

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010040755

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DECISION

The due process hearing in this matter was held before Administrative Law Judge Darrell Lepkowsky of the Office of Administrative Hearings, State of California, in San Francisco, California, on June 14 – 17, and July 7, 2010.

Attorney Kathryn E. Dobel represented Student and her parents. Student's mother and father (collectively Parents) were present each day of the hearing. Student did not attend the hearing.

Attorney William Trejo represented the San Francisco Unified School District (District). He was accompanied each day by Linda Ellis, Secondary Supervisory of Special Education for the District. Attorney Steven Chew, an associate of Mr. Trejo's, attended the hearing on June 14, 2010. Attorney Ruth Diep from the District's general counsel's office attended the hearing on June 16, 2010.

Student filed a due process hearing request (complaint) in the instant case on April 8, 2010. OAH granted the parties' joint motion for continuance on May 18, 2010, thereby tolling the statutory timelines. The hearing was continued from June 17 to July 7, 2010, for a final day of testimony at the parties' request in order to accommodate their schedules.

At hearing, the ALJ received oral and documentary evidence. The following witnesses testified: Parents, Linda Ellis, Marcia Ann Spitz, Anne Crowder, Dr. Carina Grandison, Patricia Ramos, Sandra Bennett Edinger, Lynn Eichelberger, Barbara Talley, Dr. Laura Davies, Alice Jackson, Melissa Benson, Chris Lanier, Pamela Macy, Julie Whelly, Kristine Langley, and Ellen Stecko. Ms. Talley testified by telephone.

At the conclusion of evidence on July 7, 2010, the parties requested and were granted a continuance until July 28, 2010, to prepare and submit written closing arguments. On July 27, 2010, the ALJ granted Student's unopposed oral request for a one-week continuance for the filing of closing arguments due to a family emergency of Student's counsel. The matter was submitted and the record closed upon the timely receipt of the parties' written closing arguments on August 4, 2010.

## ISSUES<sup>1</sup>

1. Between the time of an individualized educational program (IEP) meeting on November 9, 2009, when the District found Student eligible for special education, and an IEP meeting on February 9, 2010, did the District deny Student a free appropriate public education (FAPE) by failing to offer or provide Student with any special education and related services?

2. Beginning on February 9, 2010, did the District deny Student a FAPE for the 2009-2010 school year and extended school year (ESY), and the 2010-2011 school year, to February 9, 2011, by:

(a) Offering Student an inappropriate placement in a speech language impaired (SLI) classroom with lower academic levels, including no math, and lower

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<sup>1</sup> The issues are those detailed in the pre-hearing conference order issued by OAH on June 9, 2010, after discussion with the parties.

- functioning pupils who were not socially capable and were not appropriate peers for Student;
- (b) Offering the SLI class at a large, comprehensive high school campus that would overwhelm Student;
  - (c) Offering physical education in a general education setting that would overwhelm Student;
  - (d) Offering speech and language, and occupational therapy related services of insufficient duration and frequency to address Student's unique needs in those areas; and
  - (e) Offering Student inappropriate annual goals that were "non-Star Academy" goals in addition to the District's appropriate offer of other annual goals that were from Star Academy?<sup>2</sup>

## CONTENTIONS OF THE PARTIES

Student is cognitively impaired, falling into that category of individuals often described as being mildly mentally retarded based upon intelligence quotient scores. She also suffers from a significant speech and language impairment regarding articulation which makes it difficult at times for others to understand her speech. Additionally, Student has been diagnosed with attention deficit hyperactivity disorder (ADHD), anxiety disorder, and intermittent explosive disorder. Parents did not originally seek educational assistance from the public schools. Rather, they placed Student in a series of private schools. Student, however, had many challenges in each of the schools

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<sup>2</sup> During the prehearing conference, the parties clarified that the only goals at issue were those offered by the District that had not been developed by Student's private school, Star Academy.

both with regard to her inability to progress educationally as well as with regard to behavioral issues. This prompted Parents to contact the District during the summer of 2009 in order to obtain special education assistance for her.

Student contends that the District took too long to make an offer of placement to her once it completed its assessments of her. She also contends that the offer, when it was finally made, did not provide her with a free appropriate public education (FAPE). Student asserts that the special day class (SDC) placement offered by the District is inappropriate because her anxiety and other emotional issues would cause her to be overwhelmed and unable to function at the large, comprehensive high school campus where the SDC is located, and in the general education physical education (PE) class the District offered. Student further asserts that the District's offer fails to take into account her anxiety and intermittent explosive disorder. She also contends that she continues to need a small, structured environment such as that offered by Star Academy (Star), the non-public school where she has been enrolled for the last two years. Student also contends that the program and related services the District offered, irrespective of the location of the classroom, do not meet her needs because the classroom does not provide adequate academic instruction, the other students have much lower cognitive abilities than Student and are therefore not her peers, that the classroom and school campus are too chaotic for her, and the amount of related services offered was inadequate. Finally, Student contends that the goals developed by the District are inappropriate for her. As a remedy for these alleged FAPE violations, Student requests that the District be ordered to reimburse Parents for the costs of her education at Star from November 9, 2009 (the date of her first IEP meeting), to the date of this Decision, and that the District be ordered to fund her prospective placement at Star.

In response, the District asserts that it did not impermissibly delay offering a placement to Student. It contends that any delays in holding additional IEP meetings

subsequent to the first scheduled meeting held November 9, 2009, were occasioned first by Student's request that the District convene another meeting so that Student's private school staff, private assessors, and psychiatrist could participate in the IEP process. The District further maintains that it agreed to schedule additional IEP meetings upon Parents' request to view potential placements for Student. Therefore, it cannot be faulted for failing to make a placement offer at Student's first IEP meeting. With regard to the IEP it developed, the District asserts that the placement and services it offered constitute a FAPE for Student. The District states that it offered a blended program to address Student's needs in the areas of academics and life skills, and legally adequate related services in the areas of speech and language and occupational therapy (OT). The District also maintains that it addressed any concerns with regard to Student's anxiety and other emotional issues by offering sufficient accommodations that would permit Student to transition to a comprehensive high school campus and to attend a general education PE class. The District asserts that it successfully has educated at its large high school campuses students with much more severe disabilities and emotional issues than Student. The District contends that Parents never had any intention of considering placement for Student anywhere other than at Star, and therefore were predisposed to find fault with any other proposed placement. Finally, the District contends that all goals offered in Student's IEP are appropriate. Since it asserts that it did not delay making a placement offer and that it offered Student a FAPE in the least restrictive environment, the District maintains that Student is not entitled to any of the remedies she seeks.

As detailed in the following factual findings and legal conclusions, this Decision finds that the District did not unnecessarily delay making an offer of FAPE prior to the February 9, 2010 IEP meeting but that it did unnecessarily delay the process by failing to make a final offer until the meeting held on February 23, 2010. This Decision finds that Student has failed to meet her burden of proof that the District could not meet her

needs on a comprehensive high school campus or that the related services offered in the areas of OT and speech and language were legally inadequate. However, this Decision also finds that, although the District described at hearing and in its closing brief an educational program that might meet Student's needs, it failed to make that offer in the IEP document or to even describe it with any concrete detail at the four IEP meetings it convened for Student. The IEP offer made to Student in the IEP document itself fails to offer her a FAPE. Student is thus entitled to a remedy in the form of reimbursement to Parents for the cost of her private school tuition at Star from February 9, 2010, to the end of the 2009-2010 school year, and to prospective placement at Star to be funded by the District, with modifications as delineated below.

## FACTUAL FINDINGS

### JURISDICTION AND FACTUAL BACKGROUND

1. Student is a young lady who was born on October 13, 1993. Although she was 16 years old during the 2009-2010 school year, Student was only in ninth grade. She and Parents lived within the boundaries of the District at all times pertinent to this case.

2. Student has a long-standing history of learning difficulties and other challenges. Parents began noticing that she was not meeting developmental milestones when Student was very young. She had poor coordination and was not developing language skills at an appropriate rate. Parents obtained a psychological evaluation of Student when she was five years old. The assessor found Student's intellectual skills to be in the first percentile for children her age, well below average. Later assessments also indicated that Student has difficulties with auditory memory and processing as well as receptive and expressive language deficits.

3. Although Parents originally sought to enroll Student in the District for Kindergarten, they believed that the only services that the District was offering would address her language deficits. Parents therefore decided to seek their own appropriate educational placement for Student and to provide her with occupational, speech, and educational therapies to address what they saw as her deficits.

4. Parents first placed Student at the Lycee Francais, a private school in San Francisco, for preschool and then for Kindergarten. Student was not successful at this school so Parents withdrew her during Kindergarten and placed her at the Children's Day School. Again, this placement was not successful for Student in part because the other students teased and ostracized her. Parents then placed Student at the Laurel School (Laurel), which focuses on educating children with learning differences. Laurel is a very small school with small classes.<sup>3</sup> Student remained at Laurel through the end of seventh grade.

5. Laurel provided many modifications to instruction and accommodations for Student including the use of learning aids, preferential classroom seating, use of a calculator, modified examinations and homework, extra time for assignments and tests, and access to extra study guides. Student, however, struggled academically even with this assistance. She had difficulty organizing her thoughts for writing, found mathematical word problems to be difficult, and took a long time to complete homework. Student was held back in third grade because of difficulties keeping up

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<sup>3</sup> There is some confusion as to how many students were enrolled at Laurel. In her written closing argument, Student states that Laurel had 33 students when she was there. At hearing, witnesses testified that Laurel had more students than Star Academy, which generally has a maximum enrollment of 70 students. However, there is no dispute that Laurel offered a small-school environment with small class sizes.

academically. From second to fifth grade, Student had a fairly successful experience at Laurel once she had adapted to the school. However, her problems returned at school and at home as she moved into middle school grades and was not able to keep up with the material.

6. Student was diagnosed with ADHD when she was approximately seven years old. She also has long-standing anxiety issues. These issues became more pronounced as she grew older and schoolwork became more difficult for her, particularly during her last two years at Laurel. At school, Student became anxious and withdrawn, and began crawling under desks when she could no longer cope. In response, Parents took Student to Dr. Laura Davies, a psychiatrist whose practice includes a heavy focus on treating children. Dr. Davies has a medical degree from the University of California, Los Angeles. She did residencies in child, adolescent, and adult psychiatry at the University of California, San Francisco. Dr. Davies has treated Student for approximately seven years, providing counseling sessions and medication to address her issues. To manage some of Student's anxiety at school and prevent her from crawling under desks, school staff at Laurel, with Dr. Davies' approval, gave Student permission to withdraw to a closet if she felt overly anxious and unable to cope.

7. With the accommodations provided to her at Laurel, Student was initially able to keep her anxiety and frustration in-check at school. However, about the time Student reached middle school, she began experiencing increasing episodes of outbursts at home. All the anxiety that she kept bottled-up at school would explode at home, particularly in response to having to do homework. Student's behavior at home has included screaming, breaking windows, throwing chairs, and hitting her parents, particularly Mother. She has slammed doors with such force that the door frame has been damaged. Her explosive episodes at home have been so extreme that Mother has



had to barricade herself in her room. These types of explosions have never manifested in the school environment.

8. As Student grew older and the academic work at Laurel became more difficult, Student began becoming more frustrated and anxious. Her maladaptive behaviors of needing to escape by crawling under desks or going into the closet increased again at school. Her outbursts at home continued as well. During her psychiatric counseling sessions with Dr. Davies, Student would sometimes refuse to respond to questions and would instead bark like a dog throughout the entire session. Based upon the increase in Student's frustration and anxiety at Laurel as well as her increasing violence at home, Parents determined that Laurel was not meeting Student's needs. They decided to withdraw Student and enroll her at Star Academy (Star) for the 2008-2009 school year when Student entered eighth grade. Star is located in the city of San Rafael. Star is certified by the State of California as a non-public school (NPS).

#### STUDENT'S EXPERIENCE AT STAR ACADEMY

9. Ann Crowder is the Head of School for Star. She has a master of science degree in clinical psychology and has extensive experience as a NPS school director and as an intern therapist in a variety of settings. Ms. Crowder explained that Star is a certified NPS that serves up to a maximum of 70 students some of whom have learning differences and other neurological-based disabilities. Other than students with learning disabilities, the majority of the students are typically developing. Student, with her lower intellectual capacity, is not representative of the rest of the student body. The school has a total of six classrooms. It also has rooms for art, music, student activities, a gymnasium, a teaching kitchen, and rooms for the provision of individual or small-group instruction in OT, LS, and reading. The kitchen is used for teaching math and science. Social skills groups are directed by a staff therapist and a staff speech and language pathologist. Star presently has two elementary school classes, one middle school class,

and two high school classes. One high school class is on a diploma track. The other class, in which Student is enrolled, offers a modified curriculum to students not on track to receive a high school diploma. Additionally, Student received five sessions a week of speech and language therapy, individual and group occupational therapy for a total of an hour a week, and individualized reading instruction using the Lindamood-Bell method of instruction.

10. Parents and Star staff, including Ms. Crowder, Student's teacher Lynn Eichelberger, and speech language pathologist Patricia Ramos, all agree that Student did not have a good first year at Star and that it took her a full year to assimilate to the school. Student would be overcome by anxiety and would shut down and be unresponsive to instruction. She was unfocused in class. When feeling anxious or frustrated, she would become upset and verbally escalate, sometimes ripping paper or breaking pencils. She tripped a PE teacher on one occasion, and would inappropriately grab at teachers' clothing. Student's frustrations at school stemmed from her difficulty with understanding course materials, which made her anxious and frustrated, and from her inherent inability to adapt quickly to new situations. She also dislikes being different from the other students and would rather be perceived as being "mean" than being "stupid." At home, Student continued in her pattern of exploding when frustrated, particularly when asked to do homework. She continued to become violent, directing much of her explosive behavior at her mother, who was home with Student much more than was her father. According to Dr. Davies, these outbursts at home could occur up to two or three times a week. However, these types of violent outbursts never occurred at school.

