

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,  
v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009020454

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Poway, California on May 26-28, 2009 and June 2-3, 2009.

Student was represented by Eric B. Freedus, attorney at law. Student's Parents (Parents) attended each day of the hearing.

Poway Unified School District (District), was represented by Brian Sciacca, attorney at law. District Director of Special Education Emily Shiea attended each day of hearing,

Student filed a Request for Due Process Hearing on February 17, 2009. Student's request for continuance was granted on April 10, 2009 for good cause. The record remained open until June 22, 2009 for the submission of closing briefs. Upon timely receipt of closing briefs the matter was submitted and the record closed.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) by failing to assess Student in the area of auditory processing deficits through an

audiological assessment from May 8, 2007 through the end of the 2008-2009 school year?

2. Did the District deny Student a FAPE from May 8, 2007 through the end of the 2008-2009 school year by:

- (a) offering inappropriate placements in large, noisy classrooms; and
- (b) offering RSP and related services on a pull-out basis, involving distractions and transition challenges, which impeded his access to educational benefit?

## REMEDIES REQUESTED

Student seeks reimbursement for tuition and transportation to and from Newbridge School for the 2007-2008 and 2008-2009 school years and reimbursement for an audiological assessment obtained by Parents.

## FACTUAL FINDINGS

1. Student is a 12-year-old boy born on October 4, 1996. At the time of hearing, Student was eligible for special education under the categories of speech and language impairment and specific learning disability (SLD). Student was first identified as a student eligible for special education in second grade while enrolled at a District school.

### THE IEP IN EFFECT PRIOR TO MAY 8, 2007

2. Student's May 17, 2006 IEP<sup>1</sup> provided for Student's eligibility for special education under the eligibility category of speech and language impairment. Pursuant to the IEP, Student was placed in a general education classroom at Creekside Elementary

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<sup>1</sup> The May 17, 2006 IEP is not at issue.

School (Creekside) with resource specialist (RSP) pull-out support in the areas of reading, writing and math four times per week for 90 minutes per session. Related services included transportation, occupational therapy (OT) once per week for 30 minutes in the general education classroom (Push-in), OT once per week, for thirty minutes in a special education class room (pull-out) and pull-out speech and language therapy once per week for 30 minutes. As accommodations and modifications for district and state testing, Student was allowed extra time. In the classroom, Student was permitted supplemental aids and services of adapted paper, graphic organizers for writing, graph paper for math, sensory breaks as needed, preferential seating and access to a word processor and a spell check device.

3. In academics, Student's strengths were described as reading fluency at grade level, writing a story with a beginning, middle and end, adding and subtracting whole numbers with and without regrouping and knowledge of multiplication facts to 10.

4. In academics, the IEP identified areas of need. In reading, Student had difficulty finding the main idea in a text and difficulty recalling details from the text. In writing, Student made frequent errors in structure and mechanics of writing and the legibility and spatial aspects of his handwriting. In math, Student struggled to solve word problems with more than one step, and had difficulty determining which numbers to use and sequence of operations to use. Student also had an auditory memory deficit that interfered with his ability to process and remember spoken information and his ability to gain and apply new vocabulary.

5. Parents consented to the May 17, 2006 IEP, and it was implemented.

#### MAY 2007 IEP

6. On May 8, 2007, an annual IEP meeting was held for Student. Present at the meeting were: Mother, RSP teacher Donna Meyers (Meyers), speech and language

pathologist Kerrie Johnson (Johnson), general education teacher Hope Hattar (Hattar), OT Ann Jordan and Robin Robinson, principal and administrative designee.

7. At the IEP meeting, Mother reported spending significant amounts of time with Student trying to help him with his homework. She believed that Student struggled with self-esteem issues because he felt different from his peers and because his handwriting made it difficult for peers to review his work. According to Mother, Student felt embarrassed and harassed by other students. She also reported that Student experienced difficulties with transitions to and from the RSP classroom and Student felt that he was missing out on academics because of the pull-out sessions.

8. From Mother's discussions with staff and from progress reports, she was under the impression that Student was on track to meet the goals set forth in his May 2006 IEP. According to Student's goal progress chart, he had been on track to meet all of the goals contained in his May 2006 IEP as of March 9, 2007. Nevertheless, by the May 2007 IEP, Student had only met his goals in communication development, math word problems and fine motor skills. Student had made little progress on his writing/spelling goal. Student had made some progress, but needed more time for his goals in reading, writing, fine motor skills and organizational skills. Mother was very disappointed and surprised when she learned he had not met his goals. RSP teacher Meyers<sup>2</sup> explained that Student had made progress on most of the unmet goals but was

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<sup>2</sup> Donna Meyers, received her Bachelor's degree from the University of California at Berkeley in Political Science and Master's degree in Special Education from Galludet University. Meyers holds an elementary school teaching credential, a special education credential, a reading specialist credential and a resource specialist credential. She has 12 years of experience as an RSP teacher.

still a little way from achieving the goals. Meyers felt that Student had worked hard and had made progress.

9. Hattar was Student's general education teacher for the 2006-2007 fourth grade year in a fourth/fifth grade combination class at Creekside. She was an experienced teacher who held a Bachelor's degree in Education with an emphasis in special education and multicultural education. Hattar testified that Student did not appear to experience any difficulties transitioning between the general education classroom, RSP and other pull-out services. Hattar saw Student as motivated and hardworking. She noted that his writing was sometimes hard to read and therefore he had a hard time editing it and reviewing it. It was also difficult for others to read. Hattar used multi-modal presentation in her classroom including a projector in front of the class and had students sit in small groups of four students. Hattar also made adjustments to graphic organizers, books, reading groups and presentation styles throughout the year to better address Student's needs.

10. The May 2007 IEP indicated Student's academic strengths. In reading, Student read fluently and had a basic grasp of decoding skills. In writing, Student had great ideas for writing and remembered to indent and capitalize. Student used a graphic organizer to plan his writing. In math, Student added, subtracted, multiplied and divided numbers. In communication development, his strength was documented as age appropriate articulation, voice and fluency.

11. The May 2007 IEP indicated Student's academic areas of need. In reading, Student struggled with answering literal and higher level questions. In writing, Student lacked organization and had difficulty getting his ideas down on paper. In math, Student needed to learn to add, subtract and multiply fractions and master rules for double digit division. In communication development, language was noted as an area of need. The IEP notes also indicated that fine motor skills

development was an area of need. Based upon Student's present levels of performance (PLOPS) and the discussion of concerns at the May 2007 IEP meeting, the IEP team developed goals in the areas of fine motor skills, social emotional development, communication, math, reading and writing. The goals in the areas of writing, reading and communication development were designed to address Student's speech and language impairment and auditory processing deficits. The communication development goal was to be implemented by the speech and language therapist. The writing and reading goals were to be implemented by the RSP teacher.

12. The May 2007 IEP provided for extra time and supervised breaks within a subtest of state and district testing, use of word processing software on the writing test (without use of spell check or grammar check), and simplification or clarification of test directions on certain state and district tests. Classroom modifications and accommodations included adapted paper, graphic organizers for writing, graph paper for math as needed, sensory breaks as needed, preferential seating, extra time on tests and assignments as needed and use of a word processor.

13. The May 2007 IEP provided for Student's eligibility for special education as a student with a speech and language impairment. The IEP provided for placement in the Creekside general education classroom with RSP pull-out 12 times per week for 30 minutes each session in the areas of reading, writing and math, pull-out speech and language therapy for 30 minutes per session once a week and pull-out occupational therapy once a week for 30 minutes per session. Mother agreed to and signed the IEP on May 8, 2007.

14. Shortly before the end of the 2006-2007 school year, Mother met privately with Meyers after school one day. She confronted Meyers about what she

believed to be Student's lack of progress towards his goals and asked Meyers what she intended to do for Student. Meyers responded that she was not sure what else she could do for Student but would think about it over the summer and look for additional strategies to help Student. She recommended that Student utilize the Poway public library reading program over the summer. After her conversation with Meyers, Mother was frustrated, angry and desperate to do something to avoid what she believed was the beginning of Student falling behind in school.

### SUMMER 2007

15. On June 27, 2007, Mother requested an intradistrict transfer to Garden Road Elementary School (Garden Road), which Student had attended prior to Creekside. The intradistrict transfer request stated that "We started off at Garden Road. Garden Road seems to have a better resource staff. My children did better at Garden Road. Garden Road seems to better meet my family needs." The request for intradistrict transfer was granted on July 23, 2007. Student never transferred to Garden Road. Instead, Parents withdrew Student from District schools and placed him at Newbridge School (Newbridge), a state certified non-public school (NPS).

16. Around the same time, Mother sought help from educational advocate/consultant Dr. Sara Frampton (Frampton). Frampton has a Bachelor of Arts degree in Psychology, a Master's degree in Education, a Master of Science degree in Counseling and a Doctorate in Psychology. She also holds a clear specialist instruction credential in special education for the learning handicapped, a clear multiple subject teaching credential, a clear pupil personnel services credential, a life pupil personnel services credential for school psychology, a resource specialist certificate of competence, a clear administrative services credential, a community college counselor credential and a community college instructor credential in psychology. Frampton worked as a special

education classroom teacher, resource specialist, school psychologist and as an educational advocate in private practice. Parents met with Frampton on August 7, 2007, and retained her as an educational advocate.

17. Frampton was familiar with Newbridge because she knew the owners Margaret and Steve Mayo when they were at the Winston School, an NPS in San Diego. She advised Parents that in her opinion, Newbridge would be an appropriate placement for Student. Frampton opined that the Mayos had strong backgrounds in reading, writing and learning disorders. She also had seen Newbridge program brochures which indicated that Newbridge used alternate curriculum, Lindamood Bell Lips program and Visualize and Verbalize program and smaller classes, all of which she believed would be beneficial to Student.

18. On August 9, 2007, Frampton, on behalf of parents, sent District a letter advising that she had been retained by the Parents to assist Student, requesting all of Student's educational records and withdrawing parental consent to the May 7, 2007 IEP. The letter also stated that "We have interviewed the parents, evaluated [Student], and reviewed his records. [Student] is a young man with significant learning problems. [Parents] intend to remove [Student] from the Poway Unified School District, make a unilateral placement in a nonpublic school, and seek reimbursement from the district."

19. On September 6, 2007, the IEP team reconvened to discuss parental concerns and the unilateral placement at Newbridge. Participants in the meeting were RSP teacher Meyers, general education teacher Hattar, program specialist Helen Williams<sup>3</sup>, speech pathologist Kerrie Nelson, school psychologist Christine Valdez,

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<sup>3</sup> Williams is a licensed Speech and language pathologist. She has clinical Certificate of Competence from ASHA and a Clinical Rehabilitation Services credential and 20 years of experience as a speech and language pathologist. She received her



principal Robin Robinson, OT Heather Barre, educational consultant Frampton, and Parents. At the meeting, the IEP team discussed Student's progress toward his goals and his placement in the general education classroom. Hattar and Meyers noted that Student had made progress, just not at the level they had anticipated. Meyers testified that of the goals Student had not met, he had come close on most. Both asserted that Student enjoyed the general education classroom and benefited from being in the classroom. Frampton expressed concern about the possibility of Student falling further behind. Mother expressed concerns about Student's emotional well being and anxiety as a result of his handwriting issues. She also expressed that Student was not happy at school. The District IEP team members expressed that Student seemed to be a happy and enthusiastic Student. It was noted that Student liked participating in the social studies and science curriculum. Frampton disagreed with the placement and services contained in the May 2007 IEP which was reiterated on September 6, 2007. She contended that Student could not make meaningful progress because the IEP was based upon incomplete diagnostic information. She also expressed a concern that RSP teacher Meyers had told Parent that she did not know what else to do for Student. Frampton had no interest in discussing the goals or services offered as her intent was to secure funding for Newbridge from District.

20. Frampton also requested that District fund an independent psychoeducational evaluation. District denied the request, but offered to advance Student's triennial assessment which would include a psychoeducational assessment. Frampton, on behalf of Parents, declined the advanced triennial assessment on the basis that it would be disruptive to Student since he had just started a new school. Frampton

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Bachelor's degree in speech pathology from San Diego State University in 1984 and a Master's degree in speech and language pathology from the University of Michigan.

agreed that Parents would consider signing a release for Student's records from Newbridge. Ultimately, the release was not signed. District agreed to provide Parents with an assessment plan for the triennial assessment for their consideration.

#### TRIENNIAL ASSESSMENT

21. On September 6, 2007, District forwarded an assessment plan to Parents. Pursuant to the assessment plan, District would assess for suspected disabilities of speech and language impairment and specific learning disability including aspects of auditory processing disorder.

22. The assessment plan provided for an academic achievement evaluation to be administered by the resource specialist and, a processing and motor development assessment administered by the OT and school psychologist. The assessment plan also included a language/speech communication development evaluation to be performed by the speech and language pathologist and school psychologist. An intellectual development evaluation and a social/emotional and adaptive behavioral evaluation were to be administered by the school psychologist. A health assessment was to be conducted by the District nurse including a health history, physical assessment and a vision/hearing screening.

23. On September 21, 2007, District sent Parents a letter requesting that the assessment plan be signed and returned. Parents did not return the assessment plan.

24. Again, on November 6, 2007, District sent Parents a letter again requesting that the assessment plan be signed and returned. Parents did not return the assessment plan.

25. On February 26, 2008, District again wrote to Parents and requested that the triennial assessment plan be signed and returned. The letter reminded Parents that Student's triennial IEP meeting must be held on or before May 18, 2008 and that the triennial assessment needed to be completed before the IEP meeting.

26. On March 12, 2008, Parents returned the signed evaluation plan. Under the parent acknowledgment section of the evaluation plan Mother checked the box "yes" next to "all areas of suspected disability are addressed in this plan" and wrote in handwriting "To the best of my knowledge." She also checked the box "No" for the question "Do you have any assessments you would like to have considered?"

27. District School Psychologist Kristina Valdez conducted the psychoeducational assessment in March of 2008. Valdez has a Bachelor of Arts degree in Psychology and a Doctorate in School Psychology. She holds a pupil services credential in school psychology. To assess Student she reviewed his records, conducted a classroom observation at Newbridge, administered the Weschsler Intelligence Scale for Children-Fourth Edition (WISC-IV), Test of Auditory-Processing Skills-Third Edition (TAPS-III), Wide Range Assessment of Memory and Learning-2 (WRAML-2), Comprehensive Test of Phonological Processing (CTOPP), Test of Visual-Perceptual Skills-Third Edition (TVPS-3), Child Behavior Checklist: Mother's Report, Teacher Report Form: Classroom Teacher, Behavior Assessment System for Children-2 (BASC-2) by Mother and classroom teacher, Test of Written Language-Third Edition (TOWL-3), Diagnostic Achievement Battery-3 (DAB-3) and Wechsler Individual Achievement Test-Second Edition (WIAT-2).

28. Valdez found that Student's cognitive abilities were within the average range based upon the WISC-IV and WRAML-2. Student performed in the low average to below average range on the WIAT-II , DAB-3 and TOWL-3 measures of written expression. With respect to auditory processing, Valdez evaluated the results of the TAPS-3 and CTOPP. On both measures, Student's performance fell within the below average range on aspects of auditory processing. On the TAPS-3, Student's performance in higher-level linguistic tasks such as auditory comprehension and auditory reasoning was well below average. On the CTOPP, Student performed well below average on

measures of phonological memory consistent with an auditory processing disorder. Subtest results on the TVPS-3 suggested that Student had difficulty with tasks of visual form constancy consistent with an auditory processing disorder. Additionally, behavior rating scales completed by Student's teacher indicated observation of behavior associated with hyperactivity and learning problems.

29. Valdez opined that Student's scores demonstrated a significant discrepancy of at least 22 points between his ability and achievement in the areas of writing, reading, listening comprehension and oral expression and had an auditory processing disorder. Accordingly, she opined that Student met eligibility criteria for special education under the category of specific learning disability (SLD). Valdez did not refer Student for an audiological evaluation, had not referred any other students for an audiological evaluation before, and was unsure of the criterion for referral. Valdez did not believe an audiological assessment or diagnosis of auditory processing disorder were necessary as Student's deficits were identified in the psychoeducational assessment.

30. District speech and language pathologist Nelson conducted a speech and language evaluation of Student on April 28, 2008, May 12, 2008 and May 14, 2008. Nelson's evaluation was conducted over three sessions lasting between 30 and 90 minutes each. Student was given breaks between subtests as needed. Nelson used the Clinical Evaluation of Language Fundamentals-4 (CELF-4), Comprehensive Assessment of Spoken Language (CASL), Test of Narrative Language (TNL), Comprehensive Receptive and Expressive Vocabulary Test (CREVT) and informal assessment as evaluation tools. The CELF-4 is a comprehensive language test which assesses expressive language and receptive language. Student performed in the low average range on the expressive language section on CELF-4. Student performed in the average range on all other indices of the CELF-4. The CASL is a comprehensive language test which assesses

expressive language and receptive language. Student performed in the below average range on the subtests of syntax construction and pragmatic judgment. On the CASL, Student's standard scores ranged from the below average to average range for his age. Composite scores were all in the average range. He scored in the low average range for nonliteral language and paragraph comprehension. According to Nelson, Student understood situational clues such as sarcasm, but had problems with non-literal language comprehension, the ability to "read between the lines" and understanding the meaning of spoken messages that are independent of literal interpretation. According to Nelson, Student did not understand idioms and had difficulty with non-literal interpretation. Student also demonstrated difficulty with deriving meaning from inference and demonstrated difficulty formulating messages specific to a variety of situations.

31. The TNL is a comprehensive measure of a child's ability to understand and tell stories. The test evaluates these skills using three formats: no picture present; sequence of five pictures; and a single picture. For the narrative comprehension portion, the child answers questions about a story. For the oral narration portion the child retells or generates a story. Student scored in the high average in narrative comprehension, low average in oral narration and average in the narrative language ability index. Nelson noted that Student was able to produce a very basic story. He used general references to characters in his story (the girl, the boy) without character dialogue. Student's story was difficult to follow and did not follow a logical sequence. Student used correct verb tense, but had many run-on sentences and grammatical errors. Nelson opined that difficulty with oral narration of stories and events may have an impact on a students' ability to summarize information and organization of writing and was consistent with an auditory processing disorder.

32. The CREVT measures both receptive and expressive vocabulary. It includes vocabulary in a variety of categories. Expressive vocabulary is measured by having the student give definitions of vocabulary. Student scored below average in both the expressive and general vocabulary portions of the CREVT. Nelson opined that Student had difficulty giving specific identifying information for vocabulary words. Nelson opined that difficulty with expressive vocabulary may impact Student's ability to learn and use academic vocabulary, express ideas, and answer questions or elaborate on answers with specific vocabulary.

33. Nelson observed that that although Student demonstrated adequate understanding of appropriate actions, and topics, and was able to politely refuse offers, and make amends appropriate to a situation, he had difficulty making introductions and extending an invitation with necessary details. Based upon the assessment tools and informal observation, Nelson opined that Student demonstrated appropriate pragmatic language skills overall during an informal language sample. Nelson observed that Student's difficulty appeared to occur during more complex pragmatic tasks. Nelson opined that difficulty with pragmatic language skills may impact a student's ability to answer questions thoroughly, engage in classroom discussions, and communicate necessary information to listeners.

34. According to Nelson, Student's articulation and intelligibility were excellent. He demonstrated age appropriate vocal quality, speech intonation and fluency.

35. Nelson opined that Student had language skills that ranged from the below average to average range for his age. She also opined that receptive language and language memory were strengths for Student. By Nelson's analysis, Student demonstrated the ability to follow complex directions and an understanding of vocabulary, grammar, and concepts on several standardized tests. She found expressive

language, higher level pragmatic language skills and figurative language were relative weaknesses for Student. Nelson opined that Student would benefit from speech and language services.

36. The school nurse conducted a hearing screening of Student. Student passed the hearing screening.<sup>4</sup>

#### TRIENNIAL IEP MEETING

37. A triennial IEP meeting was held on June 5, 2008. Present at the meeting were Parents, Program specialist Helen Williams, general education teacher Hattar, principal Robinson, Meadowbrook Middle School RSP teacher Mary Jo Lance, Meadowbrook Middle School RSP teacher Jan Tom, speech pathologist Nelson, school psychologist Valdez, Resource specialist Meyers, OT Heather Barre, Student's speech and language pathologist consultant Nancy Lazerson, educational consultant Frampton and Student's educational/ psychological consultant Robert Prinz. During the June 5, 2008 session, the IEP team members discussed the assessment reports and parental concerns. Due to the volume of information, number of participants and extensive discussion, the IEP meeting was not completed on June 5, 2008. District made a tentative placement offer at Meadowbrook Middle School with RSP support for the 2008-2009 school year pending completion of the IEP meeting. Parents were also provided a copy of draft goals prepared by the District IEP team members for discussion at the next IEP meeting session.

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<sup>4</sup> There is no dispute about the appropriateness of thoroughness of the other portions of the triennial assessment.

38. Four days later, on June 9, 2008 Frampton contacted program specialist Helen Williams (Williams) by letter and expressed her "concern and dismay" that an offer of FAPE was made without completing Student's IEP.

39. On June 19, 2008, Williams wrote to parents in response to the letter from Frampton. In her letter, she reiterated the attempts to schedule an early triennial assessment and commented on the difficulty in scheduling a triennial IEP due to Frampton's schedule. She noted that although the triennial IEP should have been held by May 12, 2008, it was not held until June 5, 2008 due to Frampton's unavailability.

40. In her letter, Williams indicated that it was important to finish the June 5, 2008 IEP meeting. She indicated that although the IEP team had been assembled and prepared to make a FAPE offer, due to the amount of information and time required on June 5, 2008, the meeting was not concluded. She indicated that due to the summer break and Frampton's busy schedule, a follow up IEP meeting could not be scheduled until August 21, 2008. She noted that she was aware that Newbridge was scheduled to resume on September 2, 2008 for the 2008-2009 school year.

41. In the June 19, 2008 letter, Williams reiterated that the District's offer of FAPE for the 2008-2009 school year was placement in the general education classroom at Meadowbrook Middle School. The RSP support was offered five times per week for 55 minutes per session, approximately one class period per day, for language arts (reading and writing). The IEP team did not offer RSP services in math because Student had met his math goals and no longer needed the service in math. The letter noted that the RSP class size would be a seven to one student/teacher ratio. She also noted that the District IEP team members would offer goals in the areas of writing, reading, communication development and fine motor development. According to Williams, District also offered pull-out speech and language therapy twice a week for 30 minutes each week and pull-out OT once a month for 30 minutes. Her letter also indicated that the District IEP team



members would offer supplemental aids and services and that the IEP team would develop a plan for Student's transition from private school to Meadowbrook Middle School.

42. The IEP team reconvened on September 3, 2008 to discuss Student's PLOPS, draft goals, and finalize the offer of FAPE. During the September 3, 2008 IEP meeting, Frampton expressed that the family was more concerned with the placement offered than "word-smithing" goals. Mother expressed frustration that she believed Student's placement had been predetermined. Parents expressed that Student was doing well in the placement at Newbridge. The IEP team discussed extended school year (ESY) services and determined that Student did not need ESY services. Neither Frampton nor Parents had any additional information to add to the draft goals, PLOPS or services offered. At hearing, Frampton admitted that she would not provide information from Newbridge to the IEP team unless District agreed to fund the placement. When asked why she did not share information from Newbridge, Frampton responded "Why would I share?" She reasoned that the information would be used against the Student in litigation and therefore withheld it. Some grade reports were shared briefly at an IEP meeting. Frampton testified that she believed Meadowbrook was not appropriate for Student because it involved too many transitions and large regular education classroom which would require Student to exercise self-advocacy skills that he did not have. Frampton noted that Newbridge offered Student a program at his level in a small setting without the need for the disruption of pull-out RSP.

43. Parents requested an auditory processing disorder assessment. The District IEP team members felt that there was no need for additional assessment information. The District IEP team members asserted that the psychoeducational and speech and language assessments provided sufficient information about Student's auditory processing disorder and its effects on his educational performance to develop a

program to meet Student's unique needs. The District members of the IEP team stated that they believed that all of the information gathered was appropriate and comprehensive. Neither party disputes that Student had an auditory processing disorder.

44. Parents did not consent to the IEP.

#### STUDENT'S PROGRESS ON TESTING

45. Student, through his expert witness Robert Prinz (Prinz), an educational and clinical psychologist, asserted that Student had not shown progress in either California Standardized Testing and Reporting (STAR) or District MAP<sup>5</sup> testing and was therefore not making meaningful progress as contemplated by the IDEA. Prinz received a Bachelor of Science degree in Psychology from the University of Iowa in 1970, a Master of Arts degree in Psychology and Specialist in Education degree from the University of Iowa in 1972. He received a Doctorate of Philosophy in School Psychology and Clinical Psychology from the University of Iowa in 1981. Prinz holds a California life credential in school psychology and an Iowa lifetime permanent professional school psychologist credential. Prinz is also a licensed California clinical psychologist. Prinz was a school psychologist for Sweetwater School District, a high school district, for thirty years until his retirement in June of 2008. Prinz was familiar with STAR testing from his work as a school psychologist. His knowledge of MAP testing came primarily from reviewing the website information provided by the test manufacturer. Prinz developed graphs showing that Student's increase in MAP scores from year to year still resulted in an increasing gap between his MAP test performance and that of students that scored

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<sup>5</sup> The testimony offered by the witnesses and the documentary evidence introduced at hearing, did not reveal the full name of the MAP test.

in the proficient range. Prinz also asserted that a simple comparison of Student's STAR testing scores from third to fourth grade showed that Student made little to no progress. Prinz had not observed, evaluated or met Student and based his opinion on the test scores, the IEP documents, his knowledge of STAR testing and research he conducted on the MAP website.

46. District's expert Robin Robinson has both a Bachelor's degree and Master's degree in psychology. Robinson is the principal of Creekside. She is familiar with both MAP testing and STAR testing as part of her work as the Creekside principal. According to Robinson, it was true that MAP scores are comparable from year to year and that Student did not achieve proficient scores on the MAP test, but Student had shown progress on the MAP testing. Student's scores had increased each year. MAP is a test that measures instructional level, is not criterion based and is not a measure of progress on IEP goals. In contrast, the STAR test is based on California State Standards and is essentially an achievement test based upon the California State Standards for each grade. The tests for third grade and fourth grade are different. Each of the tests is based upon different curriculum and a different normative sample. Although the STAR testing is not directly comparable from year to year, one need not compare the test results to see that Student performed in the below basic range for both the 2005-2006 and 2006-2007 school years in language arts (reading and writing). Student's math performance ranged from basic to advanced over the years. On balance, Robinson's testimony was more persuasive. She had practical experience with the MAP test and an in-depth understanding of the MAP test, knowledge of Student, and was candid about Student's performance on the STAR test. Robinson understood the testing intricacies and weaknesses of the MAP testing and the STAR test as it applied to elementary school students, and elementary school curriculum. Prinz, on the other hand had no knowledge

of MAP testing except for what he researched on the internet and his school experience was with high school students.

#### INDEPENDENT AUDIOLOGICAL EVALUATION

47. Parents retained Deidre Schloyer (Schloyer) to conduct an independent audiological assessment of Student. Schloyer conducted the assessment on September 11, 2008. Schloyer received a Bachelor of Arts degree and a Master of Arts degree in Communicative Disorders from San Diego State University and a Doctorate in Audiology from the University of Florida. Schloyer has a Clinical Certificate of Competence in Audiology, a Clinical Rehabilitative Services Credential in Audiology and is a licensed California audiologist. Schloyer has 13 years of experience as an educational audiologist for the San Diego County Office of Education. She has served as a clinical supervisor and guest lecturer for San Diego State University and spent six years a special education technician for the San Diego Unified School District in the deaf/hard of hearing program. Schloyer has designed and presented workshops in diagnosis and management of auditory processing disorders in children. She is a member of the Educational Audiological Association, American Speech Language Association and American Academy of Audiology.

48. In preparation for her assessment, Schloyer reviewed prior assessments and IEP documents. Schloyer noted that Student had normal ear drum pressure and normal hearing sensitivity in all frequencies. His word recognition ability at quiet conversational levels was excellent. Schloyer used the Test for Auditory Processing Disorders in Adolescents and Adults (SCAN-A), Test of Binaural Integration and Interhemispheric Transfer, Dichotic Digits Test, Dichotic Word Listening Test (DWLT), Staggered Spondaic Word Test (SSW), Random Gap Detection Test (RGDT), Pitch Pattern Sequence Test (PPS), Phonemic Synthesis Test (PS), Auditory Figure Ground and

Auditory closure Tests, Time Compressed Speech Evaluation and BKB Speech in Noise Test and the Listening Inventory to assess Student.

49. The SCAN-A is a four part recorded word repetition screening instrument that evaluates a student's ability to process information when it is filtered, in the presence of background noise and when speech is presented to both ears at the same time. The test can provide information regarding a student's ability to process speech stimuli when it is distorted. According to Schloyer, Student performed in the normal range on the SCAN-A.

50. Tests of Binaural Integration evaluate the ability to process different messages at the same time and inter-hemispheric transfer, the ability to transfer information from the right to the left hemispheres of the brain across the corpus callosum. Binaural Integration was evaluated using the Dichotic Digits Test, the DWLT, and the SSW. Schloyer evaluated how effectively messages are processed and Student's speed in processing non-linguistic information using the RGDT and the PPS. Schloyer used the Auditory Figure Ground and Auditory Closure tests and the PS to evaluate Student's ability to sound blend, a skill related to auditory processing and required for reading decoding and spelling encoding. Schloyer evaluated Student's ability to understand when part of the message is distorted or missing using the Compressed Speech Evaluation and the BKB Speech in Noise Test. The Time Compressed Speech Evaluation is a speech intelligibility test sensitive to disorders central to the auditory nerve. Word lists are presented to each ear separately and the student is instructed to repeat the words presented. The BKB Speech in Noise Test is an instrument which determines the degree of signal to noise hearing loss which can be compared to that required for normal listeners. The test uses pre-recorded sentence stimuli presented in gradually increasing background noise. The student is instructed to repeat the sentence provided while ignoring the background noise. Schloyer also used the Listening

Inventory, a questionnaire designed to screen auditory processing problems and to differentiate between a listening or auditory disorder from other conditions. Mother completed the rating scale.

51. Schloyer concluded that Student had normal hearing sensitivity and excellent word recognition skills in a quiet setting. She noted integration weaknesses characterized by academic difficulties in the areas of poor vocabulary and decoding skills, difficulty with reading comprehension, deficits in language, memory deficits and deficits with tasks which required brain hemisphere coordination such as writing skills. She noted that integration challenges have variable impact on communication, but can include phonological deficits, difficulty linking linguistic content, deficits in attention and distractibility. Integration difficulties are also associated with variable speech in noise skills due to difficulty with auditory localization, a skill impacted by integration ability which is needed to extract a signal from a noisy background. Individuals with integration deficits typically have intact phonemic awareness and synthesizing skills but struggle with reading decoding due to difficulty associating the visual symbol on the page with the sound. This difficulty impacts vocabulary skills which in turn influences reading speed and fluency. Schloyer also found that results of the SSW suggested that Student would struggle with phonics, reading comprehension, receptive language, short term memory challenges and difficulty listening in noise. In summary, Schloyer found that Student had integrative difficulties, problems hearing speech in noise and an auditory processing disorder.

52. Schloyer did not make specific recommendations for Student's educational program other than that all of his needs be addressed. She did provide a list of environmental modifications, compensatory strategies and remediation for consideration by an IEP team. Schloyer's evaluation was not shared with the District or the IEP team.

53. For problems hearing speech in noise, Schloyer suggested strategies such as improving the teaching signal, sound treatment for classrooms, reduced class size, modification of language and/or a trial of an assistive listening device. For the integration issue, suggestions were consideration of an FM trainer, avoidance of situations that require division of attention and self monitoring. As compensatory strategies, she identified use of written instructions to supplement auditory information, use of tape recorder, books on tape, and organizational strategies such as schedules or graphic organizer, note taking assistance, organizational aids and modifications of spoken message. Schloyer's suggestions for modifications were shorter lengths of auditory information, use of familiar vocabulary, emphasis on key vocabulary, extra time, checking for comprehension and smaller chunks of information. As remediation activities, she suggested use of activities that enhance transfer of function and extraction of key information, speech in noise training, use of a reading remediation program with emphasis on visualization technique, use of hemispheric integration activities like Brain Gym, verbal motor transfers, singing, keyboarding, listening to books on tape, continued development of vocabulary, meta-linguistic and meta-cognitive strategies. She also recommended that the family consider karate, gymnastics, music, dance and games.

54. Parents paid \$937.50 to for the audiology assessment conducted by Schloyer.

55. Student's expert, licensed speech and language pathologist Nancy Lazerson, asserted that an auditory processing disorder diagnosis required an audiological evaluation although aspects of an auditory processing assessment may be conducted by a psychologist or speech and language pathologist. According to the credible testimony of Student's experts Schloyer and Lazerson, auditory processing can, but need not, have both a language deficit component and an auditory component. In

Student's case, Schloyer found an integration deficit and a problem filtering speech in noise. She also noted Student's deficits in pragmatics, vocabulary and higher level linguistics as did District speech pathologist Nelson and school psychologist Valdez, suggesting that Student's deficit was primarily a language processing problem with some overlapping audiological components.

#### NEWBRIDGE SCHOOL

56. Parents paid \$15,750 to New Bridge for the 2007-2008 school year and approximately the same amount for the 2008-2009 school year. Although invited to the June 2008 and September 2008 IEP meetings, no one from Newbridge participated.

57. Steve Mayo, the owner and director of Newbridge has a special education teaching credential and is working on his Master's degree in special education. Mayo has been the owner and director of Newbridge for 13 years. He also teaches classes at Newbridge as needed. Newbridge is a Kindergarten to eighth grade program with an enrollment of 62 students. For the 2007-2008 and 2008-2009 school year, Student was in a self-contained classroom. For the 2009-2010 school year, he will transition between three classrooms in close proximity. Direct instruction is given in small groups of no more than 4 students. The school is in a quiet country setting. It consists of 3 buildings and an office. Approximately 50 percent of the students are privately placed at Newbridge. Some of the privately placed students might have qualified for an IEP in public school. The other half of the student body is placed and funded by school districts.

58. Newbridge has a set of goals and objectives for each student. Student received direct speech and language therapy, and speech and language therapy embedded in the curriculum. Student received direct OT for an unspecified amount of time until it was discontinued. No evidence was offered as to why the direct OT services were discontinued. Student continued to receive OT embedded in the classroom



curriculum. OT was given for handwriting and sensory processing issues. Student's auditory processing deficits were dealt with by classroom modification and active listening and memory techniques. Newbridge used the Lindamood Bell Visualize and Verbalize program and the Lindamood Bell LIPS program for phonemic awareness for Student. Student also received phonics instruction. Newbridge students are taught in multi-grade classrooms. For the 2007-2008 and 2008-2009 school year Student was in a 4/5/6 combination class. Should Student enroll for the 2009-2010 school year, he would be in a combination class for sixth and seventh graders. Student does not use an FM system at Newbridge. Mayo believes an FM trainer is not necessary due to the small class size and the good classroom acoustics. Mayo has observed Student in the classroom and on the campus. He opined that Student is appropriately placed at Newbridge.

59. Mother observed Student to be more confident at Newbridge. She has seen a positive change in his emotional well being and his organizational skills. Student no longer has difficulty completing his homework.

## LEGAL CONCLUSIONS

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

### ISSUE ONE: AUDITORY PROCESSING ASSESSMENT

2. Student contends that District deprived Student of a FAPE from May 8, 2007 through the end of the 2008-2009 school year by failing to conduct an appropriate and sufficiently comprehensive assessment to determine Student's unique needs in the area of auditory processing. Specifically, Student contends that District failed to conduct an audiological assessment and therefore did not have sufficient information to determine his unique needs and design an educational program to meet those needs.

District contends that there has never been a dispute about the existence of Student's auditory processing disorder and that all parties agree on the fact that Student has an auditory processing disorder. District contends that the assessments conducted by District yielded enough information about Student's needs for District to develop Student's IEP and design an educational program to meet his needs.

3. For purposes of evaluating a child for special education eligibility, the district must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. §1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. 300.303(a); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and

form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

5. District had identified the existence of auditory memory and processing deficits as far back as the May 2006 IEP. District addressed those and other needs in the May 7, 2007 IEP with input and agreement by Parent. Measurable goals were drafted and levels of service were offered in the areas of reading, writing, math and communication development to address needs caused by Student's auditory processing and language deficits. Goals and services in social emotional development and fine motor skills were drafted to address Student's remaining needs. While Student did not achieve all of his goals, he made good progress on most of his unmet goals. In order to address this, the level of RSP service was intensified from four times per week per week at 90 minutes per session to 12 times per week at 30 minutes per session. Parents did not raise any concerns about unidentified needs or goals or the lack of an audiological evaluation at the May 7, 2007 IEP. Instead, Mother's concern was about Student's failure to meet his goals from the May 2006 IEP. Student did not proffer evidence to support his contention that Student had unidentified needs

at the time of the May 7, 2007 IEP due to the lack of an audiological evaluation.  
(Findings of Fact 1-55 and Legal Conclusions 1-5.)

6. District conducted a comprehensive triennial assessment of Student once it was able to obtain Parents' consent to conduct the assessment on March 12, 2008. District had been seeking consent to assess Student since September of 2007. District's psychologist and speech and language pathologist conducted exhaustive testing of Student using a variety of assessment tools, observation, parental input, and review of Student's records. Student does not dispute that the tools District utilized were appropriate. Similarly, Student does not contend that District personnel deviated from the test manual procedures or misinterpreted the test protocols. Student asserts, based upon the testimony of his experts Nancy Lazerson and Diane Schloyer, that a diagnosis of auditory processing disorder cannot be made without an audiological evaluation and that an audiological evaluation was required here. According to the credible testimony of Schloyer and Lazerson, auditory processing can have both a language deficit component and an auditory component. Sometimes the two components overlap in a student, but overlap is not necessary for a diagnosis of auditory processing disorder. While Schloyer and Lazerson are correct in both instances the fact remains that District is not charged with making a diagnosis of auditory processing disorder. Instead, District's obligation under federal and state law is to assess Student in all areas of suspected disability, which it did, and to ascertain Student's needs. Diagnosis of the disability is irrelevant to determining those needs. District assessors found indicia of an auditory processing disorder in both the evaluations conducted by Valdez and by Nelson. The District assessors and IEP team members did not have access to Schloyer's evaluation and made their determination based upon the "snapshot" of information the IEP team had at the time it met. Nevertheless, District was able to identify Student's needs without a formal diagnosis of auditory processing disorder by an audiologist.

Furthermore, Schloyer's report did not demonstrate that Student had any unidentified needs. Student did not produce any evidence to support the contention that an audiological evaluation would have yielded any additional unidentified needs. District did not deny Student a FAPE when it failed to obtain an audiological assessment. (Findings of Fact 1-55 and Legal Conclusions 1-6.)

*ISSUE TWO: FAPE FROM MAY 8, 2007 THROUGH THE 2008-2009 SCHOOL YEAR*

7. Student further contends that his IEPs after May 8, 2007 failed to offer him an appropriate placement and related services. Specifically, Student contends that the offered placements were inappropriate because they were in large, noisy general education classrooms. Student contends that the pull-out related services caused too many distractions and transition challenges for Student and impeded his ability to access his education. District contends that Student's placement in the general education classroom with RSP support was the least restrictive environment for Student. Student's IEPs called for RSP support in areas of weakness in a small group setting without distractions. District further contends that Student was not adversely impacted by pull-out related services or transitions to and from RSP classes and received an educational benefit from the placement and service.

8. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be

provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

9. IDEA and state law require that, in order to provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207 [73 L.Ed. 2d 690] (*Rowley*)). The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).)

10. The Supreme Court in *Rowley* held that the basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Rowley, supra*, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.) 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.)

11. Federal and state law require school districts to provide a program in the least restrictive environment (LRE) to each special education student. (Ed. Code, §§ 56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the

regular education environment only when 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)(2).) 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].)

12. 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 in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

13. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195

F.3d 1141, 1149.)<sup>6</sup> An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*) The IEP must include a written statement of present levels of academic achievement and functional performance, a statement of the manner in which the disability affects involvement and progress in the general education curriculum, and a statement of measurable annual goals, related services, supplementary aids and services, program modifications or supports that will be provided to enable the pupil to advance appropriately toward attaining the annual goals. (20 U.S.C. §1414(d); Ed. Code, § 56345.) 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.)

14. State and federal law require that Student's be placed in the least restrictive environment. An analysis of the least restrictive environment involves the review of the four 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. Here, the overwhelming weight of the evidence shows that Student was able to function in the general education classroom and received instruction from the general

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<sup>6</sup> Although *Adams* involved an Individual Family Services Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212) and district courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salelm-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)



education curriculum in several subjects. Academically, Student benefited from receiving grade level instruction with general education peers. From a social perspective, the participation provided Student with social opportunities and the opportunity to participate with non-disabled peers in the classroom. There was no evidence that Student had any adverse impact on the teacher or other students in the classroom or that his participation in the general education classroom resulted in any additional costs to the District. Accordingly, to the extent possible, state and federal law mandate that Student participate in the general education environment to the extent his IEP can be implemented. Because Student needs specialized instruction in a smaller group setting for certain subjects, his participation in the general education classroom is limited to those aspects of the curriculum where he does not require small group or individualized instruction such as science and social studies for the 2007-2008 school year and science, social studies and math for the 2008-2009 school year in order to implement his IEP.

15. Student was placed in the least restrictive environment available to implement his IEPs. The May 2007 IEP provided for placement in a general education classroom at Creekside for the 2007-2008 school year, with accommodations and modifications, pull-out OT, pull-out speech and language therapy and pull-out RSP support in reading, writing and math in a small group setting. Student was to return to the general education classroom for science and social studies instruction. The May 2007 IEP contemplated that Student would participate in the general education classroom when not in RSP, OT or speech and language therapy to the maximum extent possible.

16. The June/September 2008 IEP provided that Student would be placed in general education at Meadowbrook Middle School, with accommodations and modifications, and pull out RSP support in language arts (reading and writing) in a small group setting five times a week for 55 minutes per session (approximately one class

period) during the 2008-2009 school year. Student met his goals in math and no longer needed RSP service in math by the June/September 2008 IEP team meetings. The RSP service was intensified and limited to language arts in a block of 55 minutes five times per week (approximated one class period per session), thereby further limiting the number of times Student would be pulled out of the general education classes. The IEP also offered pull-out OT and speech and language therapy. The June/September 2008 IEP contemplated Student participating in the general education classroom when not in RSP, OT or speech and language therapy to the maximum extent possible.

17. According to Hattar, Student seemed to enjoy both the science and social Studies programs and was able to fully participate in the curriculum. The small setting and individualized instruction offered in the general education setting supported by RSP services was precisely what Student needed for his auditory processing disorder. Although, the IEP team did not have access to Schloyer's report, the RSP services offered by the IEP team were supported, in part, by Student's own expert audiologist. Audiologist Schloyer recommended that Student receive instruction in a small group setting and be taught organizational and reading strategies.

18. Student also failed to meet his burden of showing that the District's provision of pull-out RSP and related services denied him a FAPE. Student's Mother testified that she believed the pull-out model for RSP and related services was disruptive to Student, but this contention is not supported by the evidence. Student's general education teacher Hope Hattar and RSP teacher Donna Meyers credibly testified that observing Student on a daily basis, they did not see the pull-out services as disruptive to Student nor did they observe any transition difficulties or behavioral concerns related to transitioning to or from pull-out RSP, OT or speech and language therapy.

19. For the reasons set forth above, District offered Student a FAPE for the period of May 7, 2007 through and including the 2008-2009 school year. Both the May

2007 IEP and the June/September IEP were designed to address Student's unique educational needs and to provide a meaningful educational benefit to Student in the least restrictive environment. Both IEPs identified and addressed Student's then-present levels of performance and provided Student with measurable goals and appropriate related services to address his unique educational needs. The analysis is not whether placement Parents sought at Newbridge is superior to that offered by District. Instead, the analysis is whether District offered placement provided Student a FAPE. In this case, District offered Student a FAPE for the period of May 7, 2007 through and including the 2008-2009 school year. (Factual Findings 1-59 and Legal Conclusions 1-20.)

#### REMEDIES

20. Parents contend that they are entitled to reimbursement for tuition and transportation to and from Newbridge. District contends that it offered Student a FAPE and therefore, Student is not entitled to reimbursement for the unilateral placement at Newbridge

21. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S. Ct. 1996, 85 L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE.) Reimbursement may be denied if at least ten days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).)

22. Because the ALJ has determined that District offered Student a FAPE for the 2007-2008 and 2008-2009 school years, Student is not entitled to reimbursement for the unilateral placement at Newbridge. (Findings of Fact 1-59 and Legal Conclusions 21-22.)

## ORDER

All requests for relief are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

DATED: July 10, 2009

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GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings