charter's offer seems to be the inadequate time offered for specially designed instruction to remediate the challenges Student experienced in reading and writing due to her auditory processing disorder/dyslexia. The 60 minutes a week of specialized

academic instruction Charter offered was divided among reading, spelling, writing and math. In this case, it does not seem there is a distinction between Student's challenges to Charter's offer of related services regarding specialized academic instruction and dyslexia services. For the same reasons Student met her burden of proof regarding the inadequacy of Charter's offer regarding specialized academic instruction, she met her burden of proof regarding the inadequacy of Charter's offer of related services to address Student's dyslexia.

21. If a child's behavior interferes with her learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

22. At the time of the October 15, 2014 IEP, Parents perceived Student to be emotionally struggling with the volume and difficulty of sixth grade work and Student's inability to complete her work in the same amount of time as her younger brother or what would have been expected for other students in her grade. Mother wrote to Student's special education teacher that the workload was weighing on Student, but neither in her written correspondence or in her comments at the October 15, 2014 IEP meeting did she share any details of Student's experiences or emotions. Charter's teachers believed Student was happy at school and had friends, and Parents offered no specific information to call into doubt the validity of those beliefs. There was no evidence that Student demonstrated behaviors that impeded her learning or the learning of others, and there was no evidence that Student had a unique need in the area of socialization.

23. Student did not establish by a preponderance of the evidence that she required either behavior supports and services or social skills training at the time of the October 15, 2014 IEP team meeting.

24. In summary, Student carried her burden of proof that Charter did not offer her appropriate related services in the October 15, 2014 IEP with respect to specialized academic instruction and dyslexia services, but she did not carry her burden of proof regarding behavior supports and services and social skills training.

*Student's Issue C: Placement Offer in May 27, 2015 IEP*

25. In Student's Issue C, Student contends Charter denied her a FAPE by failing to offer appropriate placement in the May 27, 2015 IEP. Specifically, Student contends that her continued placement in a general education classroom and one hour a week of group specialized academic instruction was not sufficient and Student had not made progress and gained educational benefit since the October 15, 2014 IEP. Charter contends that Student's course grades, work samples, and data collected by her specialized academic instruction teacher demonstrated Student was making progress in her placement in the general education classroom "100 percent" of the time with 60 minutes a week of group specialized academic instruction. Additionally, Charter contends that it is an independent study program and it

developed a special education program that fit within the Charter program Parents had chosen, which was for Student be in the Mosaic program in the general education classroom three days a week and at home two days a week. Both parties fully litigated the appropriateness of the placement actually offered by Charter, even though Student attempted to prove Student required placement at a nonpublic school, and Charter disputed that Student's preferred placement, a nonpublic school, would have been the least restrictive environment for Student.

26. The preponderance of the evidence established that while placed in the general education environment for all but 60 minutes a week from October 15, 2014 through May 1, 2015, Student made only *de minimis* progress. Her grades were passing, due only to receiving near perfect points for the home study packets she completed with assistance from her younger brother and Mother (and sometimes she only completed half of the work required of her classmates) and full credit for classwork she completed in a group or with a partner. But her independently completed quiz and test scores were quite low, apart from her perfect spelling tests on words far below her grade level. Despite having testing accommodations such as tests being read aloud to Student, tests being taken with full access to textbooks and notes, and tests being administered in a small group setting to reduce distractions, Student did not demonstrate knowledge of the material being taught in her general education classes. Student had perfect scores on a few spelling tests regarding discrete, simple words related to her spelling goal, but her ability to spell very simple words in narrative or descriptive writing was not improved.

27. Charter's data regarding Student's progress in reading fluency reflected that after six months of specialized academic instruction at the service level Charter recommended Student was barely able to do any better than she had been doing when the October 2014 IEP was written. At the time of the May 27, 2015 IEP team meeting, it was evident Student was not able to independently demonstrate that she was learning what was being taught in her general education classes.

28. Two months after the October 2014 IEP, Charter was aware that Student was working eight to ten hours a day on home study days, and sometimes also spent time doing her home study packets on weekends. Charter was aware that Mother, who worked with Student more than full-time two days a week and some weekends, was not seeing progress in Student's work and decided to supplement Student's education with Barton Reading to help Student as a student with dyslexia and Cogmed to help Student as a student with attention and memory challenges. Charter was aware Parents were providing an additional eight to ten hours a week of services specifically to address her disabilities. Even with those services, Student only made *de minimis* progress on her goals and in her education. Charter failed to recognize that Student needed additional services to make progress. Charter failed to propose increasing the amount of special education it was providing Student or to propose any other programming or service change to address Student's needs.

29. Charter teachers agreed that Student was spending too much time trying to complete her school work, and suggested shortening the length of assignments or number of

problems that needed to be completed. But they did not suggest supporting Student in learning the necessary material or completing her assignments by increasing the amount of special education service Charter provided.

30. After the first progress report regarding Student's goals, Mother contacted Charter with concern because the report did not indicate progress. One of Student's teachers reassured Mother she did see growth in class, but growth in class did not always translate into meeting goals. The teacher pondered whether maybe Student's goals had been set too high. Rather than increase the special education services Charter provided to assist Student in meeting her goals, Charter was interested in reducing Student's goals so it could claim to have met them with the minimal amount of specialized academic instruction Charter was providing.

31. Charter unreasonably concluded that Student was receiving educational benefit based on her course grades and some reading fluency tracking documents. Charter ignored the fact that while getting nowhere, Student was spending twice as long as typical students doing home study packets with full-time support from her younger brother or Mother, and participating in two supplemental programs to address Student's disabilities. Dr. Conway's report and testimony persuasively established that despite Student's average intelligence and ability, due to Student's significant specific learning disabilities in multiple areas, and due to how far behind her same-grade and same-age peers she was in her academic achievement generally, and in her reading ability specifically, Student required specialized academic instruction many hours a day every day of the week for Student to access the curriculum and make meaningful progress.

32. While the starting point in identifying the least restrictive environment for a student is the presumption that a student will attend the public school that the student would attend if he or she were not disabled and will participate full time in the general education classroom environment with their non-disabled peers, special classes or separate schooling may occur when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The information developed from Mother's reports of Student's inability to complete work without full-time support, her need to have her workload reduced to sometimes half of what other students were required to complete, her reported lack of progress on her October 2014 IEP goals in the first reporting period, her very poor performance on independently taken, accommodated quizzes and tests between the time of the October 15, 2014 IEP and the last date Student attended Charter in May 2015, and the results of Charter's psychoeducational assessment collectively indicated that, as Dr. Conway concluded, Student could not be satisfactorily educated in general education classes with supplementary aids and services. Whether specialized academic instruction is regarded as a placement or a service, Student proved she required all of her academic instruction to be provided through specialized academic instruction in a small classroom of students with similar disabilities, as stated in Dr. Conway's report and testimony. Charter's May 27, 2015 IEP placement offer denied Student a FAPE.

33. In summary, Student carried her burden of proof that Charter did not offer her an appropriate placement in the May 27, 2015 IEP.

*Student's Issue D: Specific Related Services Offer in May 27, 2015 IEP*

34. In Student's Issue D, Student contends that Charter denied her a FAPE by failing to offer appropriate related services in the May 27, 2015 IEP. Specifically, Student contends Charter did not offer sufficient specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training. Charter contends that Student was making progress with the amount of specialized academic instruction Charter offered in the October 15, 2014 IEP and therefore it was not necessary to change the amount. Additionally, Charter contends Student did not require behavior supports and services or social skills training.

35. As explained regarding Student's Issue C above, based on the information known to Charter at the time of the May 27, 2015 IEP team meeting, Student required many hours a day every day of specialized academic instruction to be satisfactorily educated. Charter's offer of 60 minutes a week of group specialized academic instruction was not reasonably calculated to confer educational benefit on Student.

36. As explained regarding Student's Issue B above, Student's IEP stated that Student would not participate in the general education environment for basic reading, writing, and math skills because she needed specialized academic instruction in reading, writing and math to access and progress in the core curriculum. Student's challenge to the May 27, 2015 IEP's offer of related services in the category of dyslexia services is bound up with the challenge to the quantity of specialized academic instruction, in that Student contends Charter did not offer her sufficient instruction in how to decode, how to do reading comprehension, and how to spell. While attacking methodology might be one approach to contesting the dyslexia services provided, Student's primary complaint with Charter's offer seems to be the inadequate time offered for specially designed instruction to remediate the challenges Student experienced in reading and writing due to her auditory processing disorder/dyslexia. The 60 minutes a week of specialized academic instruction Charter offered was divided among reading, spelling, writing and math. In this case it does not seem there is a distinction between Student's challenges to Charter's offer of related services regarding specialized academic instruction and dyslexia services. For the same reasons Student met her burden of proof regarding the inadequacy of Charter's offer regarding specialized academic instruction, she met her burden of proof regarding the inadequacy of Charter's offer of related services to address Student's dyslexia.

37. Shortly before the May 27, 2015 IEP, Parents felt Student's difficulties with the work required in the general education program Charter provided were making Student anxious, nervous about the amount of school work, and very unhappy. They removed her from Charter and placed her at Prentice. Charter teachers claimed they had thought Student was relaxed and comfortable at school, but Mr. Jaime's responses on the Behavior Assessment Rating System for Children endorsed concerns about withdrawal and problems

with socialization. Based on the discussion at the May 27, 2015 IEP team meeting in which Parents shared their observations about Student's distress, Charter offered to assess Student in the area of social/emotional function.<sup>27</sup> There was no evidence that Student demonstrated behaviors that impeded her learning or the learning of others, and there was no evidence that Student had a unique need in the area of socialization.

38. Student did not establish by a preponderance of the evidence that she required either behavior supports and services or social skills training at the time of the May 27, 2015 IEP team meeting.

39. In summary, Student carried her burden of proof that Charter did not offer her appropriate related services in the May 27, 2015 IEP with respect to specialized academic instruction and dyslexia services, but she did not carry her burden of proof regarding behavior supports and services and social skills training.

*Student's Issue E and Charter's Issue One: Placement Offer in November 19, 2015 IEP*

40. Because the law and evidence relating to both Student's and Charter's issues are intertwined, the two issues are analyzed together.

41. In Student's Issue E, Student contends Charter denied her a FAPE by failing to offer appropriate placement in the November 19, 2015 IEP. Specifically, Student contends that her placement in a general education classroom, two hours a week of group specialized academic instruction and three hours a week of individual specialized academic instruction would not have been sufficient because the nature and severity of Student's disabilities required full-time specialized academic instruction in a small group of students with similar disabilities. In Charter's Issue One, Charter seeks a determination that Charter offered Student a FAPE in the November 19, 2015 IEP, and one component of Charter's attempt to prove up its offer is the appropriateness of the placement. Charter contends Student's course grades, work samples, and data collected by her specialized academic instruction teacher collected prior to Student's withdrawal from Charter demonstrated Student was making progress in her placement in the general education classroom "100 percent" of the time with 60 minutes a week of group specialized academic instruction when she had four goals, and it was therefore reasonable to expect Student could make progress on six goals and obtain some educational benefit with placement in the general education classroom three days a week, home instruction from Mother two days a week, two hours a week of group specialized academic instruction and three hours a week of individual specialized academic instruction. Both parties fully litigated the appropriateness of the placement actually offered by Charter, even though Student attempted to prove Student required placement at a

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<sup>27</sup> Parents did not consent to this assessment. Dr. Conway was conducting her IEE at that time. Charter filed a request for a due process hearing to override Parents' refusal of consent, but as indicated in footnote 2, Parents later consented and Charter withdrew the issue.

nonpublic school, and Charter disputed that Student's preferred placement, a nonpublic school, would have been the least restrictive environment for Student.

42. This decision does not analyze every element of FAPE on which Charter had the burden of proof. For the reasons set forth below, this decision concludes that Charter did not satisfy its burden of proof regarding a major substantive element of FAPE, appropriate placement. Therefore, it is unnecessary to evaluate every procedural and substantive component of Charter's offer. Even if Charter had met its burden of proof as to all the other elements of a FAPE, without an offer that afforded Student an appropriate placement, the November 19, 2015 IEP did not offer Student a FAPE.

43. The preponderance of the evidence established that while placed in the general education environment for all but 60 minutes a week from October 15, 2014 through May 1, 2015, Student made only *de minimis* progress. Her grades were passing, due only to receiving near perfect points for the home study packets she completed with assistance from her younger brother and Mother (and sometimes she only completed half of the work required of her classmates) and full credit for classwork she completed in a group or with a partner. But her independently completed quiz and test scores were quite low, apart from her perfect spelling tests on words far below her grade level. Despite having testing accommodations such as tests being read aloud to Student, tests being taken with full access to textbooks and notes, and tests being administered in a small group setting to reduce distractions, Student did not demonstrate knowledge of the material being taught in her general education classes. Student had perfect scores on a few spelling tests regarding discrete, simple words related to her spelling goal, but her ability to spell very simple words in narrative or descriptive writing was not improved.

44. Charter used information regarding Student's abilities, disabilities, and performance while in Charter's program from October 15, 2014 through May 1, 2015 and information gained from Prentice during the November 19, 2015 IEP team meeting to conclude that Student required eight goals, but it only developed six goals in the November 19, 2015 IEP and agreed to reconvene to develop goals for math fluency and self-advocacy and to consider the information in Dr. Conway's independent educational evaluation; Charter did not hold another IEP team meeting. Charter reasoned that Student had made progress on five goals in fifth grade with 90 minutes a week of group specialized academic instruction, progress on four goals in sixth grade with 60 minutes a week of group specialized academic instruction, and Mother complained about it being hard for Student to complete home study packets, so two hours a week of group specialized academic instruction and three hours a week of individual specialized academic instruction should be sufficient for Student to make progress on six goals in seventh grade.

45. While it might seem significant for Charter to have increased its offer of specialized academic instruction from one hour to five hours a week, and to change the model of delivery of that service to include individual as well as group instruction, even five hours a week of specialized academic instruction was inadequate to enable Student to make meaningful progress. Student proved she required all of her academic instruction to be

provided through specialized academic instruction in a small classroom of students with similar disabilities, as stated in Dr. Conway's report and testimony. Charter's November 19, 2015 IEP placement offer denied Student a FAPE.

46. Student carried her burden of proof that Charter did not offer her an appropriate placement in the November 19, 2015 IEP. Charter did not carry its burden of proof regarding the appropriateness of its placement offer and therefore did not demonstrate that it offered Student a FAPE in the November 19, 2015 IEP.

*Student's Issue F and Charter's Issue One: Specific Related Services Offer in November 19, 2015 IEP*

47. Because the law and evidence relating to both Student's and Charter's issues are intertwined, the two issues are analyzed together.

48. In Student's Issue F, Student contends Charter denied her a FAPE by failing to offer appropriate related services in the November 19, 2015 IEP. Specifically, Student contends Charter did not offer sufficient specialized academic instruction, services targeting dyslexia, behavior supports and services, and social skills training. In Charter's Issue One, Charter seeks a determination that Charter offered Student a FAPE in the November 19, 2015 IEP, and one component of Charter's attempt to prove up its offer is the appropriateness of the related services. Charter contends Student had made progress with the amount of specialized academic instruction Charter offered in the October 15, 2014 IEP and it appropriately increased the amount of specialized academic instruction to address the increased number of goals in the November 19, 2015 IEP and to address Mother's complaint about difficulty completing home study packets. Additionally, Charter contends Student did not require behavior supports and services or social skills training, and had offered to conduct a social/emotional function assessment at the May 27, 2015 IEP, but Parents had not yet consented to the assessment by the time of the November 19, 2015 IEP team meeting.

49. As explained regarding Student's Issues A, C, and E above, based on the information known to Charter at the time of the November 19, 2015 IEP team meeting, Student required many hours a day every day of specialized academic instruction to be satisfactorily educated. Charter's offer of one hour a day of specialized academic instruction, three sessions a week individual and two sessions a week in a group, was not reasonably calculated to confer educational benefit on Student.

50. As explained regarding Student's Issues B, D, and F above, Student's IEP stated that Student would not participate in the general education environment for "specialized academic instruction" because she needed specialized academic instruction in reading, writing and math to access and progress in the core curriculum. Student's challenge to the November 19, 2015 IEP's offer of related services in the category of dyslexia services is bound up with the challenge to the quantity of specialized academic instruction, in that Student contends Charter did not offer her sufficient instruction in how to decode, how to do reading comprehension, and how to spell. While attacking methodology might be one

approach to contesting the dyslexia services provided, Student's primary complaint with Charter's offer seems to be the inadequate time offered for specially designed instruction to remediate the challenges Student experienced in reading and writing due to her auditory processing disorder/dyslexia. The five hours a week of specialized academic instruction Charter offered was divided among reading, spelling, writing and math. In this case it does not seem there is a distinction between Student's challenge to Charter's offer of related services regarding specialized academic instruction and dyslexia services. For the same reasons Student met her burden of proof regarding the inadequacy of Charter's offer regarding specialized academic instruction, she met her burden of proof regarding the inadequacy of Charter's offer of related services to address Student's dyslexia.

51. By the time of the November 19, 2015 IEP team meeting, Charter had observed Student at Prentice and Student had been attending Prentice for more than five months. In addition to goals to address academic areas, the team agreed to add a self-advocacy goal due to Student's inconsistency asking her Prentice teachers for help when she needed it. Parents did not raise concerns about Student's emotional status at the November 19, 2015 IEP team meeting, and Prentice teacher Ms. Stanley's rating scale on the Behavior Assessment System for Children completed in October 2015 rated Student as normal in social/emotional areas that had been rated as concerning in May 2015 by Charter teacher Mr. Jaime. There was no evidence that Student demonstrated behaviors that impeded her learning or the learning of others, and there was no evidence that Student had a unique need in the area of socialization.

52. Student did not establish by a preponderance of the evidence that she required either behavior supports and services or social skills training at the time of the November 19 2015 IEP team meeting.

53. In summary, Student carried her burden of proof that Charter did not offer her appropriate related services in the November 19, 2015 IEP with respect to specialized academic instruction and dyslexia services, but she did not carry her burden of proof regarding behavior supports and services and social skills training. In so far as Student successfully demonstrated Charter denied her a FAPE with respect to appropriate related services, Charter did not meet its burden of proof that the November 19, 2015 IEP offered Student a FAPE.

*Student's Issue G and Charter's Issues Two and Three: Legal Adequacy of District's Assessment and Student's Entitlement to an IEE at Public Expense*

54. Because the law and evidence relating to both Student's and Charter's issues are intertwined, the three issues are analyzed together.

55. In Student's Issue G, Student contends Charter did not respond to Parents' February 12, 2015 written request for an independent educational evaluation in the area of psychoeducation without unnecessary delay. Student asserts that because Charter agreed to fund an IEE in March 2015, but then did not fund the assessment by the independent

evaluator Student selected, and instead waited until December 2015 to file to defend the October 2014 assessment Charter had conducted, Charter waived its right to defend its assessment due to unnecessary delay. Student contends she is entitled to reimbursement for the full cost of the IEE obtained from Dr. Conway. In Charter's Issue Two, Charter contends its October 2014 psychoeducation assessment of Student was appropriate under the IDEA and Student therefore is not entitled to an IEE at public expense. In Charter's Issue Three, Charter contends that the criteria it established for IEE's with respect to distance and cost are appropriate, and Student therefore is not entitled to reimbursement for the IEE by Dr. Conway because she exceeded the distance and cost limits.

56. A student who is eligible for special education and related services must be reevaluated<sup>28</sup> at least once every three years, and when a parent requests a reassessment. (20 U.S.C. § 1414(a)(2)(B), (a)(2)(A)(i); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a).) The reassessment shall be conducted under the procedures and assessment requirements set forth regarding initial assessments, as well as the requirements for reassessment. (Ed. Code, § 5638, subd. (a)(1), (b).)

57. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "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 child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329(b); 56506(c).)

58. The provision of an independent evaluation is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an independent evaluation, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that an evaluation obtained by the parent did not meet agency criteria.

59. The term "unnecessary delay" as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous 56 IDELR 175* (OSEP 2010).) Some delay in the provision of an independent evaluation is

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<sup>28</sup> The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." As used in this decision, the terms "evaluation" and "assessment" mean the same thing and are used interchangeably.

reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) The determination of “unnecessary delay” is a fact-specific inquiry. (See *Pajaro Valley Unified Sch. Dist v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C06-0380) 2006 WL 3734289 (a delay of almost three months between parent’s request for an independent evaluation and district’s due process filing was unreasonable where district offered no explanation or justification for its delay); *J.P. v. Ripon Unified Sch. Dist., supra*, (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993 (two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent and district filed for due process less than three weeks after negotiations came to an impasse was not unnecessary); *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 2007 WL 2851268 (district’s 10-week delay in filing a due process request was not a per se violation where there was evidence of ongoing efforts during that time to resolve the matters and district, within 27 days of the independent evaluation request, orally told parents the request would be denied).)

60. A parent is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent disagrees. (Ed. Code § 56329(b).) If an independent evaluation is at public expense, the criteria under which the assessment is obtained, including location of the evaluation and qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an assessment, to the extent those criteria are consistent with the parent’s right to an independent evaluation. (34 C.F.R. § 300.502(e)(1).) A district’s criteria may not be so narrow as to interfere with a parent’s right to obtain an independent evaluation. (*Letter to Petska*, 35 IDELR 191 (OSEP 2001).) If a public educational agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of pupil in pupil’s current educational placement and setting. (Ed. Code § 56329(b).)

61. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2), (e)(1).) A district may provide parent with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Id.*)

62. School districts may also establish criteria to ensure that public funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies should not be expected to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Id.*) If a district does

establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Id.*) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

63. When enforcing reasonable cost criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an independent evaluation that does not fall within the school district's criteria. (*Letter to Kirby, supra*, 213 IDELR 233 (OSEP 1989).) If an independent evaluation that falls outside the district's criteria is justified by the child's unique circumstances, that evaluation must be publicly funded. (*Id.*) Where the only person qualified to conduct the type of evaluation needed by a child does not meet agency criteria, the public agency must ensure that the parent still has the right to the evaluation at public expense and is informed about where the evaluation may be obtained. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).)

64. In reviewing 34 Code of Federal Regulations part 300.502(b)(2) regarding the obligation of a school district to, in the vernacular, "fund or file" regarding a parent's request for an IEE, the United States Department of Education Office of Special Education Programs advised, "Therefore, if a parent elects to obtain an IEE by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for IEEs or there is no justification for selecting an evaluator that does not meet agency criteria. If the public agency chooses not to initiate a due process hearing, it must ensure that the parent is reimbursed for the evaluation." (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).)

65. The Office of Special Education Programs further advised the California Department of Education to revise the guidance it offered in its documents to specify that "if a parent elects to obtain an IEE by an evaluator not on the public agency's list of evaluators, and the public agency believes the evaluator does not meet agency criteria or there is no justification for selecting an evaluator that does not meet agency criteria, the district may file for due process rather than pay for the IEE." (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).)

66. A school district must provide parents with prior written notice when it refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.) The notice must include an explanation of why the agency proposes or refuses to take the action.

67. If a parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint. (34 C.F.R. § 300.502(c)(2).)

68. In this case, Student requested an IEE on February 12, 2015. On February 20, 2015, Charter initiated communication with Student about the request for an IEE, and Charter's and Student's attorneys spoke to each other the next week. Charter requested that rather than Parents exercising their right to select the independent evaluator, Charter and Parents select a mutually agreeable assessor. Student proposed three assessors.

69. On March 6, 2015, Charter rejected two of Student's requested assessors, said the third was still under consideration, and proposed six other assessors, only one of whom was ultimately revealed to be on the list of assessors Charter had approved. Charter indicated that if a mutual agreement between Charter and Parents regarding who the independent assessor would be was not reached within a week, Charter would file to defend its October 2014 psychoeducational assessment.

70. On March 10, 2015, Charter had heard Parents had selected an independent assessor and that the assessor was coming to Charter in the near future to observe Student. Charter asked for the name of that assessor and, for the first time, provided Parents the list of assessors approved by Charter, via the Riverside County SELPA. Charter indicated it was still open to considering Dr. Passaro, one of Student's originally proposed assessors.

71. No later than March 13, 2015, Charter knew Dr. Conway was Student's chosen independent assessor, because she came to the academy Student attended to observe her.

72. On March 16, 2015, Charter again provided the list of Charter-approved assessors, and for the first time, provided Parents the Riverside County SELPA Guidelines regarding independent evaluations. Charter indicated it believed Dr. Conway did not satisfy the criteria because her office was more than 60 miles away, and Charter asked Student for information supporting any reason for making an exception to the Guidelines regarding either distance or, possibly, cost. Charter indicated they would work with Student to secure an IEE at public expense, but again suggested Student choose an assessor from the SELPA list or any other assessor who satisfied the SELPA Guidelines.

73. Charter knew Student was going forward with the IEE by Dr. Conway on March 23, 2015, when Dr. Conway returned for a second observation of Student at Charter based on the first observation not including any instructional time, at no fault of Dr. Conway.

74. In April 2015, Charter confirmed it had agreed to fund an IEE, and again requested "required information" to justify using Dr. Conway as the independent assessor. Student did not respond to these requests.

75. Charter was again reminded that Student was proceeding with the assessment by Dr. Conway when a Charter team, including the Director of Special Education, ran into Dr. Conway on June 1, 2015, when both Charter and Dr. Conway were at Prentice to observe Student.

76. Three and a half months after Student requested an IEE at public expense, Charter believed Student's selected assessor did not satisfy the SELPA Guidelines for an IEE and neither made further attempts to resolve the request for an IEE, filed to defend Charter's October 2014 assessment, nor filed to avoid paying for Dr. Conway's assessment on the basis that there was no justification for selecting an evaluator that did not meet Charter's criteria.

77. In December 2015, 10 months after Student requested an IEE at public expense, nine months after Charter knew Student had selected an independent assessor Charter believed did not satisfy the SELPA Guidelines, and six months after Parents failed to respond to two requests for information that would justify public funding for an assessor that did not meet Charter's criteria, Charter finally filed to defend its October 2014 assessment and to avoid paying for the assessment by Dr. Conway based on the belief that her office was more than 60 miles from Charter and she charged more than the SELPA Guideline authorized. The passage of more than half a year after Charter was no longer in active communication and negotiation with Student about who would conduct an independent evaluation was unnecessary delay. Charter waived its right to prove the adequacy of its October 2014 assessment and to attempt to enforce its distance and/or cost criteria.

78. Student met her burden of proof regarding unnecessary delay by Charter in responding to Student's February 12, 2015 request for an IEE. Charter waived its right to a determination regarding whether its October 2014 assessment satisfied the requirements of the IDEA. Discussion regarding Charter's cost criteria is included in the Remedies analysis, below.

## REMEDIES

1. 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 school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*)). When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

2. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14,

[114 S.Ct. 361] (*Carter*.) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. 7, 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child’s potential. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, at 1159.)

3. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

4. 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. (*Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*)). The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

5. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case, and the conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d 1489, 1497.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim, supra*, 464 F.3d 1025, 1033.)

6. Student prevailed on Student’s Issues A, C, and E and parts of Student’s Issues B, D, and F, in that Charter denied Student a FAPE by failing to offer appropriate placement, specialized academic instruction, and dyslexia services to Student in the October 2014, May 2015 and November 2015 IEP’s. Student prevailed on Student’s Issue G and Charter’s Issues Two and Three regarding Charter’s unnecessary delay in either funding the IEE with the assessor Student exercised her right to choose or filing to defend its psychoeducational assessment and/or its IEE criteria in response to Student’s request for an IEE by Dr. Conway. As a remedy, Student requested reimbursement for the cost of tuition to attend Prentice from May 2015 through the 2015-2016 school year, prospective placement at Prentice, and reimbursement for the IEE conducted by Dr. Conway.

7. In disagreement with Charter’s offers from October 2014, Parents removed Student from Charter and placed her at Prentice on May 4, 2015. In disagreement with Charter’s offer on May 27, 2015, Student remained at Prentice. Prentice was a private school, but also a school that had been certified by the State Department of Education as a nonpublic school authorized to serve students with mild to moderate disabilities. Although Student did not receive formal services guided by an IEP, she received instruction using evidence-based methodology for addressing the needs of students with specific learning disabilities, specifically the Orton-Gillingham-based Slingerland method. Student received

instruction in standard sixth and seventh grade courses, with grade-level instruction in all subjects except her reading class. In disagreement with Charter's offer on November 19, 2015, Student remained at Prentice. For instruction and afterschool homework support, Parents had paid Prentice \$26,000 at the time of hearing.

8. Charter denied Student a FAPE in the October 15, 2014 IEP. After six months of Student's *de minimis* progress in Charter's program, Parents exercised their right to unilaterally place Student in a different program for the balance of the time until Student's annual IEP team meeting was held in November 2015. Charter denied Student a FAPE in the November 19, 2015 IEP, and Parents exercised their right to unilaterally place Student in a different program. Student is awarded reimbursement of tuition up to \$26,000, subject to proof, as an equitable remedy for Charter's denial of FAPE related to May 4, 2015 through the time of the hearing. Student may be reimbursed up to \$26,000 upon submitting to Charter proof of payment for tuition and afterschool homework support for Student's attendance at Prentice from May 4, 2015 through the end of the 2015-2016 regular school year. Student shall be reimbursed at the Internal Revenue Service rate for transportation for each day of attendance calculated from Parents' home in Irvine, with one 24-mile round trip per day of attendance from May 4, 2015 through the end of the regular 2015-2016 school year.

9. Charter denied Student a FAPE in the October 15, 2014 IEP. Student participated in the program Charter developed from October 15, 2014 through May 1, 2015 and made only *de minimis* progress. As compensatory education for the loss of educational benefit during the time Student was denied a FAPE from the October 15, 2014 IEP through Student's last day of attendance at Charter on May 1, 2015, Student is awarded placement at Prentice for the fall 2016 semester. Charter will fund Student's attendance at Prentice as a nonpublic school, with transportation from Parents' home in Irvine.

10. Student was entitled to IEE from an assessor of her choosing, subject to reasonable cost limitations.<sup>29</sup> With regard to Student's request for reimbursement for the cost of Dr. Conway's assessment, the testimony at hearing established that in terms of satisfying Charter's distance criteria, an assessor was expected to be within 60 miles of Student's district of residence, which, for Charter students, was deemed to be the entirety of Riverside County. Dr. Conway's office in Studio City was exactly 60 miles from the closest edge of the Riverside County border. But more importantly, Dr. Conway did not charge for her travel time or for her mileage to conduct the assessments and observations of Student, despite her distance from Riverside County. The location of her office was therefore irrelevant.

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<sup>29</sup> For example, a student would not be entitled to an independent psychoeducational evaluation that cost \$25,000, when no other evaluator charged more than \$7,500, purely on the principle that a student is entitled to an IEE by any evaluator the student wants.

11. Most importantly, Charter's cost criteria of \$3,500 as a "routine and reasonable" fee for a psychoeducational evaluation was impermissibly based on an average of a random sampling of fees charged by assessors in the area, in violation of OSEP's 1989 *Letter to Kirby*. Therefore, Charter improperly insisted on applying its cost criteria. Additionally, Dr. Conway's testimony established that her \$5,000 fee for conducting a psychoeducational evaluation was reasonable. Dr. Conway needed to observe Student at Charter a second time to see Student in her classroom during instructional, not independent work, time; this second observation was charged as one additional hour, \$250. Dr. Conway supplemented her observations by seeing Student at Prentice on June 1, July 16, and October 15, 2015; Dr. Conway only charged Student for the observation on June 1, 2015, at one and a half hours for \$375. While it cannot be said that there was no point to Dr. Conway observing Student in the private placement Parents chose for Student, the observation did not significantly impact the findings of Dr. Conway's report and reimbursement for \$5,250 is therefore reasonable and equitable.

## ORDER

1. Within 45 days of this decision, Charter is ordered to reimburse Parents for the base cost of Dr. Conway's evaluation (\$5,000) and the observation she conducted at Charter on March 23, 2015 (\$250), for a total of \$5,250. No further proof of payment is required as sufficient proof was submitted at hearing.

2. Within 45 days after submission of proof of payment in the form of receipts, cancelled checks, or bank or credit card statements, Charter is ordered to reimburse Parents for the cost of Student attending Prentice from May 4, 2015 through the end of the 2015-2016 regular school year, and for attendance at Homework Club, up to a maximum amount of \$26,000. Charter is ordered to reimburse Parents for their cost of transporting Student from their Irvine home to Prentice at the IRS mileage rate for one round trip per day Student attended Prentice from May 4, 2015 through the end of the 2015-2016 regular school year.

3. Within 45 days of this decision, Charter is ordered to contract with Prentice for Student's attendance at Prentice as a nonpublic school placed by Student's local educational agency for the fall 2016 semester, and to reimburse Parents for their cost of transporting Student from Parents' home in Irvine at the IRS mileage rate.

## 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, Student prevailed on Issues A, C, E, G, One, Two and Three, and Student partly prevailed and Charter partly prevailed on Issues B, D, and F.

RIGHT TO APPEAL THIS DECISION

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

DATED: July 29, 2016

\_\_\_\_\_/s/  
KARA HATFIELD  
Administrative Law Judge  
Office of Administrative Hearings