11. Student did not demonstrate much progress academically, behaviorally, or in the areas of occupational therapy and speech and language during this first year at Star. While she did show an increase in her ability to converse with peers and in her

ability to utilize functional language to communicate with them, Student continued to be unable or unwilling to initiate conversations with either peers or school staff. Without being cued, Student would only directly respond to the specific questions asked of her without engaging in back and forth communication. Star had developed six speech and language goals for Student. In spite of receiving five sessions of LS therapy a week, Student had only met two of the six goals by the end of the 2008-2009 school year. Student's overall speech intelligibility level was only approximately 50 percent by the time she was assessed by Star speech language pathologist Patricia Ramos at the end of the 2008-2009 school year.

12. In spite of receiving one-on-one instruction in the Lindamood-Bell reading system, Student's scores in the area of auditory processing decreased. In reading fluency, Student had progressed approximately one grade level, from a grade equivalent of 3.7 to that of 4.7 during the school year. However, in reading comprehension, Student's test scores at the end of the 2008-2009 school year indicated that she had dropped from a grade equivalent of 4.2 to that of 2.0 at the end of the school year. She had advanced during the school year from the eighth to the ninth percentile when compared with children her age. Her strongest gains during the year were in receptive and expressive vocabulary. Student's vocabulary test scores on the Peabody Picture Vocabulary Test, which assesses verbal ability, indicated that Student was at a grade equivalent level of 5.3. In the area of structured concept imagery, which the Lindamood-Bell reading system specifically addresses, Student was working at the fourth to fifth grade level as well.

13. Student also failed to demonstrate progress in occupational therapy in spite of receiving an hour of intervention a week. By the end of the school year, Student's test scores for her goals in occupational therapy indicated that she had made no progress on those goals. For this reason, Sandra Bennett Edinger, Student's

occupational therapist at Star, recommended that instead of direct OT therapy for the 2009-2010 school year, Student participate once a week for a 50-minute session in a small lunch group focusing on functional self-help skills.

14. Parents were frustrated with Student's continued difficulties at school, including her lack of academic progress and failure to assimilate into the school environment. By the end of the 2008-2009 school year, Parents were concerned that the traditional academic curriculum at Star was not appropriate for Student and that she would not succeed there. They felt that she needed to have more functional (or "real life") instruction to help prepare her to become independent as an adult. Additionally, the burden of paying for the tuition at Star, which was approximately \$38,000 a year, was taking a significant toll on family finances.

#### PARENTS' FIRST CONTACTS WITH THE DISTRICT

15. Father cannot recall who suggested that he contact the District to determine if it had a program that would be appropriate for Student. However, Father acted upon the suggestion in July of 2009. He went to the District's main offices and asked to enroll Student in school, explaining that she had special needs. The District mailed an enrollment form to Parents. Mother filled it out, indicating that Student was currently receiving special education services and had health conditions that might affect her educational needs. Father also signed a waiver so that Star could send Student's records to the District. As of this point in time, Parents had no knowledge of the IEP process.

16. Linda Ellis is the District's Secondary Supervisory of Special Education. She has over 25 years of experience working as an educator with special education students. She has taught general education students as well as special education and gifted students. Her past experience includes working with emotionally disturbed students at a

NPS. For the last five years, she has been a special education administrator. Presently, she oversees the special education programs at all District high schools.

17. During her testimony at the hearing in this matter, Ms. Ellis explained that in response to Parents' enrollment application for Student, as supported by her records from Star, the District assigned Student to a learning disabled SDC as an interim placement pending assessment of her and the convening of an IEP team meeting to determine an appropriate placement based upon the assessments. Since Student had never had an IEP, the District was not legally required to offer her a special education placement or any related services. However, District policy is to offer an interim placement during the assessment process to students who have indicated that they have special education issues so that at least known needs may be addressed before the full extent of the student's needs have been determined. Had Parents wished, they could have requested a general education placement for Student instead of the SDC placement that was offered. Parents did not do so.

18. The District operates a school choice program. Rather than assigning children to neighborhood schools, each student may request placement at any of the District's schools serving the student's grade level. The District therefore did not assign Student to her neighborhood high school. Rather, it chose George Washington High School for Student because it had a learning disabled SDC with space availability.

19. Parents were surprised that the District immediately assigned Student to a school. Since the District did not know Student, they thought that the District would first assess Student and then make an assignment based upon the assessments. Parents were unfamiliar with the IEP process and were not aware at the time that school districts legally have 60 days to assess a student and hold an initial IEP meeting.

20. Father drove by the George Washington campus. He did not enter the school. However, he was taken aback by the sheer size of the school, which covered at

least a city block. Parents did not believe that such a large school would be appropriate for Student who had always attended special education schools that had small classes and specialized instruction. They believed that Student would be overwhelmed by the size of the school and would not be able to function there.

#### THE ESTABLISHMENT BY STAR ACADEMY OF A LIFE SKILLS INSTRUCTIONAL PROGRAM

21. Between the end of the 2008-2009 school year and the beginning of the 2009-2010 school year, Star decided to augment its core instructional program by adding a life skills component. Lynn Eichelberger, Student's teacher for both eighth and ninth grades, was the impetus behind the revision in programming. Ms. Eichelberger has a bachelor of science degree in psychology from the University of California, Berkeley, and a master of science degree in educational psychology from California State University, Hayward. Additionally, she holds a multiple subject teaching credential, learning handicapped teaching credential, and a pupil personnel credential. She has worked as a general education teacher, a special education teacher, a high school counselor, an educational therapist, and as a private school principal.

22. Based on the fact that Star had several students who, like Student, could benefit from a life skills program, Ms. Eichelberger approached Head of School Ann Crowder with her proposal. Star agreed with Ms. Eichelberger's proposal. The life skills program it ultimately designed and implemented for the 2009-2010 school year includes adapting grade-level standards to a real-world curriculum based upon functional math, what Ms. Eichelberger described as "survival" English, basic food preparation classes in the school kitchen, and United States history based upon the completion of projects. The academic portion of the program incorporates literature, writing, and poetry. The program also includes a community access component in which the students are taken on community-based field trips where they can use the

functional skills they are learning in class. Although it is in the process of purchasing a van to be used for the field trips, as of the time this hearing took place, the purchase had not yet been made. Therefore, all field trips during the 2009-2010 school year took place within walking distance of the school. For example, the children went to a farmer's market for one of their outings.

23. Parents became aware that Star would institute its new life skills program for the 2009-2010 school year. The emphasis on functional learning in addition to regular academic instruction alleviated their concerns about having Student continue at Star. Because of their concerns that the SDC at George Washington was not appropriate for Student, Parents re-enrolled her at Star in spite of the difficulty they were having paying the tuition. On August 17, 2009, Parents wrote to the District to inform them that they were not accepting the placement at George Washington but were instead keeping Student at Star. They indicated in their letter that they anticipated the District would reimburse them for tuition costs while the District assessed Student to determine how it would address her specific special needs.

#### THE DISTRICT'S ASSESSMENTS OF STUDENT

24. On August 31, 2009, Ms. Ellis wrote a letter to Parents in response to the concerns raised in their letter of August 17. She indicated that pursuant to their request, the District would send Parents an assessment plan and begin the process of assessing Student to assist an IEP team in determining her eligibility for special education and related services. Ms. Ellis informed Parents that the District would convene an IEP meeting when the assessments were completed. Ms. Ellis also informed Parents that while Student was being assessed, Parents could enroll Student in general education at a District school by indicating to the appropriate District office their preferences for school assignment. Student would then be enrolled, in order of preference, in the first of the schools on Parents' list that had an opening. Ms. Ellis also provided contact

information for Pam Macy, the District Supervisor for Designated Instruction and Services,<sup>4</sup> in case Parents had questions about enrollment and services while the assessment process was pending. She also informed Parents that, since the District had not yet assessed Student, determined if she was eligible for special education and related services, and, if so made a FAPE offer, it was premature for Parents to unilaterally place Student at a private school. Implied in Ms. Ellis's letter was the District's position that it was not going to reimburse Parents for the cost of Student's tuition at Star during the assessment process. Ms. Ellis included a copy of the Notice of Procedural Safeguards and Parents' Rights in her letter to Parents.

25. The District sent an assessment plan to Parents on September 1, 2009. In its letter accompanying the plan, the District informed Parents that they could provide any additional information concerning Student for the District to consider in the assessment process. The District also informed Parents that they could request assessments in areas not proposed by the District if Parents thought it necessary.

26. The District proposed an initial assessment of Student that included six areas of suspected need. It proposed a cognitive development/thinking strategies assessment to be conducted by a school psychologist that would assess Student's ability to comprehend, integrate and apply information, problem solve, think critically, and use abstract reasoning skills. This assessment would not assess intelligence quotient because District policy is not to conduct IQ tests of students. The District also proposed

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<sup>4</sup> "Designated instruction and services" (or "DIS") is the term used in California statutes and regulations to describe ancillary services that may be needed by students found eligible for special education in order for them to receive a FAPE. Federal statutes and regulations refer to them as "related services." The terms are used interchangeably in this Decision.



a motor development assessment, to be conducted by a school psychologist and occupational therapist, designed to assess Student's ability to coordinate small and large muscles, general physical conditioning and hand-eye coordination skills in educational settings and activities. The District proposed a perceptual development assessment to assess Student's visual and auditory processing skills and ability to analyze and understand information. This assessment would also be conducted by a school psychologist. To assess Student's ability to receive, understand and use language in an age-appropriate manner through verbal and alternative communication methods, the District proposed that a speech and language pathologist conduct a communication/language function assessment of Student. To determine Student's social and emotional development, adaptive functioning, and to analyze her behavior, the District proposed that a school psychologist conduct a social/emotional development assessment of her. Finally, the District proposed that a special education teacher assess Student's academic achievement in order to determine her current levels of academic performance.

27. Mother signed the assessment plan on September 6, 2009, and returned it to the District. However, she had neglected to check off the box on the plan which indicated Parents' permission for the assessments. On September 11, 2009, the District received oral confirmation from Mother that the District had permission to proceed with the assessments.

#### The District's Psycho-educational Assessment

28. School psychologist Melissa Benson conducted a psycho-educational assessment of Student in conjunction with special education teacher Sarita Groisser on September 28 and October 20, 2009. Ms. Benson has been a school psychologist with the District for about eight years at both the elementary and secondary levels. Her present duties include assessing students for special education eligibility and continuing

services, providing group and individual counseling to students, and consulting with teachers regarding classroom management, behavior support, alternative learning strategies, individualized instruction, and the social and emotional needs of students. Ms. Benson also is responsible for conducting all assessments related to students attending a NPS in the District and for students residing in San Francisco who attend a NPS, like Star, which is located outside of San Francisco.

29. Ms. Benson's assessment consisted of interviews with Student, Parents, and Ms. Eichelberger, a review of Student's records including an educational evaluation administered to Student in May 2008 by an education specialist, observations of Student at Star, and the administration of various testing instruments. The assessment instruments Ms. Benson utilized were the Differential Ability Scales (DAS), the Cognitive Assessment System (CAS), the Connors-III Self-Report, the Vineland Adaptive Behavior Scales-II for parents or caregivers (Vineland), and the Behavior Assessment System for Children – teacher rating scales (BASC). Although she knew that Student was seeing a psychiatrist who was prescribing medication for her, Ms. Benson did not ask Parents for permission to contact Dr. Davies or to review Student's psychiatric medical records.

30. Through her interviews, Ms. Benson learned that Student enjoyed spending time with her dog, playing with a neighbor who was a year younger than she, and spending time chatting with friends on the computer or through text messages. Walking her dog was the only physical exercise in which Student would voluntarily engage.

31. Contrary to what Parents and Star staff testified to at hearing and contrary to what Parents relayed to their private assessor, as described below, Ms. Benson was informed that Student's transition from Laurel to Star was successful and that Student only experienced minor anxiety about the change in schools. However, Ms. Eichelberger did inform her that Student was much more apprehensive and volatile during her first

year at Star but that she became more comfortable and confident as the year progressed. Although the 2009-2010 school year had only been in session for a short time when Ms. Benson conducted her interviews, Ms. Eichelberger informed her that she already saw substantial improvement in Student from the previous year. Student was more confident, had friends at school, and was fitting in nicely with the school routine. She trusted her teacher more and was willing to take risks in her learning and ask for assistance when needed. From Ms. Eichelberger, Ms. Benson learned that Student needed reinforcement and re-teaching of concepts in order to retain information and that problem-solving and higher-level thinking were difficult for her. Ms. Eichelberger indicated that Student was academically performing at approximately the fourth grade level, but that her academic progress was slowing down. Therefore, Ms. Eichelberger was incorporating more of the life skills curriculum into Student's educational program.

32. From her interview with Student, Ms. Benson learned that Student liked going to Star but only because of the friends she had made there. Student liked the small class size and appreciated the academic help she was receiving but was adamant that she did not like to read or do homework.

33. Parents informed Ms. Benson that they believed the small class size and individualized assistance that Star provided Student was what she required and that Student felt comfortable there because other students had learning challenges as well. They reported that, although Student required a lot of one-on-one attention to reinforce information taught to her, they believed that she still had the potential to learn. Parents also stated that Student was more willing to write and that her communication ability was becoming more functional, as evidenced by Student's ability to send emails and text messages to her friends. Parents agreed that the development of life skills should be the focus of Student's school program.

34. Ms. Benson observed Student at her study hall class and music class at Star. The study hall class had a total of seven students, which comprised Student's entire high school class. Student was working on multiplication problems during the observation. She did not know how to do problems with numbers eight and nine and asked for a multiplication table to assist her, something which Ms. Eichelberger considered a major improvement in Student's study skills. Student required more assistance from her teacher when doing word problems than when doing number problems. During music class, Student sat next to someone she liked and participated along with her classmates although she did not volunteer to be singled out at any time during the class.

35. To measure Student's cognitive ability, Ms. Benson administered the DAS to her. The DAS was developed to evaluate conceptual and reasoning abilities. Based upon her scores on the DAS, Ms. Benson found that Student's overall verbal and nonverbal cognitive ability was significantly below average.

36. Ms. Benson also administered the CAS to Student, which was developed to integrate theoretical and applied areas of psychological knowledge. The CAS is designed to provide information about a person's strengths and weaknesses and processing to predict academic achievement and determine appropriate interventions. Ms. Benson administered two of the four clusters to Student: those in planning and attention. The planning cluster assesses mental processes to determine, select, and evaluate solutions to problems. The attention cluster assesses the ability to selectively focus on particular items while inhibiting responses to competing items. Student's scores on both clusters of the CAS administered to her were below the first percentile and thus in the significantly-below-average range.

37. To measure Student's performance in day-to-day activities, Ms. Benson had Parents respond to questions about Student's personal and social skills using the

Vineland-II, which assesses how a person actually performs on a day-to-day basis rather than what the person is abstractly capable of doing. The results of the Vineland, in conjunction with the results of a student's cognitive assessments, physical health and school achievements, assist and enable an IEP team to address the student's special needs. Ms. Benson used the Vineland-II to assess Student in three domains: communication, daily living skills, and socialization.

38. The communication section of the Vineland measures a person's expressive, receptive, and written communication abilities. Parents reported that Student's attention to conversation depends on whether she is interested in the topic of discussion. She does not generally initiate conversations and generally requires prompting or cues to stay engaged in a discussion and needs guidance to change conversation topics. Student's attention span is short. She does not enjoy reading and is behind grade level in reading and writing although at the time of the assessment, Student had recently begun sending emails and telephone text messages to friends.

39. With regard to daily living skills, Parents reported that Student did not always hold eating utensils correctly. She has difficulty with cutting meat when eating. Student is also clumsy and thus suffers from frequent minor cuts and bruises. Although Student does not always pick the proper clothing to wear to match the weather, she dislikes being corrected on her choices. Student benefits from a routine at home. She is able to assist with basic chores and is learning to use simple appliances for cooking. Although Student does not have a strong sense of safety and needs supervision when crossing busy streets, she can run simple errands for her parents at the local corner grocery store. As of the time of the assessment, Student was still learning to perfect her concepts of time, calendar and money.

40. Parents reported that Student's social skills had improved since she began attending Star. She had made a few friends and was demonstrating an interest in others.

While she continued to having difficulty in taking the perspective of others and in initiating interactions, she was able to engage in reciprocal greetings. Parents reported that Student becomes angry at home when something does not go her way. Completing homework had been a significant problem. However, Parents reported that the problem had been resolved by Student being able to complete her homework in study hall at school. Since Student had made friends with whom she enjoyed spending time, she was having fewer "meltdowns." Parents also noted that Student was better with changes in schedule and transitions.

41. Ms. Benson administered the Connors-III to Student which assesses ADHD. The assessment takes into account the home, social, and school environments. Student's responses to the questions on the Connors-III indicated that she has significant difficulties in the areas of inattention, hyperactivity/impulsivity and learning problems. Student reported that it is difficult for her to sit still and pay attention for long periods of time, and that she is impatient, talkative, and easily distracted. Student reported that she frequently makes mistakes on her class assignments and homework and has difficulties in the areas of science, spelling and reading, but that she has fewer problems in math.

42. Ms. Benson had Student's teacher, Lynn Eichelberger, fill out the BASC. Her responses indicated that Student scored in the at-risk range in the areas of externalizing and internalizing problems, anxiety, attention problems, adaptive skills, functional communication, adaptability and study skills. Student was in the clinically significant range in the areas of aggression, depression, and school problems. However,

Ms. Eichelberger rated Student as being within normal limits in the areas of hyperactivity, conduct problems, somatization,<sup>5</sup> social skills, and leadership.

43. District special education teacher Sarita Groisser<sup>6</sup> administered the Woodcock–Johnson-III Tests of Achievement (WJ-III) to Student as part of the District’s psycho-educational assessment. Student scored in the second percentile or lower on each of the subtests of the assessment, indicating that she is performing significantly below her expected age and grade level. Student’s lowest scores, which were below the first percentile, were in reading comprehension, math reasoning, and written expression.

44. The assessment results obtained by Ms. Benson and Ms. Groisser were commensurate with the assessment results obtained by Student’s private assessor in 2008.

45. After reviewing Student’s past assessments, her overall school performance, the information gained from interviews, and the results of the District’s assessments, Ms. Benson concluded that Student met eligibility for special education as a student with a cognitive impairment. Ms. Benson noted that Student would continue to learn and to develop but that her rate of learning and development would be slower than average in the future as it had been in the past.

46. Ms. Benson made various recommendations in her assessment report, including some that were specifically germane to Student’s educational setting. She suggested that Student be provided with tools to reduce the amount of potentially distracting stimuli. She also suggested that material in school needed to be broken down into small parts and presented repeatedly so that Student could master it. Ms.

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<sup>5</sup> To somatize means to convert anxiety to physical symptoms.  
(<http://dictionary.reference.com/browse/somatization>)

<sup>6</sup> Ms. Groisser did not testify at the hearing.

Benson further suggested that Student receive frequent redirection to stay on task and follow directions. She noted that Student's frustration and fatigue toward perceived challenging curricula would likely continue to be an issue for her. Ms. Benson therefore suggested that prompt intervention with possible alternative behaviors or approaches should be made available to Student and that instruction should be limited to short periods of time with frequent breaks or diversions. None of Ms. Benson's suggestions were ever documented in Student's IEP.

#### The District's Speech and Language Assessment

47. District speech and language pathologist Kristine Langley administered a speech and language assessment to Student on October 2 and 9, 2009. Ms. Langley has a master of arts degree in communicative disorders from San Diego State University. She has worked for the District as a speech and language pathologist for over nine years. As part of her assessment process, Ms. Langley reviewed prior assessments of Student, including the one done by Star speech and language pathologist Patricia Ramos in June 2009 which indicated that Student had difficulties in the areas of auditory memory, receptive and expressive language, processing speed, and oral motor skills. Ms. Langley administered her assessment to determine Student's then-present current levels of performance in the areas of speech and language and to determine if she was eligible for speech and language services.

48. Ms. Langley administered five assessments to Student: the Clinical Evaluation of Language Fundamentals-IV (CELF-4); the Receptive One Word Picture Vocabulary Test (ROWPVT); the Expressive One-Word Picture Vocabulary Test (EOWPVT); a Speech and Language Sample; and the Photo Articulation Test-3 (PAT-3). Ms. Langley noted that Student stated at the outset of the testing process that she was bad at taking the tests and had a bad memory, but that she appeared to gain confidence to continue when given encouragement.



49. The CELF-4 assesses the ability to understand and produce content and form in language. Student's scores were all in the second percentile or lower, with the exception of the word definitions subtest where Student scored in the fifth percentile, an area of relative strength for her. In the receptive language index, which measures listening and auditory comprehension, Student's scores were all below the first percentile. In the expressive language index, which measures overall expressive language skills, her scores were in the second percentile or lower. Student's total language score was 56, indicating that she was performing significantly below the average age-level expectancy.

50. For the ROWPVT, Ms. Langley asked Student to identify a picture from a field of four choices when given a specific word. Student's standard score of 80 on this assessment placed her in the ninth percentile compared to children her age, in the below-average range. This indicates that Student has difficulty in understanding single-word vocabulary.

51. For the EOWPVT, Ms. Langley asked Student to verbally identify a successive number of single pictures. Student's standard score of 82 placed her in the 11th percentile when compared to children her age, also in the below-average range. The results of this assessment indicate that Student has difficulty in using single-word vocabulary.

52. The PAT-3 is an articulation test. Student demonstrated articulation problems with various sounds in spoken English. As Ms. Ramos had found in her assessment of Student at Star in June 2009, Ms. Langley noted that Student demonstrated oral motor weakness in her jaw and tongue. Like Ms. Ramos, Ms. Langley found Student's spoken language to be intelligible about 50 percent of the time, although she also reported that Student's level of intelligibility would frequently rise to

75 percent, depending upon the length and complexity of ideas she was communicating.

53. Ms. Langley also took a speech and language sample of Student. She found that Student had difficulty initiating ideas in conversational speech and required support in determining a topic to discuss. Student only conveyed her ideas when given cues and direction. Her vocabulary was limited as well.

54. Based upon the results of her assessment, Ms. Langley found that Student's total language score was below the first percentile when compared to peers her age, significantly below average. She noted that Student had not met four of her six speech and language goals the prior year at Star, and that her articulation difficulties, which are the product of oral motor weakness in her jaw and tongue, continued at approximately the same level. Ms. Langley recommended that Student share experiences in social conversation in order to practice initiation, maintenance and conversational exchanges which would improve her functional communication. Ms. Langley also recommended that Student continue oral motor exercises to assist her in improving the clarity of her speech. None of Ms. Langley's recommendations were ever documented in Student's IEP.

#### The District's Occupational Therapy Assessment

55. The last assessment the District administered to Student was in the area of OT. The assessment was conducted by occupational therapist Lisa Keough.<sup>7</sup> Her assessment consisted of observations of Student and interviews with Student's mother, Star Head of School Anne Crowder, Star teacher Lynn Eichelberger, and Star occupational therapist Sandra Bennett. Ms. Keough also reviewed past assessments of Student and annual goals recommended by Star. Finally, she administered the

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<sup>7</sup> Ms. Keough did not testify at the hearing.

Developmental Test of Visual Perception-Adolescent and Adult (DTVP-A), which is a standardized test to measure occupational therapy needs in the area of visual perceptual skills.

56. From her conversations with Ms. Eichelberger, Ms. Keough learned that Student sat close to the board in her classroom at Star. She used a graphic organizer to help with routine and transitions, had a visual schedule on her desktop, and needed occasional prompting to follow through successfully with classroom routines. Student's mother reported that she was concerned about Student's ability to perform fine and gross motor tasks and that Student had difficulty with visual scanning.

57. The DTVP-A that Ms. Keough administered to Student included six subtests. From Student's scores on this assessment, Ms. Keough determined that Student's general visual perception composite percentile score was less than the first percentile, her motor-reduced visual perception composite score was in the first percentile, and her visual-motor integration composite score was also less than the first percentile. Ms. Keough found that Student's scores reflected significant difficulty in all visual perceptual skill areas tested.

58. Ms. Keough observed Student for the purposes of determining her endurance with regard to fine and gross motor skills as well as to determine how Student's fine motor control and strength were functioning. She observed that Student was able to sustain her fine motor tasks appropriately. With regard to fine motor control, Ms. Keough observed that Student's hand strength, muscle tone, wrist control, hand arches, and range of motion were all within normal limits. She also found that Student was appropriately able to demonstrate opposition with her fingers and had appropriate grasp and bilateral coordination.

59. Ms. Keough also reviewed Student's ability to write. The quality of Student's writing was notably better when she copied from a sample on her desk than

when she copied from something on the board. Student's cursive writing was very good; her teacher reported to Ms. Keough that handwriting was one of Student's strengths. Student also demonstrated fair to good speed when asked to type a paragraph from a visual model using a word processing device called an Alphasmart. From Ms. Eichelberger, Ms. Keough learned that Student typed daily in class.

60. In order to observe Student's abilities with functional tasks, Ms. Keough asked her to prepare a peanut butter sandwich. Student was able to arrange the bread, open a new jar of peanut butter and prepare the sandwich with very little prompting. She had to be cued to clean up, but once prompted was able to finish appropriately the task of cleaning up. Both Student's mother and teacher reported that Student was able to complete tasks independently given practice and repetition.

61. In the area of self-help skills, Ms. Keough noted that Student's mobility was functional for the school environment, and that she was able to dress herself and feed herself independently, although her mother said she was a "messy" eater.

62. Based upon Student's ability to function in a school environment with regard to her mobility, self-help abilities, and writing strengths, Ms. Keough's assessment report recommended that Student receive occupational therapy services on a consultative basis so that educational staff could institute classroom modifications and activities to address her educational needs. Ms. Keough made the following recommendations for Student's classroom: color coding/numbering of items on the chalkboard to help with visual discrimination; use of a marker to uncover one line at a time with handwriting, reading and math tasks; and extra time to process directions and perform fine and visual motor tasks given Student's difficulty with fine motor coordination and auditory processing. None of Ms. Keough's recommendations were ever documented in Student's IEP.

## STUDENT'S IEP MEETINGS AND THE DISTRICT'S OFFER OF FAPE

### November 9, 2010 IEP Meeting

63. Subsequent to completing its assessments of Student, the District notified Parents that it would convene an IEP meeting for Student on November 9, 2009, to determine her eligibility for special education, develop an IEP if appropriate including a transition plan and goals, and to make recommendations regarding a program and placement for her. The notice identified the District staff who would be participating in the meeting. The notice also informed Parents that they could bring other people to the meeting who had knowledge or special expertise regarding Student.

64. The IEP meeting convened as scheduled on November 9, 2009. Although the District put into evidence at the hearing recordings of subsequent meetings, this initial meeting was not recorded. Present at the meeting were special education teacher Sarah Grossier, school psychologist Melissa Benson, speech language pathologist Kristine Langley, content specialist Chris Lanier, occupational therapist Lisa Keough, and Linda Ellis, District Secondary Supervisor for Special Education. The District did not specifically invite any staff from Star or Student's psychiatrist.

65. Although they had been notified that they could bring other people with them, Parents did not do so at this meeting. However, at the outset of the meeting, they informed the District that they wanted representatives from Star and possibly Student's psychiatrist present at a future IEP meeting. The District agreed that the participation of those people would be helpful in developing Student's IEP. The parties therefore acknowledged that a subsequent IEP meeting would be necessary in order to include input from Star staff and Dr. Davies.

66. Since this was the first IEP meeting Parents had ever attended, the District spent some time explaining the process and the fact that Parents were an integral and necessary part of it. The District provided another copy of the procedural safeguards to

Parents and explained what safeguards meant. Mr. Lanier offered to assist Parents with their questions or concerns.

67. The District had developed draft goals for Student prior to the IEP meeting. The District informed Parents that it would forward the recommended goals to Student's teacher at Star for input.

68. The IEP team then discussed what it anticipated Student's needs would be once she reached age 18 or graduated from high school. Parents agreed that Student was not on a diploma track and wanted to know what the District offered students who were similarly situated. Ms. Ellis discussed the need for transition services to help students with job training, post-high school education and career training. She indicated that transition goals could change and/or become more specific as a student reached 12th grade.

69. The District informed Parents that Student met the criteria for special education services as a student with the cognitive impairment of mental retardation. The District informed Parents that Student also qualified as speech and language impaired and indicated that as a secondary category of eligibility. The team then reviewed Ms. Benson's psycho-educational assessment, including her recommendations. Based upon the assessment, the team discussed the possibility of providing mental health support to Student on a school site. However, none of the recommendations for accommodations and/or modifications suggested by Ms. Benson in her report were ever included in any of the draft IEP documents or in the final IEP document given to Parents, nor did the IEP include any mental health support services.

70. The team noted that Student's academic testing indicated that Student was performing at approximately the third or fourth grade level and that her present academic curriculum contained a life skills component.

71. In reviewing Ms. Keough's OT assessment, the IEP team noted that Student had begun using a laptop computer at school for written assignments. The team discussed the recommendation that OT services be provided to Student by the District on a consultative basis so that her skills could be generalized across settings. Parents did not object to this recommendation or offer a counter suggestion for the amount of OT services. The team also agreed with Ms. Keough's recommendation that Student would benefit from accommodations in the classroom. However, none of the accommodations discussed in Ms. Keough's assessment report were included in any draft IEP documents or the final IEP document given to Parents.

72. Ms. Langley reviewed her speech and language assessment with the team. She noted that Student had memory and conceptualization of language difficulties as well as continued low oral-motor strength that caused mild distortions in Student's articulation. Ms. Langley recommended that Student receive 135 minutes per month of direct speech and language services to address Student's needs. Parents did not object to the recommendation or offer any alternative suggestion for the length or frequency of speech and language services.

73. The team discussed available dates to re-convene. The District suggested November 23, 2009, with January 11 and January 19, 2010, as back-up dates if all parties, including Parents' designated participants, were not available on November 23.

#### Developmental Neuropsychology Assessment by Dr. Carina Grandison

74. Immediately after the November 9 IEP meeting, Parents decided to obtain their own psychological assessment of Student to assist in developing Student's IEP. They contracted with Dr. Carina Grandison for that purpose. Dr. Grandison, who has a doctorate degree in clinical psychology from Boston University, is an Assistant Clinical Professor in the Department of Psychiatry at the University of California, San Francisco's School of Medicine. She also maintains a private practice. She has approximately 20

years of experience in the field of neuropsychology with an emphasis on working with and treating infants and children.

75. Dr. Grandison's assessment took place on November 14, 18, 20, 23, and 24, 2009. The assessment consisted of interviews with Parents and Student, a telephone conversation with Student's psychiatrist Dr. Davies, observation of Student at school and in her office, review of recent Star testing, having Student's current teacher fill out a questionnaire that Dr. Grandison had developed, and the administration of several standardized assessments. The testing instruments that Dr. Grandison used were parts of the Wechsler Adult Intelligence Scale-III (WAIS-III); the Comprehensive Test of Nonverbal Intelligence (C-TONI); the Wechsler Individual Achievement Test-II (WIAT-II); the Children's Memory Scale, the Children's Structured Response and Projective Inventory (partial); the Adaptive Behavior Assessment System-II (ABAS-II); and the Behavior Assessment System for Children-2 Parent Report (BASC-2).

76. Dr. Davies informed Dr. Grandison of Student's difficulties in the past at school and at home. They discussed the fact that Student's aggressive behavior at home had calmed somewhat since she had started attending Star and since Dr. Davies had prescribed the medication Abilify for her, but that Student still had episodes of explosive behavior at home, particularly in response to having to do homework. Dr. Davies also informed Dr. Grandison that none of the aggressive behaviors occurred at school. Ms. Eichelberger informed Dr. Grandison that Student was eager to please teachers and chat with friends at school, that Student performed at a second to fifth grade level, and that her school program emphasized life skills.

77. Dr. Grandison administered the C-TONI and WAIS-III to Student to measure her cognitive functioning. The scores she obtained were commensurate with those obtained by the District, indicating that Student's intellectual potential was at or below the first percentile or in the deficient range of functioning.



78. To test Student's language functioning, Dr. Grandison read her two stories and then asked questions about the stories. Dr. Grandison's findings that Student's language skills were at the first percentile and commensurate with her intellectual potential, were consistent with the District's findings.

79. The results of Dr. Grandison's administration of the WIAT-II corresponded with the District's findings that Student was performing somewhere in the third to fourth grade level. On the WIAT-II, Student's math computation scores were at the fourth grade level, her math reasoning scores were at the third grade level, and her spelling and writing skills were at about the second grade level. Dr. Grandison noted that Student probably performed better in a familiar setting such as at school where the tasks were also familiar.

80. Based upon the questionnaires completed by Parents, her interviews with them and Student, and her observations of Student, Dr. Grandison noted that Student continued to suffer from anxiety, withdrawal, and sudden mood changes. Based upon the ratings obtained from Parents' completion of the ABAS-II scales, Dr. Grandison found that Student's adaptive functioning was below the first percentile, indicating that she did not have the independent skills expected for her age.

81. Based on all the information obtained in the course of her assessment, Dr. Grandison concluded that: Student met the criteria for mild mental retardation; that she was performing academically at grade levels two through five; that she met the criteria for anxiety disorder not otherwise specified and for intermittent explosive disorder; and that Student should qualify for special education under the primary category of cognitive impairment, with secondary categories of other health impairment (OHI) based upon her intermittent explosive disorder, and emotional disturbance (ED) based upon her anxiety.

82. Dr. Grandison recommended that Student needed a small, quiet and nurturing setting. She thus felt that Student should continue attending Star because of the small, structured educational environment, the one-on-one instruction Student received in the areas of speech and language, reading and social skills, and because Student's anxiety would prevent her from transitioning successfully to a new environment. Dr. Grandison concluded that Student was at risk to be victimized on a large school campus. She noted that Student's educational program needed to be tailored to her needs in order for Student to feel successful, and that academics taught to her should not be abstract. Rather, they should be "real-world bound"; that is, geared toward vocational readiness and practical skills. Dr. Grandison believed that could be accomplished by combining a curriculum for learning disabled students with a vocational curriculum. Because Student's explosive rages were generally triggered by having to do homework, Dr. Grandison recommended that any homework assigned to Student be vocational in nature rather than academic. Dr. Grandison also recommended that Student receive intensive instruction to improve her reading, writing and math skills. Finally, since Student has interests in dogs and computer games, Dr. Grandison recommended that Student's interests be used as vehicles for developing her future employment skills.

#### January 11, 2010 IEP Meeting

83. Although the District had offered November 23, 2009, as a potential date to hold Student's second IEP meeting, the meeting did not take place until January 11, 2010. The meeting was delayed because of Father's work commitments, the fact that Dr. Grandison had not completed her assessment by November 23, and because there were so many participants involved that it was difficult to arrange a meeting around everyone's schedules particularly given the intervening winter holidays in December.

84. Sixteen people participated in this IEP meeting. District staff members present were Ms. Ellis, Ms. Benson, Ms. Groisser, Ms. Langley, Mr. Lanier, and Ms. Keough. Also present were Parents, Dr. Davies and Dr. Grandison. The Star personnel who attended in person were Ms. Crowder, Ms. Eichelberger, and Ms. Ramos. Star personnel who participated by phone were Ms. Bennett and Lindamood-Bell specialists Barbara Talley and Cris Stevens.

85. District staff gave a copy of a draft IEP to Parents at the beginning of the meeting. Since Ms. Ellis was not going to be able to remain for the entire meeting, the District wanted to discuss program options for Student. Parents objected because they believed it was illogical to discuss program options before Star staff and Drs. Grandison and Davies could add their input into developing Student's IEP and thereafter discussing alternative available programs based upon Student's needs.

86. Ms. Ellis told Parents that the District was thinking about two program options for Student, either a SDC classroom for speech and language impaired (SLI) students at Lincoln High School or one of two classrooms for severely impaired (SI) students at Lowell High School. She and Mr. Lanier explained that programs at the schools could be blended to meet Student's needs. For example, Student could take an art class and the IEP team could decide where Student would receive math and English instruction. None of these suggestions was concretely defined and none was described on the final IEP document presented to Parents. As discussed below, Ms. Ellis did not correctly describe the placements at the schools. None of the three classes is a SLI-SDC; all are classes for severely impaired students.

87. Dr. Grandison then reviewed her assessment report. She emphasized to the IEP team that Student was behaving well at school and that her loss of control and violent behavior, triggered primarily by resistance to doing homework, occurred in Student's home. Dr. Grandison also acknowledged that the violent episodes at home

were decreasing. Dr. Grandison reiterated to the IEP team the concern she expressed in her report: that Student should not presently change school environments because of her anxiety. She acknowledged that in all other aspects, her view of Student's profile corresponded to that of the District.

88. Ms. Eichelberger informed the team that during the previous school year, Student's first at Star, Student had had difficulty adjusting to the school. She had difficulty getting along with other students, did not want to attend PE, had tried to trip a PE teacher, and would shut down and not participate in class. Basically, Student had acted like a four- or five-year-old child who did not want to do something. Ms. Eichelberger stated that Student's behavior and participation in school had significantly improved during the present (2009-2010) school year. She concurred with Dr. Grandison that Star's small, structured and secure environment was what Student needed to meet her needs. Star Head of School Anne Crowder also voiced her concurrence that Star was necessary to meet Student's needs due to the fact that she had learned the layout of the school, was comfortable with it and her peers, and that she had learned a routine. According to Dr. Grandison, Ms. Crowder, and Ms. Eichelberger, removing Student from her environment at Star would cause her to regress.

89. Dr. Davies also opined that Student would not be able to function on a large public school campus. She stated that Student had difficulties with transitions and functioned at a second grade level. She commented on the fact that Student has barked during an entire counseling session with her and that if she did that at a mainstream school, the other students would "eat her alive." However, Student has never engaged in that type of behavior at school.

90. Ms. Ellis informed the IEP team how the concerns Drs. Grandison and Davies and the Star staff expressed for Student could be addressed by the District. She stated that Student would need paraprofessional support in the form of a class aide

trained to meet Student's needs, who would help her with transitions. She stated that the aide could leave class early with Student to make sure she was safe while transitioning from one class to another. Ms. Ellis stated that the aide would not be permanent but would be faded out in order to foster Student's independence and that the District would do what was needed to make Student successful at school. She stated that the District has other students with profiles and needs similar to Student's and that they have not had any difficulty meeting their needs. At hearing, Ms. Ellis also testified that the District was familiar with transition issues for children such as Student and that the District offered to transition Student during the extended school year (ESY) in the summer of 2010. However, the District never explained the discrepancy between the fact that it was developing an IEP for Student to begin attending a District school by the spring semester of 2010 and its proposal to transition her to a District school for ESY 2010, after the semester had ended. Furthermore, none of the IEP documents prepared for Student, including the final IEP given to Parents, contain any reference to a one-on-one aide or paraprofessional support, the time and locations such an aide would be with Student, or how the services of the aide would be faded. Nor do the documents contain any reference to a transition plan for ESY 2010.

91. Although Parents admitted to the IEP team that they wanted Student placed at Star with OT and speech support and that they could no longer afford the tuition there, they also agreed to observe and consider the District's recommendations for Student's program and placement. They agreed that Student needed to learn life skills to prepare her for the future.

92. The District team members then discussed the SDC classes available at Lowell High School. They explained that at least one of the SDC classes there was "routine driven" with a ratio of at least three adult instructors for the 10 students in the class. Lowell does not have bells to dismiss classes and has a student body much smaller

than that of most of the other District high schools. Additionally, the SDC classes were not in the main school building. The SDC students went to lunch a bit earlier than the other students so that they were not caught in the lunch rush. The District explained that the general education students at Lowell are very nurturing toward the special education students and that the school has a "best buddy" system to pair special education and general education students. The school also has a wellness center staffed with a psychologist. One of the SDC classes has in-class instruction in the mornings and a community-based instructional program in the afternoons.

93. Although Star occupational therapist Sandra Bennett and speech language pathologist Patricia Ramos both attended and participated in this IEP meeting, neither expressed any disagreement with the District's proposed goals for Student. Nor did they express any disagreement at the meeting with the type, amount, frequency, or duration of the OT or speech language services the District was recommending for Student.

94. At the hearing, Ms. Ramos indicated that Student had not experienced much growth during the previous school year, but that the intelligibility of Student's speech had increased from 50 percent to 80 percent as of the date Ms. Ramos testified. Although Ms. Ramos described the amount and type of speech and language services Student receives at Star, she did not address at any time during the IEP process or during her testimony at hearing why the speech and language services offered by the District in Student's IEP do not meet her needs.

95. Likewise, Star occupational therapist Sandra Bennett described during her testimony the type and amount of OT services Student had received during her first year at Star and the fact that, during Student's second year (2009-2010), those services had changed. Rather than receiving one session of individual OT and one session of group OT a week, Student began receiving just one group OT session a week which consisted of a functional cooking class. Ms. Bennett testified that Student still needs to work on

developing functional skills. However, she did not state during the IEP meetings or during her testimony at hearing that the District's offer of consultative OT services for Student or the functional skills taught in the District's SDC classrooms would not meet Student's needs.

96. Since Parents wanted to visit the programs proposed by the District for Student, the District did not make a final offer of placement at the January 11, 2010 IEP meeting. However, the District, through Ms. Ellis, did state at various times during the IEP meetings that an offer of an undefined SI-SDC as well as the District's original offer of placement in the LD program at George Washington High School were always "on the table" for Parents to consider. The IEP team agreed to meet again on February 9, 2010, after Parents had viewed the proposed classrooms, at which time the District intended to make a final offer of FAPE for Student.

#### The Lowell High School and Lincoln High School Classrooms

97. Although Ms. Ellis had originally described the Lincoln SDC as a speech language impaired classroom, it is not. Rather, it is a SI classroom for moderately to severely disabled students. Ellen Stecko is the teacher for that classroom. She has been with the District as a special education teacher for 13 years. She is credentialed to teach moderately to severely impaired Students. She is an enthusiastic and dynamic teacher.

98. Ms. Stecko's class at Lincoln is a community-based program with functional academics and living skills taught on an integrated model. The class generally has 10 students with up to three aides (sometimes called paraprofessionals) to assist her. At times during the school day, students from another SDC, who are not cognitively impaired, come to the classroom as aides to assist the students in her class with their work. The students in Ms. Stecko's class function at different levels, from kindergarten up to fourth or fifth grade, depending on the subject matter being taught.

99. During the school's first period, Ms. Stecko teaches the students English. She has worksheets for different levels of academic capability and gives the appropriate level worksheet to each respective student. However, she also has three students who are working at a more advanced level than the others in her class. Those three students leave class for first period and go to a mainstream remedial English class with another teacher. That classroom is similar to what is often called a resource specialist program or "RSP" classroom in other school districts. The teacher of this remedial class has modified the course materials for Ms. Stecko's three students since they are performing at a level lower than the mainstream students. Ms. Stecko indicated that Student was functioning at about the same level as two of the students and at a level lower than one. All three are also girls. Student would be the fourth girl in Ms. Stecko's class. Both Ms. Stecko and Ms. Ellis testified that Student could also have an educational program that included the modified English class. However, Student's IEP never included any reference to her spending time in either a mainstream or learning disabled English classroom.

100. The three students mainstreamed for English rejoin Ms. Stecko's class after first period. All her students then are given a journal-writing assignment in which they answer a question that Ms. Stecko poses to them. The question might be something like "What did you do over the weekend?" The students have different capabilities. Some can only write a sentence while others are capable of writing a paragraph or even a page. After journal writing, the students do a phonetic writing program called Signs for Sounds. About 75 percent of the class receives speech and language services. Those who remain in the class when the others go to speech are given different tasks to do.

101. All of the students go to general education PE during fourth period. A male aide accompanies the boys and a female aide accompanies the girls. The aides remain with the students for the duration of the PE class. Ms. Stecko often accompanies her class to PE as well. There are a total of 35 children in the PE class. All of the present



students from Ms. Stecko's class enjoy their time in PE and there have never been any problems with their participation in the general education PE environment. Should a student not want to participate for any reason, the student's issues would be addressed individually.

102. Ms. Stecko's class has lunch after PE class. They eat in her classroom instead of the school's cafeteria. Her students are not permitted to leave the classroom without permission and must have a hall pass to do so. After lunch, the students participate in a work detail at school picking up debris and recycling materials. The students get paid for this participation. The program is designed to assist the students to learn how to function at a job. They have to put on gloves and they have to sign in on a wage sheet with the time they begin and end work. The more time they work, the more money they earn. The students cash in any recyclable materials they collect and use the money for the classroom. The wages they earn are theirs to keep.

103. During the last period of the day on Mondays, Ms. Stecko teaches math. She divides her students into three or four different groups according to their math ability. The classroom has a kitchen. The students most advanced in math generally do their math work in the kitchen. They are at a level where they can do fractions. Ms. Stecko teaches math to the ability level of each student and has different course materials that address different math skills.

104. The course work in Ms. Stecko's class may change during the week. For example, on days the students do not have speech and language sessions, the class may do yoga, which is taught by one of the classroom aides.

105. On Wednesdays, Ms. Stecko's class goes into the community after first period. Ms. Stecko incorporates functional skills into the community outing. The students use a city bus map to determine which bus they will be taking and the route the bus will take to get them to whatever community activity is planned for the day.

They have to determine what time the bus will arrive and can use the computer to find that information. The students have to make sure they have brought money from home and have identification with them. They have to count their money so that they are aware of how much they have. All the students have a city transportation department identification card.

106. Ms. Stecko plans the outings in advance. She breaks the students up into groups with an adult accompanying each group. Each group takes a different route and then meets at the community location. The students are taught to look for the bus number and to pay attention for their disembarkation point. The adult in charge of the group sometimes will sit apart from the students on the bus so that they get a sense of independence. However, the adult is present at all times.

107. On Fridays, there are two main activities for the students. Ms. Stecko has a cooking class for one group of students. She first does a lesson on nutrition, discussing what will be prepared to eat in the class. She writes the menu on the board so the students will remember what they will be preparing. She also has lessons focusing on buying food. The class reviews newspaper ads for grocery stores and discusses the money needed to buy the items they will be preparing in the cooking class. Part of the lesson includes having the students find an item advertised at a specific price and compare prices for items. The class has prepared foods such as salads, hamburgers, and macaroni and cheese.

108. The other group of students goes into the community and works at a donation center. The center gives the students tasks to do such as sorting donated materials. The students are paid minimum wage for the work they do. Sometimes this group of students eats lunch in the community. At other times, they return to class and eat what their fellow students have cooked.

109. Dr. Grandison and Student's mother observed Ms. Stecko's classroom at Lincoln High School on January 22, 2010. As referenced below, Dr. Grandison also observed the classroom with Student's father in February 2010. Parents and Dr. Grandison all thought that the students in Ms. Stecko's class were functioning at a lower level cognitively and academically than Student, and would therefore not be her peers. However, as stated above, there are at least three girls functioning at or above Student's level. The District has tailored academic programs for them, including a modified English class, to meet their individual needs.

110. Parents and Dr. Grandison also believe the large campus at Lincoln would overwhelm Student. However, Student has never been on a large campus so it is speculative how she would react. In any case, the District has the capacity to provide aide support and student buddies to assist Student in navigating the campus. Additionally, Ms. Stecko's students are generally accompanied when they leave the classroom such as going to PE. Moreover, although Dr. Grandison was concerned that Student would be overwhelmed by having to have lunch with hundreds of other students, Ms. Stecko explained that her students eat lunch in the classroom.

111. Dr. Grandison also opined that the Wednesday community outings of Ms. Stecko's class would provoke too much anxiety in Student. However, the outings are described and prepared for in advance by Ms. Stecko so that the students understand all aspects of where they will be going and what they will be doing. The students are broken into small groups and are always accompanied by an adult. Moreover, Student has been introduced to such community outings at Star during the 2009-2010 school year as part of Star's new life skills program. She also has learned to take public transportation in her home neighborhood accompanied by a friend. The community outings in Ms. Stecko's class merely expand on what Student is already doing at Star and at home.

112. Dr. Grandison also believed that all of Ms. Stecko's students go to a worksite on Fridays, which she felt would be too overwhelming for Student. However, contrary to her belief, not all students in Ms. Stecko's class go to a worksite on Fridays. Rather, there is a group of students that stays at school to participate in a cooking class. The class is very similar to the cooking classes Student receives at Star. There is no reason to believe that Student could not choose to participate in the cooking class rather than go and work offsite if she was unable or unwilling to participate in the worksite program.

113. Dr. Grandison also believed that there was too much emphasis on life skills and not enough emphasis on academics in Ms. Stecko's class for it to be an appropriate placement for Student. With regard to the life skills emphasis of the program, it is exactly such a program that Parents believed was missing from Star during Student's first year there and one of the reasons they felt she was not successful initially. Star also believed that Student, like others at the school, would benefit from a life skills program. It therefore specifically instituted one for the 2009-2010 school year. It was only after she was enrolled in the new life skills program at Star that Student adapted to the school, showed progress in her behavior, became less anxious, improved her speech, and progressed academically. Moreover, the District has the ability to provide Student with the additional academic instruction she might need to fit her ability levels just as it is doing with the three female students presently in Ms. Stecko's class.

114. At hearing, Student also presented the testimony of Alice Jackson. Ms. Jackson, who has a master of arts degree in counseling psychology, is an educational consultant with over 30 years of experience in counseling and consulting. She observed Student in her classes at Star. She also has observed Ms. Stecko's classroom in the context of consulting for other students. Ms. Jackson felt that Ms. Stecko, although very engaged with her students, did not manage the classroom well, leaving the class in

chaos. She also saw a student leave the classroom. Ms. Stecko then had to go find him and bring him back. Additionally, Ms. Jackson believed that the classroom did not have enough adult supervision. She also believed that the students' level of functioning was much lower than that of Student. However, Ms. Jackson did not observe the three students in Ms. Stecko's class who went to the LD class for English and therefore did not comment on that aspect of Ms. Stecko's program.

115. On January 22, 2010, Dr. Grandison and Student's mother also observed the two classrooms at Lowell High School proposed by the District at the January 11, 2010 IEP meeting. Both felt that neither class was appropriate for Student. One class was designed for severely disabled students. Dr. Grandison observed that the TEACCH program was being implemented in the class.<sup>8</sup> The students were engaging in workshop activities, bead sorting, and had picture schedules. The abilities of the students in this class were clearly far below Student's academic and cognitive levels. This SI class at Lowell was not appropriate for Student.

116. Dr. Grandison and Mother also observed a learning handicapped classroom at Lowell. The students in that class spent the majority of their time mainstreamed with the rest of the school population. They moved from classroom to classroom, ate lunch with the rest of the students, and generally participated in the full panoply of classes and programs offered in the mainstream high school environment. Their academic and cognitive abilities were far above those of Student. This classroom was also inappropriate for Student.

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<sup>8</sup> TEACCH stands for Treatment and Education of Autistic and Related Communication Handicapped Children. It is a program most commonly associated with the education of children with autism. See, e.g., *Student v. San Juan Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs Case No. 2006120636, at p. 10.

117. The District never made an offer to Parents of any program offered at Lowell High School. At the IEP meeting held on February 9, 2010, when Student's mother and Dr. Grandison informed the District that the classes they observed at Lowell were not appropriate for Student because the level of instruction was respectively too high or too low for her, Mr. Lanier told Parents that the programs at Lowell had been presented to them for comparison with the program at Lincoln High School that was recommended by the District.

#### February 9, 2010 IEP Meeting

118. Student's IEP team reconvened on February 9, 2010. None of the staff from Star participated in this meeting. Present at the meeting were Parents, Dr. Grandison, Dr. Davies, Ms. Ellis, Ms. Benson, Mr. Lanier, and another content specialist named Julie Whelly. Ms. Whelly has two teaching credentials. She worked at Star for 13 years before going to work for the District where she has been employed for two years. As a content specialist, she is a liaison between the schools and the District's central office. Her job duties include ensuring that special education students are properly placed, ensuring that students' IEPs are being followed, and giving support to teachers with their programs. Lincoln High School is one of the schools with which she works. Ms. Whelly was invited to the meeting to address questions Parents might have had regarding the programs there.

119. The IEP team spent the first part of the meeting discussing and creating a behavior support plan for Student to address her difficulty completing assignments, asking for help, and her lack of self-confidence. The team made changes to the plan based on concerns and suggestions expressed by Dr. Grandison. The team also considered input from Parents and Dr. Davies in finalizing the plan.

120. The team then spent some time discussing the categories under which Student should be identified for purposes of special education eligibility. Drs. Davies and

Grandison both believed that Student also met the criteria for eligibility due to emotional disturbance (ED), and other health impairment (OHI) based upon her anxiety and intermittent explosive disorder. The District disagreed since Student does not exhibit emotional difficulties in the school setting that adversely impact her education. There was considerable testimony at hearing as to why Student should, or should not, be found eligible under the classification of emotional disturbance. However, although in the factual background portion of her due process complaint Student mentions that she should be found eligible under OHI and ED, she did not specifically raise that as a stated issue in her complaint. Nor does the prehearing conference statement identify Student's eligibility under those classifications as an issue to be determined at hearing. Moreover, Student did not present any evidence at hearing and did not present argument in her written closing argument as to why the District's failure to classify her as OHI and/or ED denied her a FAPE or what other programs, placement or services she required but was denied because of the District's failure to include the additional eligibility classifications. This Decision therefore will not address Student's contention that she should also be classified as OHI and/or ED.

121. Ms. Whelly then discussed the merits of Ms. Stecko's classroom, which she identified as a severely impaired special day class. As part of her job, she observes the class at least twice a month. She has never seen conflict in the classroom and has no knowledge over the years that any student in the class has been victimized at school by classmates or general education students. During the IEP meeting and her testimony at hearing, Ms. Whelly stated that mainstreaming possibilities existed for Student and that her program could be blended in order to best meet her needs. At hearing, Ms. Whelly explained that there was always a group of students from the SI classes who went to a learning disabled SDC classroom, accompanied by an aide, for instruction in language arts. The students were taught a modified version of the California content standards.

However, neither Ms. Whelly nor any other District IEP member ever discussed the specifics of what Student's school program outside of Ms. Stecko's class would look like, the frequency she would be out of the class, or the extent to which her program would be "blended." Nor is there any reference to attending a learning disabled class or to any other such "blended" program in the final IEP document presented to Parents.

122. The District IEP team members believed that the day Student's mother and Dr. Grandison visited Ms. Stecko's class was unrepresentative of the program since Ms. Stecko had been absent and because the entire class had not been present. Ms. Ellis and Mr. Lanier urged Parents to visit the class again to get a better notion of the contours of the program. Parents agreed to do so. The team agreed to meet again on February 23, 2010. Ms. Ellis also stated that she would review other possible available programs and/or classrooms at other District schools that might be appropriate for Student. She never did inform Parents of any other potential programs.

#### February 23, 2010 IEP Meeting

123. As stated above, Dr. Grandison and Student's father visited Ms. Stecko's classroom after the February 9, 2010 IEP meeting. They continued to believe that the classroom was inappropriate for Student. On February 11, 2010, after visiting Ms. Stecko's classroom, Student's father sent an email to Mr. Lanier asking if the District's placement offer to them was for Lincoln High School. Mr. Lanier responded in an email that the Lincoln SI-SDC would be the placement offer for Student at the IEP meeting scheduled for February 23.

124. Student's IEP team reconvened on February 23, 2010. Present at the meeting were Parents, Dr. Grandison, Ms. Ellis, Ms. Benson, Ms. Whelly, and Mr. Lanier.

125. Dr. Grandison discussed her second observation of Ms. Stecko's classroom and her continued belief that it was not an appropriate placement for Student. Ms. Whelly disagreed with Dr. Grandison's conclusion that the level of functioning of all the



students in the class was lower than Student's. She explained that the students were at a second to fourth grade level of functioning, similar to that of Student. Ms. Whelly also felt that the day Dr. Grandison and Student's father visited the class was not representative of the class. The District suggested that Parents should again visit the class; Parents declined to make yet another visit to the same classroom.

126. At this IEP meeting, Ms. Ellis again informed Parents that a program could be designed for Student based upon her IEP, with post-secondary goals being the focal point for the type of program that could be created for her. During her testimony at hearing, Ms. Ellis also stated that the District intended to mainstream Student as appropriate for academic subjects and that it would build a program around Student's strengths and interests, such as the fact that she really liked her dog and liked art. However, no such program specifics were ever discussed with Parents and Student's final IEP document does not reference any.

127. The IEP meeting ended with Parents reiterating that they did not believe that either the Lincoln High School SI-SDC or either of the classes at Lowell High School was an appropriate placement for Student. Rather, Star Academy was where Student should be placed by the District. The District informed Parents that it would add information obtained from Anne Crowder at Star concerning Student's transition plan for post-secondary objectives before sending them the final version of the IEP.

## THE DISTRICT'S FINAL IEP OFFER

### Goals and Objectives

128. The District developed 13 goals for Student based upon her present levels of performance or "PLOPS." The District determined Student's PLOPS from the assessments it administered as well as from input from Parents, Star, and prior assessments of her. As discussed above, the assessment results obtained by the District

are commensurate with the results from the private assessment administered to Student in 2008 as well as the results obtained by Dr. Grandison from her assessment.

129. It is unclear exactly which goals Student believes are inappropriate for her and for what reasons. During her testimony, speech language pathologist Patricia Ramos from Star addressed the District's special education language goal which states that Student will demonstrate effective literal comprehension, increasing her comprehension from 40 percent to 65 percent over the course of a calendar year. The goal proposes that Student will achieve the goal by identifying the setting in short stories, novels, and plays. Ms. Ramos found the goal to be appropriate for Student.

130. The District also proposed two pragmatics goals for Student. The first states that Student will demonstrate effective social judgment, increasing her ability to do so from 35 percent of the time to 65 percent of the time within a calendar year. The goal proposes having Student use worded statements to describe pictures and situations using pictures and story telling. The second pragmatics goal states that Student will initiate and continue socially acceptable conversations through the use of conversations with peers and by establishing topics in conversation consistent with her role and the social situation. Ms. Ramos opined that the pragmatics goals were worded well but that she was unsure where the baseline came from or how the goal would be measured. However, Ms. Langley, the District speech language pathologist, explained that the goals were developed from Star proposed goals. With regard to measuring results, the goal itself states that they would be obtained from observations by Student's speech language pathologist, teacher, and family, as well as demonstrations by Student. Although not models of clarity, the pragmatics goals meet their intended purpose of addressing Student's needs and formulating a method by which Student's IEP team can determine if she is making progress in a given area of need.

131. Two other goals developed by the District addressed Student's deficits in articulation. The first goal states that Student will use proper teeth positioning, tongue placement, and centralized air stream in order to correctly produce sounds within words that she was not presently pronouncing properly. The second goal states that Student will improve her speech intelligibility in the same way with regard to speaking sentences. Ms. Ramos felt that Student already was able to make the sounds identified in single words. However, this was not the case when Ms. Langley assessed Student. Moreover, even assuming that Student already had the ability to make the sounds in single words, the second goal focused on the goal of making them within sentences. Therefore, even if Student proved capable of the first goal, the District speech language pathologist could work on the second goal. Ms. Ramos did not contend that Student was presently capable of reproducing the sounds in sentences as was the object of the second articulation goal.

132. Ms. Eichelberger believed that the District should have included reading comprehension and written expression goals for Student. It is unclear, however, why she believes that they did not. There are three proposed language goals. The first addresses English language arts and writing for fourth grade, the approximate level of written expression at which Student was functioning when assessed by the District. The goal has as its objective teaching Student to write grammatically proper paragraphs which contain information from a given topic. Although not specifically stated, implicit in being able to describe what the topic is about is the fact that Student would first have to read it correctly in order to describe cause and effect, similarities and differences, and posing and answering questions as proposed in the goal. Ms. Eichelberger acknowledged that the District's proposed goals were based, in part, on those she had proposed. She also stated that while she generally was more specific in writing goals, she did not usually

write as many objectives as did the District in formulating its goals. Ms. Eichelberger did not identify any of the District's proposed goals as being inappropriate for Student.

133. Student appears to contend that the District should have included all of Star's proposed goals in Student's IEP. Student has not, however, met her burden of proof that the failure to do so denied her a FAPE. None of the witnesses at hearing identified the specific goals that should have been included but were not. Nor does Student, in her written closing argument, address the issue. Moreover, a review of Star's proposed goals indicates that the District did incorporate reading and writing goals in the ones it proposed. Finally, Student has failed to demonstrate that she was even capable of meeting all of Star's proposed goals. For example, Star's goal two is based on Student's results from a standardized assessment it had administered to her. The goal states that Student made numerous word substitutions, ostensibly when she was reading. The goal proposes that Student be able to read at the sixth grade level with three or fewer word substitutions in four out of five trials by the end of a calendar year. However, all other assessments of Student indicated that she was reading and writing at approximately a fourth grade level. Star's goal of having her read at the sixth grade level within a year was therefore unrealistic. Star's goals had been unrealistic in the past; as stated above, Student had only met two of the six goals Star had developed for Student for the 2008-2009 school year.

#### Contents of the Final IEP Document

134. The final IEP document was mailed to Parents after the IEP meeting of February 23, 2010. The document is replete with errors and omissions to such an extent that Parents had no idea what the District's final offer of placement and services for Student was.

135. For reasons the District did not and perhaps could not explain, the IEP has numerous informational errors. It indicates that Student's school of residence was

George Washington High School. Although the District offered Student an interim placement there, she never enrolled in the school. The IEP also states that Student does not live with Parents. However, she has always lived with them.

136. More significant, however, are the errors and omissions with regard to the program, placement, and services allegedly offered to Student. The IEP states that, out of 1800 available minutes of school per week, Student would only be spending 62 minutes of that time in a special education setting, which represents approximately three percent of her school week. This indicates that Student would be spending the remainder of her time, amounting to 97 percent, in general education. This contradicts the discussions at the IEP meetings in which the District stated that it was offering Student placement in a SI-SDC rather than in a mainstream general education class. Even if one were to assume that the numbers were reversed, that is the District meant to say that Student would be spending 97 percent of her time *outside* of general education, the correct proportion of time is not indicated. The District's proposal supposedly included mainstreaming in a general education PE class, which would amount to much more than three percent of Student's school week.

137. The IEP also includes a section described as "supplementary aids, services & other supports for school personnel or for student or on behalf of student." The first service, under the sub-heading Special Education, is entitled "other transition services." The frequency is defined as "any other frequency as needed." Sixty minutes are indicated per session, with the location of the services to be at a public school or during community-based instruction. However, there is no indication of what type of transition services these would be and how and by whom the frequency would be determined. There is no indication of whether this service was meant to be the one-on-one aide the IEP team discussed during the IEP meetings as a means of ensuring Student's transition

to public school and safety while there. This particular item of the IEP was never discussed with Parents.

138. The second sub-heading is entitled "DIS Services." Although it lists the OT consultative services of 60 minutes per month and the 135 minutes per month of direct speech and language services that the District IEP team members discussed at the IEP meetings with Parents, both services are listed twice as separate services. It is therefore unclear in the IEP document whether Student was being offered twice the amount of related services or whether an error in printing had occurred.

139. The final significant error in the IEP is on the page entitled "Offer of FAPE Educational Setting." It indicates that the placement offered to Student was a speech/language impaired SDC classroom at George Washington High School. This is in direct contradiction to what the District IEP team consistently reiterated during all IEP team meetings and to what all District staff testified to at hearing: that the District's offer of FAPE was a SI-SDC classroom at Lincoln High School. All District witnesses who were asked at hearing, including Ms. Benson, Ms. Langley, and District supervisor Pamela Macy, acknowledged that the final IEP document contained errors that made it confusing to any parents, let alone those, like Student's parents, who had not previously participated in the IEP process.

140. The IEP document also omits several aspects of the program which the District allegedly was proposing for Student. It fails to contain any mention of or reference to the modifications and/or accommodations necessary for Student to access her education, most specifically those recommended by District assessors Melissa Benson and Lisa Keough, and those mentioned at the IEP meetings and at hearing by Ms. Ellis, such as modifying Student's homework assignments. It fails to specifically state that Student would have a one-on-one aide or other type of paraprofessional support to aid in her transition to a large public school campus and to assist her in navigating

the campus and the general education PE class the District proposed for her. It fails to specifically state that Student would be placed in general education PE. It fails to state that Student would be in a "blended" program where she would attend a modified learning handicapped English language arts class and/or a mainstream art class. Finally, it fails to identify the mental health supports discussed by the District during the IEP meetings that the District had indicated Student might need.

141. The final IEP offer the District made to Student, as detailed in the IEP document presented to Parents, is for placement at George Washington High School in a SLI-SDC classroom with 135 minutes a month of direct speech and language services, 60 minutes a month of OT consultation, and 60 minutes during an unspecified time of undefined transition services. The offer as worded and presented to Parents does not provide Student a FAPE.

#### REIMBURSEMENT OF EXPENSES

142. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Student requests that Parents be reimbursed for the cost of Student's tuition at Star from November 9, 2009, through the date of the hearing. She also requests that the District be ordered to pay for her prospective placement at Star for the 2010-2011 school year. Parents have provided documentary evidence of the payments they made to Star for the 2009-2010 school year in the total amount of \$38,168. They have also provided documentary evidence that the base tuition for the 2010-2011 school year at Star for Student is \$31,300. Their evidence indicates that group speech and language therapy sessions at Star are charged at \$42 dollars for each session for a total of \$4,410 (three group sessions a week for 35 weeks) for the school year. Additionally, the evidence indicates that Star will charge Parents \$55 per session for individual speech

and language therapy for Student each week, for a total of \$1,925. Finally, the evidence submitted by Parents shows that for the 2010-2011 school year, Star will charge \$55 per session for Student's weekly group occupational therapy sessions, for a total of \$1,925.

143. There is no dispute that Star Academy was during the 2009-2010 school year, and is presently, an appropriate placement for Student. Star is a certified NPS. Its curriculum now includes a life skills component that addresses Student's needs for functional skills that will prepare her for independence as a young adult. The curriculum also includes intensive reading instruction and math classes. The school modifies its program for students as appropriate. Related services in areas such as speech and language and OT are also available to meet the individual needs of the school's students. The District has placed children at Star in the past.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

#### BURDEN OF PERSUASION

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

#### ELEMENTS OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and State law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)<sup>9</sup> A FAPE means special education

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<sup>9</sup> All statutory citations to the Education Code are to California law, unless otherwise noted.



and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*).) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

4. The Ninth Circuit recently reaffirmed the validity of the *Rowley* standard in analyzing FAPE in the context of the 1997 version of the IDEA. In *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, the Ninth Circuit overturned the district court's finding that *Rowley's* educational benefit standard had been superseded by Congress when it revised the IDEA in 1997. The court found that for all intents and purposes, Congress had retained the same definition of a free appropriate public education when it reenacted the IDEA in 1997 and that it had not indicated any disapproval of *Rowley*. The court further found that Congress did not express any clear intent to change the *Rowley* FAPE standard. The court thus found that the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard set forth by the Supreme Court in *Rowley*. (*Id.* at pp. 949 – 951.) A review of the 2004 reauthorization of the IDEA does not indicate any substantive changes in the definition of FAPE or anything in the legislative history that would support a finding that Congress intended to change or modify the educational benefit standard enunciated in *Rowley* when it reauthorized the IDEA in 2004. The Ninth Circuit's discussion regarding the lack of congressional intent to modify the *Rowley* standard is therefore equally applicable to IDEA 2004.

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

environment. (*Ibid.*; 20 U.S.C. § 1401(9).) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232).)

6. There are two parts to the legal analysis of whether a local educational agency (LEA) such as a school district offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Ibid.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*).) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

8. If a child is referred for assessment, the school district is obligated to develop a proposed assessment plan within 15 calendar days of the referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) An IEP required as a result of an assessment of a student must be developed within a total time not to exceed 60 calendar days from the date the school district

received the parent's written consent to the assessments, not counting school vacations in excess of five schooldays, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).)

## THE IEP

9. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

10. Federal and State special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

11. A district must also make a formal, written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519,

1526 (hereafter *Union*).) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, designed to address a child's unique needs. (Ed. Code, § 56345.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) The Ninth Circuit also stated that "this formal requirement [of a written offer of placement] has an important purpose that is not merely technical, and we therefore believe that it should be enforced rigorously." (*Ibid.*) However, that right does not mean that a change in location of a program amounts to a change in placement, or that the district failed to make a clear, written offer of placement. As stated by the United States Department of Education in its comments to the 2006 federal regulations: "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed.Reg. 46687 (Aug 14, 2006); see also *Johnson v. SEHO* (9th Cir. 2002) 287 F.3d 1176.)

12. Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*).) The relevance of a student's subsequent performance to the adequacy of his or her IEP is limited.

#### LEAST RESTRICTIVE ENVIRONMENT

13. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2);<sup>10</sup> Ed. Code, § 56342.) A child with a disability should be removed from the

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<sup>10</sup> All references to the Code of Federal Regulations are to the 2006 version.

regular educational environment only 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. A child with a disability shall not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).) In determining the program placement of the student, a school district shall ensure that the placement decisions are made in accordance with federal requirements regarding placing the child in the LRE. (Ed. Code, § 56342, subd.(b).)

14. To provide the LRE, 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); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires

determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

## RELATED SERVICES

15. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union, supra*, 15 F.3d at p. 1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

## APPROPRIATE REMEDIES

16. Courts have long recognized that equitable considerations are appropriate when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (hereafter *Puyallup School*), citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (hereafter, *Burlington*); *Greenland Sch. Dist. v. Amy N.* (1st Cir. 2004) 358 F.3d 150, 157; 20 U.S.C. § 1412(a)(10)(C)(i), (ii), (iii) & (iv).) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Puyallup School, supra*,

31 F.3d at p. 1497.) Relief is appropriate if it is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (hereafter *Reid*).)

17. A district may be required to reimburse a student's parents for the costs of a private school if the district failed to make a FAPE available to the child. (20 U.S.C. § 1412(a)(10) (C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.) A student is only entitled to reimbursement of private school tuition if it is determined that the placement at the private school was appropriate for the student. The placement does not have to meet the standard of a public school's offer of FAPE; it must, however, address the student's needs and provide educational benefit to him or her. (*Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 13 [114 S.Ct. 361, 126 L.Ed.2d 284] (hereafter *Carter*); *Forest Grove School District v. T.A.* (2009) 557 U.S. \_\_\_, 129 S.Ct. 2484, 2493-2494, 174 L.Ed.2d 166 (hereafter *Forest Grove*); *Alamo Heights Independent Sch. Dist. v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161; 34 C.F.R. § 300.148.) Court decisions subsequent to *Burlington* have also extended relief in the form of compensatory education to students who have been denied a FAPE. (See, e.g., *Lester H. v. K. Gilhool and the Chester Upland School District* (3d Cir. 1990) 916 F.2d 865; *Miener v. State of Missouri* (8th Cir. 1986) 800 F.2d 749.) Compensatory education is an equitable remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Puyallup School, supra*, 31 F.3d at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid, supra*, 401 F.3d at p. 524.) The award must be "reasonably calculated to provide the educational benefits that likely



would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*) A pupil need not have already received special education in the public school district in order to be awarded reimbursement for a private placement. (*Forest Grove, supra*, 129 S.Ct. at p. 2496.)

18. Therefore, under appropriate circumstances, a court (and an ALJ) has the discretion to award compensatory relief in the form of placement at a private school. In California, an ALJ may render a decision that results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school as long as that school has been certified by the State of California pursuant to the Education Code. (Ed. Code, § 56505.2, subd. (a).)

#### DETERMINATION OF ISSUES

Issue 1: Between the time of the IEP meeting on November 9, 2009, when the District found Student eligible for special education, and an IEP meeting on February 9, 2010, did the District deny Student a FAPE by failing to offer or provide Student any special education and related services?

19. Student contends that the District should have finalized her IEP and offered her a placement by the end of the first IEP meeting the District convened for her on November 9, 2009. Instead, the District did not make a final offer of FAPE until after the February 23, 2010 IEP meeting. Student maintains that the three-month delay in the development of her IEP denied her a FAPE. Student basically argues that Education Code section 56043, subdivision (f)(1) (See Legal Conclusion 8 above) compels such a finding.

20. The primary flaw in Student’s argument is that the District’s delays in making her an IEP offer initially were occasioned in substantial part by Parents’ requests for additional IEP meetings. The District sent Parents a notice of IEP meeting in advance of the Student’s initial IEP meeting on November 9, 2009, which informed them that they could invite other participants to the meeting. They did not do so. However, at the

outset of the meeting, Parents informed the District that they wished Star Academy personnel and Student's psychiatrist to participate in a subsequent IEP meeting. The District agreed that those individuals would have useful input into Student's IEP. The District therefore scheduled a second IEP meeting in response to Parents' request.

21. Student then argues that the meeting should have been held on November 23, 2009, and that the delay in not holding it until January 11, 2010, is solely attributable to the District's procrastination. The evidence does not support Student's contention. Student's father had conflicts with his job and his health that impacted on his ability to attend an earlier meeting. The District also had logistical problems attempting to find a date on which all of the 16 participants designated to attend the meeting would be available. Additionally, the District was closed for the Thanksgiving and winter break holidays for a total of about three weeks during the period from November 9, 2009, and January 11, 2010, making it more difficult to schedule everyone for a meeting. Finally, Dr. Grandison did not finish her assessment of Student until November 24, 2009. She therefore would not have been able to discuss it on November 23, the original date the District wanted to hold the meeting. The District therefore did not unduly delay holding Student's second IEP meeting until January 11, 2010.

22. At the second IEP meeting it convened on January 11, the District came prepared to make an offer of placement. However, after discussion of the possible programs and program locations proposed by the District, Parents requested an opportunity to observe them. Although their desire to view the placement options before determining if they would accept the District's offer is appropriate and understandable, it was their request to do so that delayed an offer from the District.

23. Student's argument places the District in a no-win situation: had it not agreed to allow Parents to call for another IEP meeting in order to include the participation of the Star staff, Dr. Grandison and Student's psychiatrist, and had it

refused to delay making an offer so that Parents and Dr. Grandison could observe the proposed placements, the District would have been subject to a potential allegation that it had prohibited Parents from participating in the IEP process. Instead, the District properly acceded to Parents' requests and scheduled subsequent meetings in order to address the input from Star personnel and Drs. Grandison and Davies, and in order to permit Parents to observe the proposed placements.

24. At the close of the hearing, the ALJ directed Student's attorney to provide case authority for Student's contention that a delay in making an IEP offer due to the fact that subsequent IEP meetings had been scheduled could be the basis for a finding that such a delay constituted a denial of FAPE. Student did not provide any case authority in her written closing argument.

25. Because the scheduling of the IEP meetings on January 11, 2010, and February 9, 2010, were in response to Parents' requests, Student has failed to meet her burden of proof that the District unreasonably and/or deliberately delayed making her an offer of FAPE. The failure to make an offer of placement and service on November 9, 2009 is not attributable to the District. There was therefore no denial of FAPE up to the February 9, 2010 IEP meeting. (Factual Findings 83 through 127; Legal Conclusions 8, 16-18, and 19-25.)

26. Such is not the case with regard to the IEP meeting convened on February 9, 2010, and the subsequent scheduling by the District of another meeting on February 23, 2010. Student's mother and Dr. Grandison observed the District's proposed placements prior to the February 9 meeting. At the meeting, they expressed strong opposition to placing Student in any of the proposed classrooms. However, the District felt that the observations of Ms. Stecko's classroom at Lincoln had not been under the best of circumstances. The District therefore urged Parents to observe the classroom again. Parents reluctantly agreed. However, they had been expecting a final offer from

the District at the February 9 meeting and expressed their disappointment that one had not been made. Additionally, it is apparent from the record that by the time of the February 9 IEP meeting, the District had determined that the SLI-SD classroom at Lincoln would ostensibly be its offer of FAPE for Student. Ms. Ellis stated so at various times during the January 11 and February 9 meetings. Additionally, Mr. Lanier confirmed in an email to Parents on February 11, prior to the second observation at Lincoln by Dr. Grandison accompanied by Student's father, that the Lincoln SI-SDC would be the District's offer of FAPE.

27. Student has therefore met her burden of proof that the delay in making an offer after February 9, 2010, is solely attributable to the District. However, this does not end the inquiry, because the failure to make the offer of FAPE by February 9 is a procedural violation of Student's rights. Student must still show that the District's procedural violation impeded her right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or caused her a deprivation of educational benefits. Student has not met her burden of proof in this regard. Parents' rights were not impeded because the delay after February 9 was in order for them to again observe the proposed placement. Additionally, the weight of the evidence demonstrates that by February 9, 2010, if not earlier, Parents had determined that they would not accept placement for Student in Ms. Stecko's class at Lincoln under any circumstances. Student therefore did not lose any educational benefit by the District's delay in making an offer from February 9 to February 23, 2010, because Parents would never have agreed for her to attend the placement proposed by the District. Since Student has not proven that she or her parents suffered a substantive loss, she has failed to meet her burden of proof that the District's delay in making an offer denied her a FAPE. (Factual Findings 83 through 127; Legal Conclusions 6, 7, 8, 16-18, and 19-26.)

Issue 2(a): Beginning on February 9, 2010, did the District deny Student a FAPE for the 2009-2010 school year ESY, and the 2010-2011 school year, to February 9, 2011, by offering Student an inappropriate placement in a SLI classroom with lower academic levels, including no math, and lower-functioning pupils who were not socially capable and were not appropriate peers for Student?

28. Student contends that the placement offered by the District was in a SLI-SDC classroom in which the students were functioning at a much lower level academically and socially than Student and who, therefore, are not her peers. Student also contends that the classroom does not offer sufficient academic instruction for her in math.

29. The problem in this case is that it is impossible to determine what exactly the District's offer of placement was. At hearing, District witnesses testified that the placement offered was in a severely handicapped SDC class with a life skills emphasis, specifically at Lincoln High School in Ms. Stecko's classroom, with full one-on-one aide support, modifications and accommodations to assist Student in the classroom and on campus, and placement in an English language arts learning handicapped classroom with a modified curriculum. The District, through the testimony of Ms. Stecko, Ms. Mays, and Ms. Whelly, demonstrated that the students in Ms. Stecko's class functioned at a variety of levels but that at least three of them, who also happen to be girls, functioned at a level similar to Student's. Ms. Stecko also credibly testified that her class curriculum included math instruction that would address Student's needs. The assessments administered to Student indicated that she functioned at approximately a second grade level in math, commensurate with other students in Ms. Stecko's classroom.

30. Had Ms. Stecko's classroom been identified as the placement for Student, with the accommodations, modifications, and support services discussed generally by the District during Student's IEP meetings and presented as the offer by Ms. Ellis at hearing, Student would not have met her burden of proof that the placement would not

provide her with meaningful educational benefit. While she has demonstrated that Star may be the most appropriate placement for her, a district's IEP offer need not be the most appropriate one or one that will maximize a Student's potential. Rather, as discussed in *Rowley* and *Mercer Island*, a district must only provide a placement that permits a student to derive a meaningful benefit from the placement. The problem in this case is that Student's IEP does not identify her proposed placement as a SI-SDC, be it at Lincoln or elsewhere, does not address modifications or accommodations although they had been specifically proposed by District assessors, does not indicate that Student would have an aide, and does not address placement in a learning handicapped English class with modifications. Importantly, the IEP does not indicate that Student would be placed in a life skills class or that the SLI placement indicated on the IEP document has a life skills component. Student has persuasively shown that she requires a life skills program to help her attain independence, that she will need an aide to assist her in transitioning to a large campus, that she requires modifications and accommodations in the classroom and to her curriculum, that she continues to improve in reading and thus requires English language instruction, and that she needs to be with other students who function at approximately the same level as she does.

31. The Ninth Circuit, in its decision in *Union*, explicitly stressed the importance of a written, formal offer of FAPE. In *Union*, the school district believed that a specific placement was appropriate for the student in the case. However, it had never made a specific offer of that placement because it believed that the student's parents would never agree to it. The Ninth Circuit found that school districts are required to make specific written offers of placement in a student's IEP and that failure to do so is not just a technical violation:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore

believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child ." (20 U.S.C. § 1415(b)(1)(E).)

(*Union, supra*, 15 F.3d. at p. 1526.)

32. There is no evidence that the placement delineated in Student's IEP document-a SLI-SDC without aide support, accommodations and/or modifications, without reference to a life skills program, and without additional academic support in English language arts- would provide Student with a FAPE. To the contrary, Student has demonstrated that at the least, in order to obtain meaningful benefit from her education, she requires placement in a SI-SDC with a life skills component, supplemented by academic classes and supported by an aide and appropriate modifications and accommodations. This placement was referenced in general terms during Student's IEP meetings and described eloquently by Ms. Ellis and other District staff at hearing, but was never formally offered to Student. Student has therefore met her burden of persuasion that the District's formal, written IEP offer to her did not provide her with a FAPE. (Factual Findings 1 through 141; Legal Conclusions 1 through 15, and 28 through 32.)

Issues 2(b) and 2(c): Did the District's offer of placement in the SLI class at a large, comprehensive high school campus with placement in a general education PE class, both of which would overwhelm Student, fail to offer her a FAPE?

33. Whether the District offered Student a placement in a SLI-SDC classroom or in a SI-SDC classroom, there is no dispute that the class would be located at one of the District's large, comprehensive campuses and that Student would be assigned to a general education PE class. Both George Washington and Lincoln high schools have an enrollment of approximately two thousand students. Student, Parents, Star personnel, Ms. Jackson, and Drs. Grandison and Davies all sincerely believe that Student suffers too much anxiety, would be overwhelmed by having to navigate such a large campus and attend general education PE, would be subject to possible victimization, and would regress if forced to matriculate at either school. The weight of the evidence however does not support such a conclusion.

34. Student has never attended a large comprehensive high school. It is therefore speculation that she would be unable to function at one. As the District personnel persuasively testified, the District has served many students with a similar profile to students who have made educational progress in spite of the size and potential chaos of the high school campuses.

35. Additionally, the evidence indicates that it is not the size of a school that impacts Student's ability to function in the environment or prevents her from having explosive episodes of rage at home. Every school Student has attended to date has had a much smaller enrollment than do the District's high schools. Parents first enrolled Student in a French *Lycee*. She was unsuccessful in that program. They then enrolled her in the Children's Day School, another small private school. Student was teased and tormented for her differences. Parents then enrolled Student at Laurel, which has anywhere from 33 to approximately 100 students on campus, a fraction of the number



of students at District high schools. Student took time to adjust there, had to be held back a year, but finally adapted to the school during her elementary school years. However, once Student reached middle school, her anxiety, depression, and behavioral concerns at school and at home returned. There was no change in the enrollment at Laurel. Rather, the change was to the curriculum since the academic demands of middle school became too difficult for Student, she fell behind, and her problems resurfaced. Thus, it was not the size of the enrollment at Laurel but the academic demands placed on Student that affected her ability to function at the school.

36. Since Student was not functioning at Laurel, Parents removed her and enrolled her at Star. However, the same pattern occurred there. For her first year, in spite of the fact that Star only had an enrollment of about 60 students and in spite of the fact that Student received considerable one-on-one instruction, Student had issues at school and even more significant issues at home. She was not keeping up in class, did not want to do the schoolwork, did not want to read, did not want to do homework, and did not meet four of six language goals by the end of the year. Parents believed that Star was not going to benefit Student. In desperation, they turned to the District for placement. It was not until Star instituted a life skills class which includes components similar to those in Ms. Stecko's program that Student began to function there. The weight of the evidence therefore indicates that it is not the size of the school but the components of the educational program offered that impacts Student's ability to function. The weight of the evidence indicates that she functions successfully when given an appropriate curriculum that does not place excessive academic demands on her.

37. Student has additionally proven that she can adapt to new situations if they are introduced gradually. She has learned to ride public transportation with a friend, is able to walk her dog in her neighborhood on her own, can do simple errands

in her neighborhood also unaccompanied, and has participated in the community access aspect of the Star life skills curriculum.

38. The District described at hearing a placement that would meet Student's needs. Ms. Stecko's students are met at their school buses and always accompanied by an adult. The students eat lunch in their classroom. An adult accompanies them to PE. The District described a one-on-one aide that would assist Student throughout her school day. Ms. Ellis also described a peer buddy system where a typical peer would help Student during transition at school. All these supports should enable Student to adapt to a District high school. It is not a certainty that she would be able to do so: it took a year for her to adapt to Star, and that only occurred after her curriculum was changed. However, the weight of the evidence indicates that Student has the capacity to be successful at a comprehensive high school, and in a general PE class if she is given the necessary supports and accommodations to be able to so do.

39. Student has therefore failed to meet her burden of persuasion that she would not be able to obtain meaningful educational benefit from an appropriate placement on a comprehensive high school campus or from placement in a general education PE class. The District has demonstrated that a comprehensive high school campus, with an appropriate placement, and supports and accommodations, is the least restrictive environment for Student. (Factual Findings 1 through 141; Legal Conclusions 1 through 15, and 33 through 39.)

Issue 2(d): Did the District's offer of speech and language and occupational therapy services fail to provide student a FAPE because the duration and frequency of the services were inadequate to meet Student's needs?

40. Student contends that the District's offer of 135 minutes of speech and language therapy a month and 60 minutes of consultative OT services a month was insufficient to meet her needs. Student presently receives three, one-half hour sessions

of group speech and language therapy and one, one-half hour session of individual speech and language therapy per week at Star. She also receives one 90-minute group OT session a week as well. Student asserts that the District's failure to offer her the same level of related services as does Star denies her a FAPE.

41. However, as discussed above, Student has failed to present any evidence in support of her assertions regarding the level of related services she needs in order to receive a FAPE. Star speech language pathologist Patricia Ramos did not offer any specific justification for the level of services Student has received and is now receiving at Star. Likewise, Ms. Ramos did not offer any criticism of the level of speech and language services offered by the District in Student's IEP. Similarly, Star occupational therapist Sandra Bennett failed to support the necessity of the level of OT services Student now receives at Star and failed to criticize the level of OT services offered by the District. Student's present OT services at Star consist of a once a week cooking class. The same type of class is available in Ms. Stecko's SI-SDC at Lincoln High School. It is therefore unnecessary for the District to offer a separate OT session when functional cooking instruction is integrated into its SI-SDC program.

42. Student receives a significant amount of related services from Star. However, a FAPE analysis does not focus on the merits of a student's alternative placement and/or services. Rather, it focuses on the adequacy or inadequacy of a district's offer. In this case, Student has failed to meet her burden of persuasion that the District's offer of OT therapy and speech and language therapy was inadequate to meet Student's needs at the time it made the offer. There was no denial of FAPE. (Factual Findings 47 through 62, 71, 72, and 93 through 95; Legal Conclusions 1 through 5, 9, 15, and 39 through 42.)

Issue 2(e): Did the District Deny Student a FAPE by Offering her Inappropriate Goals that were not from Star Academy in Addition to the District's Appropriate Offer of Other Annual Goals that were from Star?

43. Student contends that some of the District goals that were not based on goals submitted by Star were not appropriate for her. It is unclear, however, how and why Student makes this contention. As discussed above, Star personnel had very little criticism of the District's goals. Ms. Ramos criticized the District's pragmatic speech goal as being unmeasurable, but the goal itself describes how it will be measured. She also felt that Student was already making the sounds indicated in the articulation goal the District developed. However, that goal was based upon assessments results obtained by Ms. Langley and therefore indicates that Student was not consistently making the sounds. In any case, there are two parts to the articulation goal: one part addresses Student's ability to make the sounds when speaking single words and the other part addresses her ability to make the sounds in complete sentences. Ms. Ramos did not state that Student had perfected the second part of the articulation goal. It was therefore not an inappropriate goal for Student.

44. Ms. Eichelberger, Student's teacher at Star, felt that the District should have included a specific reading comprehension goal for her. However, as discussed above, the District developed two English language goals for Student that inherently incorporated reading comprehension into the goal's objectives.

45. The evidence presented at hearing indicates that the District addressed all of Student's deficits through the goals it proposed. It incorporated those goals from Star that it felt were appropriate and added additional goals that Star had omitted. Student has failed to meet her burden of proof that the District's goals were inappropriate or did not meet her needs. There was no denial of FAPE. (Factual Findings 128 through 133; Legal Conclusions 9, 10. and 43 through 45.)

## DETERMINATION OF RELIEF

46. As stated in Legal Conclusions 16 through 18, the courts have recognized that equitable factors may be considered when fashioning relief for violations of the IDEA. Any relief ordered must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. A school district may be required to reimburse a student's parents for the costs of self-funded private school tuition or other services if the district failed to provide a FAPE to the student. Prospective placement is an equitable remedy, akin to an award of compensatory education, which a court or administrative law judge may award in order to remedy FAPE violations.

47. As determined in Factual Findings 46, 54, 62, 69, 71, 86, 90, 121, 126, and 134 through 141, this Decision finds that the District formal, written offer of placement in the IEP it developed for Student and presented to Parents for consent, denied Student a FAPE by failing to include an appropriate placement, accommodations, and aide support.

48. Based upon Factual Findings 1 through 143, and Legal Conclusions 1 through 18, 28 through 32, and 46- 48, and after weighing all the evidence and considering the equities, this Decision finds that Parents are entitled to reimbursement for Student's tuition at Star Academy from February 23, 2010, when the District made its final offer of FAPE, through the end of the 2009-2010 school year, in the amount of \$16,359 for tuition reimbursement and \$630 for reimbursement of one session a week of group speech and language services at \$42 per session, for 15 weeks. The total reimbursement for tuition and speech and language services owed to Parents is \$16,989. The amount is derived from the proof of payment provided by Student at hearing that demonstrate Parents paid Star a total of \$38,168 for the 2009-2010 school year. The evidence also indicates that Star is in session for 35 weeks during the school

year; the amount due to Parents is therefore pro-rated to attribute reimbursement for 15 weeks, the approximate amount of time remaining in the school year, less a week for Spring break, after February 23, 2010. Fifteen weeks amounts to three-sevenths of the total 35 weeks comprising the school year. The amount ordered for reimbursement for tuition is three-sevenths of the total amount Parents paid for the school year.

49. Parents are also entitled to reimbursement for the cost of transporting Student for two round trips a day from their home to the Star campus in San Rafael, California at the District's standard rate for reimbursement of mileage. Parents will be ordered to provide the District with attendance sheets from Star indicating the days Student attended school from February 23, 2010, to the end of the 2009-2010 school year. The District shall base the transportation reimbursement on the distance from Student's home (whose address is part of the District's records) to Star. The District shall be ordered to provide the reimbursement within 45 days of receipt of this order.

50. The District has failed to develop an appropriate IEP for Student for the 2010-2011 school year which, on its face, addresses her needs. There is thus no placement that can be ordered at a District school without the ALJ, in effect, creating an IEP for Student. Student has demonstrated that Star is an appropriate placement for her. Therefore, based upon Factual Findings 46, 54, 62, 69, 71, 86, 90, 121, 126, and 134-143, and Legal Conclusions 1 through 18, 28 through 32, and 46- 50, Student is also entitled to placement at Star for the 2010-2011 school as compensatory education for the District's denial of a FAPE to her. Since the ALJ is ordering placement at Star for the 2010-2011 school year as compensatory education, the placement at Star shall not constitute stay-put for Student. The District will be ordered to pay for Student's base tuition and one group session of speech and language services a week. This amount of speech and language is substantially equivalent to the speech and language services recommended by the District and found above to offer Student a FAPE. Student has not

met her burden of persuasion that she needs more than the amount of speech and language services recommended by the District. Student has not proven by a preponderance of the evidence that she is entitled to direct OT services. Should Parents believe Student requires additional services not covered by this Decision, they may privately fund them. The District will also be ordered to provide Student with transportation to Star, either by providing door-to-door bus transportation for her or by reimbursing Parents for the cost of two round-trips a day from their home to the Star campus, at the District's discretion.

51. Student has failed to offer evidence to support all other relief she has requested and therefore those requests not addressed above are denied.

## ORDER

1. Within 15 days of receipt of this Decision, Parents shall provide the District with an attendance list for Student at Star indicating all days she attended school from February 23, 2010, to the end of the 2009-2010 school year.

2. Within 45 days from the receipt from Parents of the attendance list, the District shall reimburse Parents for the cost of two round trips transporting Student from their residence to Star, at the District's standard rate for reimbursement of transportation costs.

3. Within 45 days of the receipt of this Decision, the District shall reimburse Parents in the amount of \$16, 959 (sixteen thousand nine hundred fifty-nine dollars), for the cost of Student's tuition and one group speech and language session per week at Star, from the period February 23, 2010, to the end of the school year, for a total of 15 weeks of tuition and speech and language services at Star.

4. The District shall place Student at Star and pay for her base tuition and one session of group speech and language therapy a week for the 2010-2011 school year as compensatory education for its failure to offer her a FAPE for the 2010-2011

school year. This placement is in the form of compensatory education for Student based upon the District's denial of FAPE and does not constitute Student's stay-put placement.

5. Within 45 days of receipt from Parents of proof they have paid a deposit to Star or any tuition for the 2010-2011 school year, the District shall reimburse them for those costs.

6. The District shall either arrange for door-to-door bus transportation for Student from her home to Star or shall reimburse Parents for the cost of two round trips between their home and the Star campus.

7. The District shall not be under any obligation to fund Student's placement at Star if she moves out of the boundaries of the District.

8. All other relief requested by Student is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student was the prevailing party on Issue 2(a). The District prevailed on all other issues raised by Student in her due process complaint.

## RIGHT TO APPEAL

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)



Dated: September 3, 2010

/s/

DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings