

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS on behalf of STUDENT,

v.

ST. HELENA UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2008110533

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ST. HELENA UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008110309

DECISION

This hearing convened in St. Helena, California, on March 16 to 19 and 23 to 25, and on April 6 to 8, 2009 before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH).

Nancy J. LoDolce and Robert A. Edwards, Attorneys at Law, appeared on behalf of Student and her parents (Parents). Student's mother (Mother) attended the hearing on behalf of Student, and Student's father (Father) attended portions of the hearing on behalf of Student. Dora J. Dome, Attorney at Law, appeared on behalf of the St. Helena Unified School District (District). Dr. Robert Haley, Assistant Superintendent and Special Education Director, attended the hearing on behalf of the District.

On November 7, 2008, OAH received the District's due process hearing request (complaint), which OAH identified as Case No. 2008110309. On November 17, 2008, OAH received Student's complaint, which OAH identified as Case No. 2008110533. On

November 26, 2008, OAH granted a motion to consolidate both cases and a motion to continue the consolidated cases. That order also specified that the 45-day timeline for issuance of the decision in the consolidated cases would be based on the date of the filing of the complaint in Student's case, OAH Case No. 2008110533. On December 8, 2008, OAH granted a motion to continue the hearing in the consolidated cases.

During the hearing, documentary and testimonial evidence was admitted. Upon motion by both parties, the ALJ determined that there was good cause for a continuance of the hearing to allow the parties to prepare their written closing arguments. OAH received the parties' written closing briefs on May 1, 2009. On that date, the record was closed and the matter submitted for decision.

## STUDENT'S ISSUES<sup>1</sup>

1. For the 2007-2008 school year, did the District's 30-day interim individualized education program (IEP) of March 2008 deny Student a free appropriate public education (FAPE) by failing to offer services comparable to those in her last IEP in effect at her previous school, Pathways Charter School (Pathways), in another school district?

2. Did the District's IEP of April 29 and May 16, 2008, deny Student a FAPE through October 13, 2008, as follows:

A. By predetermining Student's special education placement and services prior to the April and May 2008 IEP meetings, and/or failing to consider any other placement and services options at the IEP meetings;

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<sup>1</sup> The issues have been slightly reorganized and rephrased for clarity of the decision, and based upon issue clarification on the first day of hearing.

- B. By failing to provide Parents with meaningful, timely and accurate information on the curriculum, methodology, and programs in connection with the placement and services offered or provided, so that Parents had sufficient information to make an informed decision regarding the placement and services;
- C. By failing to provide Student's complete educational records when requested by Parents;
- D. By failing to provide meaningful, timely and accurate information regarding Student's progress toward her annual IEP goals; and
- E. By offering or providing inappropriate special education program, placement and services in the April/May 2008 IEP?

## DISTRICT'S ISSUE

For the 2008-2009 school year, did the District's IEP of October 14, 20 and 27, 2008, procedurally and substantively offer Student a FAPE in the least restrictive environment (LRE)?

## CONTENTIONS OF THE PARTIES

Regarding the 30-day interim IEP of March 2008, Student contends that the District did not provide services comparable to her last agreed-upon and implemented IEP from Pathways. The District contends that the 30-day interim IEP was comparable.

Regarding procedural issues for the April/May 2008 IEP offer, Student contends that the District procedurally denied her a FAPE by predetermining the placement, failing to provide Parents with sufficient information to be able to make an informed decision about the proposed placement and services, failing to provide educational records at Parents' request, and failing to provide sufficient information about her

progress on her IEP goals. The District argues that it complied with all procedural requirements.

Regarding substantive issues for the April/May 2008 IEP, on the first day of hearing Student identified several areas of dispute. After the admission of all documentary and testimonial evidence, it was not clear what Student's contentions were regarding several of those areas. Regarding that IEP, Student's closing brief identifies substantive claims only regarding the failure to offer Lindamood Phoneme Sequencing (LiPS) and the District's offers of Read 180 and classroom placement.<sup>2</sup> Given these circumstances, Student's Issue 2(E) regarding substantive appropriateness of the April/May 2008 IEP offer concerns only the disputes regarding LiPS, Read 180, and classroom placement. The District argues that those components of the April/May 2008 IEP offer was substantively appropriate.

Regarding the October 2008 IEP offer, the District contends that no procedural violations occurred and the October 2008 IEP procedurally and substantively offered Student a FAPE. However, it is Student's contention that the District procedurally denied her a FAPE because the District predetermined the program, failed to provide Parents with sufficient information about the proposed program, and failed to properly and timely assess Student. Substantively, Student contends that the special and general education classroom placements, speech-language therapy, OT, proposed annual goals, and accommodations, modifications and supports were all substantively inappropriate.

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<sup>2</sup> Prior to the close of the hearing, the ALJ reminded the parties that their written closing briefs should address each hearing issue.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is 14 years of age. During all times at issue in this case, she was a resident within the boundaries of the District, where she lives with her family. She is eligible for special education services under the primary eligibility category of specific learning disability (SLD), with a secondary eligibility category of speech-language impairment (SLI).

### FACTUAL BACKGROUND

2. Student received early intervention services from the Napa Infant Program beginning at age two due to a language impairment. She continued to receive special education services throughout her attendance at preschool, kindergarten, and first grade. In or about August 2002, her family moved within the boundaries of the District. For the 2002-2003 school year, she repeated the first grade at the District's St. Helena Primary School, where she also received OT and speech-language services. She continued to receive special education services during the 2003-2004 school year, when she was in second grade. During that school year, Dr. Carina Grandison conducted an independent educational evaluation (IEE) of Student.

3. For the 2004-2005 school year, Student was supposed to attend third grade in a special day class (SDC) for communicatively handicapped pupils. Early in the school year, Parents felt that the SDC was not being implemented as stated in the IEP. In October 2004, Parents removed Student from the District and enrolled her in Pathways, a charter school that offers an independent home-based education program in which the parent is the primary teacher. Pursuant to her IEP at Pathways, Student's instruction and services included one-to-one home instruction from Mother, OT, speech-language therapy, and consultation with a resource specialist.

4. Student continued to receive her education through Pathways for her fourth and fifth grade years. During the 2006-2007 school year, Pathways conducted Student's triennial reassessment, which included a psychoeducational assessment, academic testing, an OT assessment, and a speech-language assessment. Student's Pathways IEP team convened for her triennial IEP in March, April, and May 2007. The team agreed upon Student's instruction and services at Pathways, including continued delivery of OT, resource specialist consultation, and speech-language services, and Mother consented to the IEP following the May 14, 2007 IEP meeting. However, members of the IEP team expressed concern that Student needed a more intensive program that she could receive in home instruction through Pathways. In May and June 2007, Dr. Grandison conducted a second IEE of Student.

5. In July 2007, Parents sent letters to the District to inquire about what programs would be available for Student if she returned to attending school in the District. On September 14, 2007, Student's Pathways IEP team convened again to review assessment results and Student's progress. The IEP agreed to an addendum and Mother consented to that addendum.

6. At a meeting on October 18, 2007, District staff met with Mother to discuss Student's enrollment in the District. The District explained and presented a proposed assessment plan and a 30-day interim placement, contained in a document entitled 30-Day Temporary IEP. Thereafter, the parties exchanged correspondence regarding these items.

7. On October 19 and November 30, 2007, Student's Pathways IEP team convened for Student's annual IEP meeting. The team agreed that Student's program would continue to include specialized academic consultation, OT, and speech-language services. Mother consented to that IEP on November 30, 2007.

8. On December 4, 2007, District staff, Parents, and their respective attorneys met for an IEP team meeting regarding Student's transfer from Pathways into the District. The team discussed topics including the 30-day interim placement and the proposed assessment plan. Following that meeting, the parties and their respective attorneys exchanged correspondence about those topics, and expressed disagreements about what Student needed and what constituted a program comparable to her last agreed-upon IEP from Pathways. On January 25, 2008, Student's Pathways IEP team convened again and agreed upon an amendment to the October/November 2007 IEP. During this time period, Student continued to receive her education and services from Pathways.

9. On March 17, 2008, Parents enrolled Student in the District's Robert Louis Stevenson Middle School (RLS). In a letter dated March 24, 2008, the District provided Parents with a 30-Day Temporary IEP document. On March 31, 2008, the first day after the school's spring break, Student began attending sixth grade at RLS. On that same date, Mother again met with District staff to discuss the 30-Day Temporary IEP. Mother signed the document, but wrote that the interim IEP was not comparable to Student's current IEP from Pathways and, therefore, was not a FAPE for Student.

10. For the remainder of the 2007-2008 school year, Student attended sixth grade at RLS, in a combination of special education classes, general education classes, and designated instruction and services (DIS) including OT and speech-language therapy. On April 29 and May 16, 2008, Student's IEP team convened to review her 30-day interim placement and developed the IEP for her attendance in the District.

11. On June 19, 2008, Parents delivered to the District a ten-page Parent Statement, identifying their areas of disagreement with the April/May 2008 IEP, with several documents attached. The attachments included recent reports by Student's speech-language pathologist (SLP) and occupational therapist at Pathways, an assistive

technology (AT) report from the Sonoma County Office of Education (SCOE), Parents' revisions to the IEP goals, and Parents' signatures on the April/May 2008 IEP, with the notation to see the Parent Statement. In a letter dated July 21, 2008, Dr. Haley replied to Parents and suggested that they schedule another IEP meeting so that the IEP team could respond to the concerns raised in the June 19, 2008 Parent Statement. Parents did not agree to another IEP meeting.

12. In late August 2008, Student began seventh grade at RLS. She attended special education classes for math, language arts, and life skills, and general education classes for history, art, and physical education (PE), with accommodations/modifications for all classes. She also received DIS of speech-language therapy and OT.

13. On September 17, 2008, Mother notified the District that Dr. Grandison would be observing Student at RLS. On September 25, 2008, the District sent to Parents an assessment plan proposing to assess Student in the areas of academic achievement, social and emotional development, motor ability, language/speech/communication, general (cognitive) ability, and behavior. In late September and early October 2008, the parties exchanged correspondence regarding the purpose and timelines for the assessments. On October 6, 2008, Mother sent the District the signed assessment plan. In October 2008, a District school psychologist, behaviorist, SLP, and special education teacher each conducted assessments of Student pursuant to the assessment plan.

14. On October 14, 2008, the IEP team convened at the District for Student's annual IEP meeting. The team members did not complete discussion of all the topics, and agreed to continue the meeting to October 20. In a letter dated October 17, 2008, Parents notified the District's special education coordinator that Parents would be unilaterally placing Student at STAR Academy, a non-public school (NPS), and would be seeking reimbursement from the District for the cost of that program effective November 3, 2008.



15. The IEP team met again on October 20 and October 29, 2008. In a letter dated October 31, 2008, Parents wrote to District staff that the October 2008 IEP did not provide an appropriate program and was inadequate to address Student's complex needs. On or about the same date, Parents provided the District with a copy of a recent IEE conducted by Dr. Grandison.

16. On November 3, 2008, Student began attending STAR Academy, and did not return to her program at RLS. The District filed its due process complaint on November 7, 2008, and Student filed her due process complaint on November 17, 2008.

### THIRTY-DAY INTERIM PLACEMENT

17. Student contends that the 30-day interim placement proposed by the District was not comparable to her last agreed-upon and implemented IEP from Pathways. The District argues that its 30-day interim placement was comparable, and in any event could not have exactly replicated the Pathways IEP because of the significant differences between a home-based program and a school-based program.

18. When a special education student with an approved IEP transfers from one California district to a new California district in a different SELPA within the same academic year, the receiving district must provide the student services comparable to those described in his previously approved IEP. Within the 30-day period the receiving district must also adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law.

19. Student's agreed-upon and implemented IEP from Pathways, dated October 19 and November 30, 2007, provided for the following: Specialized academic consultation four times per month for 240 minutes; speech-language services three times a week for 90 minutes per session; and OT once a week for 60 minutes per session. The IEP listed end dates of October 19, 2008, for the OT and specialized academic instruction, while end date listed for the speech-language services was

January 25, 2008.<sup>3</sup> On January 25, 2008, the Pathways IEP team convened for a follow-up meeting. At that meeting, the team agreed upon an IEP addendum stating that Pathways would continue to provide Student's speech-language services for an additional eight weeks, until March 21, 2008.

20. On March 24, 2008, the District offered Student's 30-day interim placement that included the following: Speech-language services three times per week for 30 minutes per session; OT for 60 minutes per week; three mild/moderate special education classes (English 6, English Support, and Math Support); one general education class with special education support (Math I); one general education class with modified curriculum and special education teacher consultation (Science 6); a general education physical education (PE) class; and the option of either a general education class in Keyboarding or a special education class in Study Skills.

21. In a letter dated April 4, 2008, Dr. Haley provided further details about the 30-day interim placement, explaining how goals, services and accommodations would be implemented. Regarding implementing the October/November 2007 IEP's provision for specialized academic instruction four times a month for 240 minutes, the letter stated that the 30-day interim placement provided for 150 minutes of special education instruction each school day. Regarding the speech-language services, the letter stated in part that the January 25, 2008 IEP amendment ended those services on March 21, 2008, but that based on an overall analysis of Student's goals, the District would provide those services three times a week for 30 minutes per session during the 30-day interim placement.

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<sup>3</sup> The IEP also listed June 6, 2008, as end dates for the OT and specialized academic instruction, and restart dates of September 3, 2008. These dates reflected that those services were offered for the regular academic year, but not for the summer.

22. The parties' disagreement regarding the 30-day interim placement centers on 180 minutes of speech-language services per week, which is the difference between the 90 minutes per week of speech-language services that the District offered and the 270 minutes per week that Student had been receiving pursuant to her January 25, 2008 Pathways IEP amendment. The District argues that the January 25, 2008 IEP amendment terminated the speech-language services on March 21, 2008. Student argues that the speech-language services were not scheduled to end on March 21, 2008, but rather that on that date the IEP team was scheduled to assess and review whether to end those services.

23. The parties presented evidence regarding whether the speech-language services had ended. The January 25, 2008 IEP amendment listed an end date of March 21, 2008, for the speech-language services. The document further states: "[t]he service has an end date on the 10/19/07 & 11/30/07 IEP of 1/25/08. We want to continue the same support for [Student] for 8 more weeks, assess & review continuation at that time." In trying to determine whether this IEP amendment ended the speech-language services on January 25, both parties' interpretations of the language are reasonable. In reaching the District's interpretation, Dr. Haley spoke on the telephone with Pam Moulton, the school psychologist on Student's Pathways IEP team, and Sandra Lenzi, Student's case manager at Pathways. Dr. Haley established that the Pathways staff he spoke with indicated that Student's SLP, Barry Vejby, had stated that Student was nearly finished with the LiPS program, and that thereafter Student needed to continue with a more comprehensive reading program.<sup>4</sup> Ms. Lenzi's testimony was consistent with that report. The LiPS Mastery List prepared by Mr. Vejby on January 25, 2008, indicated that Student

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<sup>4</sup> The evidence established, and there is no dispute, that the LiPS program is completed once a student reaches the mastery level.

had mastered many areas of the LiPS program and was at 70 to 75 percent mastery in the remaining six areas. Credible testimony from SLPs Wanda Richardson and Bonnie Groth established that, at that mastery level, Student would have most likely completed the LiPS program in eight weeks given the frequency of instruction she was receiving. Thus, the District reasonably determined in late March 2008 that Student had completed the LiPS program. Mr. Vejby's subsequent report that Student still had some remaining areas to master does not change the finding that the District's determination was reasonable at the time.

24. More importantly, whether Student had completed the LiPS program does not affect the determination of whether the District offered a comparable program. The District established that it offered reading instruction by a District special education teacher that was comparable to the 180 minutes per week of the reading instruction Student had been receiving from her Pathways SLP, Mr. Vejby. Mr. Vejby delivered Student's reading program and worked on Student's reading goals because Student was in a home-based program. As testimony from Mr. Vejby established, in some school districts, the reading program that Student had received from him would be addressed by the special education teacher, not the SLP. Testimony from District witnesses, including SLP Wanda Richardson and special education teacher Melissa Pritchett, confirmed that was the case in the District. Ms. Richardson and other District witnesses established that the 180 minutes of reading instruction that Student would have received from Mr. Vejby was instead provided by Student's special education teacher, Ms. Pritchett, during two class periods each day: English 6, a special education reading class, and English Support, a special education language arts class. In his testimony, Mr. Vejby agreed that he could have addressed Student's speech-language goals in a reduced amount of time, such as 60 minutes per week, if a reading teacher was delivering Student's reading program and working on the reading goals.

25. One of the components of Student's reading instruction during the 30-day interim placement was the Read 180 program Ms. Pritchett used during English 6. Student argues that the District's reading instruction was not comparable because the Read 180 program was not comparable to the LiPS program. Specifically, Student contends that Read 180 was at too high a level to be appropriate for her, but this was not supported by the evidence. Student points to an April 2008 electronic mail (e-mail) response to Mother from Dr. Kevin Feldman, one of the authors of the Read 180 Enterprise Edition, suggesting that Lindamood Bell programs would better address Student's needs than Read 180.<sup>5</sup> However, during his testimony, when presented with additional information about Student's levels, Dr. Feldman agreed that Student's test scores from recent assessments indicated that Read 180 would be consistent with her level. Student appears to argue that System 44, a phonics program, would have been the program comparable to LiPS, but Dr. Feldman confirmed that Student's scores appeared too high for System 44.

26. Student also argues that Read 180 was not comparable for the reason that the District was not implementing it properly, because Ms. Pritchett did not have sufficient training in the program and because Student did not receive the program in the recommended 90-minute blocks. The Read 180 documents and testimony of Dr. Feldman established that the Read 180 program is a research-based reading program. Student previously received a reading program at Pathways. Any incongruities in the District's implementation of the Read 180 program were not so significant as to render Student's entire reading program incomparable to the one she received at Pathways.

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<sup>5</sup> It is notable that, during Dr. Feldman's testimony, Student did not ask Dr. Feldman to explain, confirm, or otherwise comment on his statements in his April 2008 e-mail response to Mother.

27. In addition, Student appears to contend that the District's offer of OT services was not comparable because the 30-day interim placement offered OT in the school setting instead of the clinic setting. Student points to the recommendation from her previous occupational therapist, Kristi Harris, that the OT services be provided in the clinic setting. Nevertheless, testimony from Ms. Harris established that all of Student's OT goals in the October/November 2007 IEP could be implemented in a school setting, and did not require a clinic setting.

28. Moreover, District occupational therapist Linda Molinari established in her testimony that, during her OT sessions, Student was able to address her OT needs using the District's OT equipment, including an overhead rope swing, scooter board, tilt board and OT balls. Ms. Molinari further established that she was able to implement Student's OT goals in the school setting. Accordingly, the District's provision of OT in the school setting was comparable to the provision for OT pursuant to the October/November 2007 Pathways IEP.

29. Hence, the evidence established that the District's 30-day interim IEP was comparable to Student's last agreed-upon and implemented IEP from Pathways.

#### APRIL/MAY 2008 IEP: PARENTS' MEANINGFUL PARTICIPATION IN IEP PROCESS

30. Student contends that the District denied Parents meaningful participation in the IEP process. Student points to the fact that the District prepared a draft IEP document prior to the IEP meeting. The District argues that it did not deny Parents' opportunity to meaningfully participate, and that the District considered Parents' opinions and made changes based on that input.

31. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A local educational agency (LEA) must fairly and honestly consider the views of parents expressed in an IEP meeting.

Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. An LEA that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process, which constitutes a procedural denial of FAPE.

32. School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. Prior to the April 2008 IEP meeting, District staff prepared a draft IEP document that contained information including draft IEP goals, present levels of performance, and proposed placement and services.

33. Evidence of the April and May 2008 IEP meetings, including Mother's informal transcript of those meetings, indicates that the District members of the team answered questions from Mother and Student's advocate, Jill Markham, sought information and opinions from them, and the IEP team made changes based on their input. Consistent with that, the neutral facilitator of the meetings, Mike Coughlin from Napa County Office of Education, testified credibly that the District was open to Parents' opinions, worked cooperatively with Mother during the meetings, and gave Parents a meaningful opportunity to participate in the IEP process.

34. Student argues that the IEP team did not discuss alternative options at the IEP meetings. However, there is no requirement that the IEP team members discuss all options, so long as alternative options are available. In the present case, the team discussed topics including special education classes and general education classes, and agreed to move Student to a different math class. The District did not refuse to discuss any placement proposals from Mother, Ms. Markham, or any other team member. There was no indication that the District had adopted a "take it or leave it" position regarding

its draft IEP, or was otherwise unwilling to consider placement options for Student. Given all of the above, the evidence established that District staff did not predetermine the IEP and, instead, fairly considered Parents' input.

#### APRIL/MAY 2008 IEP: FAILURE TO PROVIDE SUFFICIENT INFORMATION ABOUT CURRICULUM, METHODOLOGY, AND PROGRAMS

35. As noted above, parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of FAPE to their child.

36. Student contends that the District did not provide Parents with meaningful, timely, and accurate information on the curriculum, methodology, and programs in connection with the placement and services offered or provided, so that Parents could have sufficient information to make an informed decision regarding the placement and services being offered.<sup>6</sup> During the April and May 2008 IEP meetings, Student's teachers and service providers presented detailed information to the team about Student's proposed educational program. The District also mailed Parents a total of 48 pages of information about reading, writing, and math methodologies. The evidence clearly establishes that, in April and May 2008, the District provided extensive information to Parents about Student's proposed educational program.

37. Student contends that the District provided only modifications but not individualized curriculum for her science class. Regardless of whether Student needed individualized curriculum for her science class, there is no evidence that Parents needed

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<sup>6</sup> There is no dispute and no question that the District provided Parents with a clear, formal written offer of the proposed program pursuant to the requirements of *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.



to see that curriculum in order to make an informed decision regarding the placement being offered, nor does Student explain how any failure to provide that information affected Parents' ability to make an informed decision.

38. Next, Student suggests that Parents did not receive enough information about Read 180. The District mailed information to Parents about Read 180 in early April 2008. During the April and May IEP meetings, District staff further described the Read 180 program and how it is implemented at RLS and would address Student's needs. The evidence established that Parents received sufficient information about Read 180 to knowledgeably participate in the IEP process. Therefore, there was no procedural violation on this basis.

39. Finally, Student contends that the District failed to provide Parents with sufficient information about the proposed program because the District never told Parents that Student would not be receiving Read 180 after the end of the 2007-2008 school year. At the April/May 2008 IEP, District team members discussed how Ms. Pritchett, who taught English 6 and English Support, would use Read 180 to address several of Student's IEP goals. However, neither Read 180 nor any other specific reading methodology is identified in the IEP document as part of Student's educational program. Thereafter, Parents accepted portions of the IEP and Student received Read 180 as part of her English 6 class through the end of the 2007-2008 school year. When school began again in fall 2008, Ms. Pritchett was on maternity leave, and Student's new reading teacher was Mary O'Donnell. Read 180 was one of the programs listed on the description of the Reading class, and Ms. O'Donnell indicated during a parent/teacher meeting that the class had not yet begun Read 180 but would do so in the future. However, subsequently Ms. O'Donnell did not use the Read 180 program in the Reading class, and instead used novels and the Read Naturally program to work on reading. Student did not receive Read 180 instruction in fall 2008.

40. It is not clear that a later change regarding a particular methodology, when no methodology is listed in the IEP, could have constituted a procedural violation regarding the parents' participation in the IEP.<sup>7</sup> As discussed previously, it is within the discretion of the district to determine the methodology used to address a student's needs. In addition, it is implicit that a pupil's curriculum will have some changes as the pupil advances to a new grade. In light of all of the above, the absence of Read 180 from Student's program in fall 2008 did not deny Parents' right to meaningfully participate in developing the April/May 2008 IEP.

#### APRIL/MAY 2008 IEP: EDUCATIONAL RECORDS

41. The parent in a special education due process hearing has the right to examine pupil records. The parent may examine his or her child's school records and receive copies of them within five business days after request, and before any IEP meeting or any due process hearing. The right to inspect and review records includes the right to a response to reasonable requests for explanations and interpretations of the records.

42. Pupil records include any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means. Pupil records do not include informal notes related to a pupil compiled by a school

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<sup>7</sup> To the extent that Student may be arguing that the District failed to provide her educational program in conformity with the April/May 2008 IEP, that issue was not identified in Student's complaint and therefore is not addressed in this decision.

officer or employee which remain in the sole possession of the maker, and are not accessible or revealed to any other person except a substitute.

43. Student's contention regarding this issue is not clear. There is no question that the District provided numerous documents in response to Parents' request for pupil records. However, on February 20, 2009, Student filed a motion asking OAH to order the District to produce "protocols, answer sheets, and other test-related documentation." In response, the District filed an opposition stating that "[t]he protocols sought by Student are not maintained by the District, and do not exist." In an order dated March 5, 2009, OAH issued an Order Granting Motion To Produce Limited Test Protocols And Related Documents. That order specified in part as follows:

3. District shall produce to the other party, within five business days from the date of this order, the following documents, to the extent that they are personally identifiable to the Student, and are in the possession of, or under the control of the District or a party who has acted on behalf of the District, in connection with any and all assessments of Student in 2008 [footnote omitted]:
  - (a) Standardized testing protocols;
  - (b) Test, evaluation, assessment, survey, or inventory answer sheets;
  - (c) Read 180 evaluation or assessment data, protocols, and answer sheets;
  - (d) Any other test-related documentation, such as test instructions, instruments and question booklets, that are reasonably necessary to explain or interpret the test, evaluation, or assessment results [footnote omitted].
  
4. In the event that the District does not have any test-related documents as described in Paragraph 3 above, then the District shall file with OAH and serve on the other party a declaration

under penalty of perjury from the District's custodian of records or other administration personnel addressing and explaining the lack of records in each of the four categories set forth above.

44. In response to OAH's Order Granting Motion To Produce Limited Test Protocols And Related Documents, the District produced a sworn declaration from Dr. Haley, who declared that the District had previously produced all records, documents, or materials in existence as described in the OAH order.<sup>8</sup> Dr. Haley's declaration further stated that data from the school psychologist and occupational therapist had been destroyed, and that no other responsive documents were in existence and in the possession, custody or control of the District. During the hearing, the school psychologist, Dr. Ramah Commanday, confirmed that she had destroyed some notes and raw data from assessments once she had entered the information into the computer, which is standard practice in the District. Student presented no evidence that a district is required to maintain these types documents for any particular period of time. Nor did Student establish that District destroyed the documents for any purpose other than standard practice.

45. Regarding Student's pupil records from Read 180, testimony from Ms. Pritchett established that the District had produced only one Lexile test result.<sup>9</sup> The District also provided Parents with Read 180 work samples which reflected work Student

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<sup>8</sup> OAH support staff inadvertently did not serve the Order on the District on March 5, 2009. The District received a copy of the order at the hearing on March 16, 2009, and produced its response to the Order five business days from that date.

<sup>9</sup> A Lexile measure indicates a pupil's reading level, based on the pupil's performance on specific types of reading tests.

did in the program. Ms. Pritchett credibly established that, because of the short time period that Student attended the Read 180 program, Student did not generate the typical amount of Read 180 data. Student entered the program while the class was near the end of Unit 3. Ms. Pritchett established that, although Student subsequently completed Unit 4, it would not have been useful to give her the assessment, because it tested material from both units. Hence, the Read 180 data produced was all that existed.

46. Accordingly, the District has established that it complied with its obligation to produce Student's educational records, and no procedural violation occurred on this basis.

#### APRIL/MAY 2008 IEP: INFORMATION ABOUT STUDENT'S PROGRESS TOWARD ANNUAL IEP GOALS

47. Federal and state special education laws contain specific requirements for the mandatory contents of an IEP document. For example, an IEP must include a description of the manner in which the progress of the pupil towards meeting the annual goals will be measured and when periodic reports on the progress the pupil is making toward meeting the annual goals, such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, will be provided. Conversely, the IDEA does not require IEPs to contain additional information in a pupil's IEP that is not specifically required by law.

48. Student contends that the District failed to provide sufficient data to support the progress reports presented during the April and May 2008 IEP meetings. During those meetings, Student's teachers and service providers presented detailed information about Student's progress on each of her IEP goals. However, staff were not able to produce the raw data that Parents sought. Credible witnesses such as Ms. Richardson, the SLP who was working with Student at that time, established that they

generally do not retain the paper on which they calculate a pupil's progress. As Ms. Richardson explained, her scoring system would not be useful to other people, and instead she can explain to parents how she reached her findings on progress. Likewise, Ms. Groth confirmed that SLPs are trained to destroy their data once it is reported, and that the data is unintelligible to anyone not trained in the SLP's particular system for recording data. Student presented no evidence that SLPs are required to maintain this type of data.

49. Regarding Read 180 data, as determined above in Factual Finding 45, because of the short time period that she attended the Read 180 program, Student did not generate the typical amount of Read 180 data. The District produced Student's Read 180 work samples and a Read 180 lexile test result.

50. Moreover, Student's teachers and service providers regularly provided information to Parents about Student's progress throughout Student's attendance at RLS in spring 2008. As noted in the April/May 2008 IEP, in addition to quarterly progress reports, Parents were informed of Student's progress by "weekly communication via email, a summary or work samples." For example, Ms. Richardson, Student's SLP during this time period, sent weekly summaries of what Student worked on during speech-language sessions, including the particular IEP goal and the activity Student did to work on that goal. The evidence established that Student's other service providers and teachers frequently communicated with Mother by e-mail, and gave Parents weekly packets with samples of Student's work.

51. In light of all of the above, the District did not fail to produce meaningful, timely, and accurate information regarding Student's progress toward her annual IEP goals. Instead, District staff provided and explained detailed information about Student's progress on all of her IEP goals. Considering these findings, there was no failure to provide information about progress on goals that denied Parents meaningful

participation in the IEP process. Furthermore, since there is no legal requirement that school districts produce the raw data that progress reports are based upon, any failure to provide such data did not constitute a procedural violation. Finally, the evidence did not establish that any procedural violation impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

#### APRIL/MAY 2008 IEP: READING/LANGUAGE ARTS PROGRAM

52. Student contends that the Read 180 program was not designed to address her unique needs and not reasonably calculated to result in educational benefit. Instead, Student argues that she needed Lindamood Bell's LiPS program, a multisensory program that focuses on phonemic awareness and phonological processing, to develop the basic skills of reading. The District contends that its reading program, which included Read 180 and other components, was designed to address her unique needs and reasonably calculated to result in educational benefit. The District argues both that Student did not need LiPS and that the District had discretion to choose methodology.

53. When developing each pupil's IEP, the IEP team must consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. An educational program offered by a school district must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with meaningful educational benefit in the LRE. However, school districts are not required to offer instruction or services to maximize a student's abilities. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. As long as a school district provides an appropriate education, methodology is left up to the district's discretion.

54. Student's needs are well-documented in the evidence. In brief summary, during the time period at issue, Student had unique needs in auditory processing, visual processing, phonological processing, sensory processing and self-regulation, memory, attention, reading comprehension, basic reading skills, written expression, expressive and receptive language, math reasoning, math calculation, social pragmatics, delayed social development, visual perception, visual motor integration, fine and gross motor planning, handwriting, and bilateral integration.

55. The April/May 2008 IEP proposed four periods of specialized instruction in a special education classroom, three general education classes, speech-language services three times per week for 30 minutes per session, OT services once a week for 30 minutes, and extended school year (ESY) services. That IEP also contained goals in reading comprehension, reading fluency, writing strategies, number sense, math reasoning, encoding and decoding, critical thinking and perspective taking, memory skills, higher-order thinking skills, self-regulation, visual perception, accepting correction and constructive criticism, organizational/study skills, social-emotional development, and handwriting.

56. Documentary exhibits and the testimony of Dr. Feldman and Ms. Pritchett established that Read 180 is a curriculum-referenced, comprehensive reading intervention. The program has several multisensory elements, through reading, writing, listening to instruction, and using the computer programs.

57. In spring 2008, Student received Read 180 instruction during Ms. Pritchett's English 6 class. Student received additional reading and writing instruction during Ms. Pritchett's English Support class, using materials including novels and the Step Up To Writing program. Testimony from Ms. Pritchett established that, during spring 2008, Student made progress on her IEP goals in reading comprehension, reading fluency, writing, and expressive and receptive communication. Ms. Pritchett



further established how other evidence, such as work samples, also demonstrated Student's progress in these areas.

58. As discussed above in Factual Finding 25, Dr. Feldman, one of the authors of the Read 180 Enterprise Edition, reviewed Student's scores and agreed that, in combination with other appropriate programs, Read 180 would be an appropriate program to work on reading for a child with test scores like Student's. Furthermore, Ms. Pritchett's testimony established that Read 180 addressed Student's reading deficits.

59. Student argues that Read 180 was not appropriate for her because the District was not delivering it in the recommended 90-minute blocks. Dr. Feldman explained that the Read 180 research had been conducted using the 90-minute model, and therefore that the effectiveness of Read 180 delivered in a shorter block has not been proven through similar research. However, the Read 180 brochures list delivery in a 50-minute model as an effective option, and Dr. Feldman agreed that the Read 180 program accommodates delivery in that time block. Considering all evidence, the District's delivery of Read 180 to Student in 50-minute time blocks was an effective program to address her reading needs.

60. Student also contends that Ms. Pritchett was not properly trained in the Read 180 program, based on Dr. Feldman's testimony that teachers should receive at least two days of training on the Read 180 program. Ms. Pritchett testified that she attended a one-day training by Scholastic, the publisher of the Read 180 program, and that Scholastic had represented that this training was sufficient for a teacher to implement the program. Ms. Pritchett is an experienced, credentialed special education teacher who demonstrated her knowledge about and familiarity with the Read 180 program during her testimony. There is no evidence that Ms. Pritchett failed to correctly implement the Read 180 program to Student. Thus, there is no showing that the one-day discrepancy between the training she received and the training Dr. Feldman

recommended affected Student's education or rendered the program inappropriate for Student.

61. In fall 2008, Student received reading instruction in the Reading class taught by Ms. O'Donnell, a credentialed special education teacher. Ms. O'Donnell used reading materials including novels, the Read Naturally program, and the Rewards program, and taught writing using the Step Up To Writing program. Ms. O'Donnell's testimony established that Student made progress on her reading, writing, and communication goals during this time period. Other evidence such as Student's work samples from Reading class were consistent with Ms. O'Donnell's testimony about Student's progress. Hence, the evidence established that Student's reading instruction in fall 2008 addressed her reading needs and resulted in educational gains.

62. Student argues that the District's evidence of progress is contradicted by Dr. Grandison's findings that Student's test scores declined from May 2007 to October 2008 in areas such as reading comprehension. This argument ignores Dr. Grandison's testimony about those scores. During the 16-month time period between Dr. Grandison's assessments, Student attended the District's program for only a few months, and spent a greater percentage of that time period receiving the home-based instruction overseen by Pathways. During her testimony, Dr. Grandison clearly stated that, because of the time periods involved, she could not directly attribute the lack of growth on test scores to Student's attendance at either RLS or the home-based program.

63. Based on all of the above, the evidence established that the District's reading program, including the Read 180 program, was designed to meet Student's unique needs and reasonably calculated to result in meaningful, educational benefit.

64. Student argues that she required LiPS as her reading program, and points to testimony from her advocate, Jill Markham, regarding Student's need for the LiPS

program. Ms. Markham has been representing Student since 2007 and is familiar with Student's needs. While Ms. Markham was generally knowledgeable about special education, she lacked the objectivity and unbiased insight necessary for an expert witness to be persuasive, and her testimony is given little weight.

65. Student's Pathways' SLP, Mr. Vejby, was an objective, independent, knowledgeable witness who gave credible testimony. His recommendation that Student continue using the LiPS program established that the program would have been appropriate to address Student's basic reading skills during the time period at issue here. However, his testimony did not establish that Student specifically needed that program to address her unique needs and receive educational benefit. Moreover, unlike Read 180, LiPS is not a comprehensive reading program, and therefore LiPS alone would not have addressed all of Student's needs related to reading.

66. Testimony from Dr. Grandison is consistent with this finding. Dr. Grandison was also a knowledgeable, objective, independent, and credible witness. In her October 2008 IEE report, she wrote that Student "needs programs that specifically address her underlying phonological processing disorder, such as Lindamood Bell, Slingerland, and Orton Gillingham programs are highly recommended." However, during her testimony, Dr. Grandison clarified that the reading programs she named in her report were just suggestions. Dr. Grandison explained that she just thought that Student needed an intensive reading program because of her reading needs, but the particular program did not have to be Lindamood Bell.

67. Given the evidence that the District had offered and provided an appropriate reading program, the District had discretion regarding methodology and was not required to offer the LiPS program. Therefore, the District's failure to offer the LiPS program did not deny Student a FAPE.

## APRIL/MAY 2008 IEP: PLACEMENT IN SPECIAL EDUCATION CLASSES

68. Student agrees that she should have been placed in special education classes, but argues that her special education classes at RLS were inappropriate because they included children functioning below her cognitive level. The District contends that Student's placement in special education classes was designed to meet her unique needs and reasonably calculated to result in educational benefit in the LRE.

69. In Student's last triennial psychoeducational report from March 2007, Pathways' educational psychologist, Pamela Moulton, recommended that Student "be placed on a regular school campus where she would be able to participate in both the structure that is afforded by a special day class environment, and in mainstream classes, in those areas of interest and strength." Consistent with this recommendation, the April/May 2008 IEP offered Student placement in special education classes in areas such as math and English/language arts, and general education classes in other subjects.

70. As determined in the prior section, Student made gains in reading, writing, and communication from the instruction she received in English 6 and English Support classes in spring 2008, and from her Reading class in fall 2008. Both Ms. Pritchett and Ms. O'Donnell established that the other pupils in those classes had mild to moderate disabilities such as learning disabilities. There was no evidence that Student's reading/language arts needs could have been addressed in a less restrictive environment. Moreover, testimony from Ms. O'Donnell and SLP Janielle Bradley established that Student's behavior was generally appropriate and on-task in the Reading class in fall 2008.

71. Similarly, testimony from Ms. Pritchett and Ms. O'Donnell established that Student's needs were addressed in her special education math classes, following the change in math class made after the 30-day interim placement. Both witnesses credibly described how Student made progress on the math goals on her IEP. There was no

evidence that Student could have addressed her math needs in a less restrictive environment. To the contrary, when Student attended Math I during her 30-day interim placement, that class was too difficult for her.

72. Ms. O'Donnell also established that her Learning Center class was designed to address Student's needs, reasonably calculated to produce meaningful, educational benefit, and in the LRE. Learning Center was a study skills class where the pupils received instruction and support related to organizational skills, and learning the subject matter and completing assignments for their other classes. There is no dispute that Student needed specialized instruction and support on her academic subjects, and that she also needed to address needs in organizational and study skills. Student received that instruction and support in the Learning Center class. There was no evidence that the other students in the class were too low functioning, or that Student's needs could have been addressed in a less restrictive environment.

73. Student's arguments disputing the evidence of her educational progress in spring and fall 2008 are ultimately not persuasive. As determined in Factual Finding 62, Dr. Grandison's findings that some of Student's test scores declined from May 2007 to October 2008 could not be specifically attributed to Student's attendance at RLS, because the time period between Dr. Grandison's assessments primarily covered the period when Student received the home-based instruction overseen by Pathways. Next, Student also points out that she did not meet all of her IEP goals as of October 2008. A school district's obligation to offer FAPE does not include any guarantee that a pupil will meet all of her IEP goals; rather, the educational program needs to be reasonably calculated to result in meaningful educational benefit, based on what the IEP team knew or reasonably should have known at the time. Here, the evidence clearly established that Student made progress on all of her IEP goals, which indicates that the program was reasonably calculated to result in meaningful educational benefit. Finally, the testimony

of Kim Camp, head teacher at STAR Academy, did not establish that Student failed to make the progress on her IEP goals reported by the October 2008 IEP team members. It is difficult to determine what effect the transition to STAR Academy had on Student's functioning, and how Student's performance might be different at STAR than it was at RLS. Given these unknown factors, Ms. Camp's testimony about Student's performance at STAR was not sufficient to overcome credible evidence from Student's teachers and service providers at RLS about the progress that they observed.

74. Regarding the special education Life Skills class in fall 2008, Student's position is not entirely clear. She argues generally that some of her special education classes were inappropriate because the other pupils in the class were lower functioning, but the only special education class where that was the case was the Life Skills class, and she points to no other example. Nonetheless, in her closing brief, Student criticizes the District's behaviorist and school psychologist for recommending "that she be pulled out of the very SE [special education] class the purpose of which was to teach her much needed social skills...."

75. It is undisputed that Student had needs in social skills and related areas that the Life Skills class was designed to address. Dr. Grandison established through her testimony that Student needed social skills instruction. However, Dr. Grandison further established that placement in that class was not in the LRE because several of the other students in the class had disabilities more severe than Student's. Similarly, District behaviorist Dana Sabin established that the peers in the Life Skills class had lower social functioning than Student did. Student's needs in social skills and related areas could have been addressed in a less restrictive setting, including during speech-language therapy and general education classes that provided for social interaction. Moreover, the evidence was consistent and undisputed that Student exhibited behavioral problems that interfered with her learning in the Life Skills class, whereas she exhibited fewer

behavioral problems in her other special education classes and none in her general education classes. Student's negative behaviors in Life Skills were in part related to her boredom and discomfort at being placed in a class with lower functioning students, and the absence of typically developing peer models who demonstrated appropriate social behavior.

76. Thus, placement in the Life Skills class was not in Student's LRE to address her needs. As discussed further below, District staff recognized early in the school year that Life Skills was not Student's LRE, and therefore proposed changes to attempt to rectify the problem.

77. Accordingly, Student's placement in special education classes for math, English/reading, and study skills pursuant to the April/May 2008 IEP was designed to meet her unique needs and reasonably calculated to result in educational benefit in the LRE. Her placement in Life Skills in fall 2008 was not in the LRE.

#### APRIL/MAY 2008 IEP: PLACEMENT IN GENERAL EDUCATION CLASSES

78. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Whether a student can be mainstreamed in a regular education class is determined by balancing four factors: (1) the educational benefits of placement in a general education class compared to that of a special education class; (2) the non-academic benefits of mainstreaming; (3) the effect the student has on the teacher and children in the regular class; and (4) costs of mainstreaming the student.

79. In spring 2008, Student attended general education classes in Science, Keyboarding, and PE. In fall 2008, she attended general education classes in History, Art, and PE. There is no dispute that she was appropriately placed in general education PE.

Student argues that her placement in other general education classes denied her a FAPE because she received no academic or non-academic benefit from those classes, and because the cost of her mainstreaming was high. The District argues that the general education classes were the LRE because Student received academic and non-academic benefit, and Student had only a positive effect on the teachers and other pupils in those classes.

80. Regarding academic benefit, Dr. Grandison observed Student in classes at RLS one day in September 2008. Dr. Grandison concluded that Student was not receiving benefit from attending general education history and art classes, because she could not follow the material or teacher instructions.

81. While Dr. Grandison was a knowledgeable and credible witness, her testimony on this point was not persuasive in light of the additional information from Student's teachers.<sup>10</sup> Student's history teacher, Todd Mills, established that Student was able to follow and learn from the lessons and class materials with several modifications and accommodations, such as simplified assignments. Mr. Mills persuasively testified about how Student was able to participate in most aspects of the class, and how he checked to see that she was able to follow the material. Student's art teacher, Linda Rowland, established that Student made good progress in art class, completing the assignments and fully participating in the class without modifications.<sup>11</sup> Similarly,

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<sup>10</sup> In addition, testimony from Mr. Mills, Ms. Rowland, and school psychologist Dr. Commanday about the incidents that formed the basis for Dr. Grandison's opinion all described the events differently from how Dr. Grandison described them.

<sup>11</sup> Student's grade of "A" in Art reflects the modification that she was allowed to turn in assignments late without penalty. Ms. Rowland established that, had Student's



Student's teacher for Science and Keyboarding classes in spring 2008 reported at the April/May 2008 IEP meeting that Student enjoyed and did well in those classes. As Dr. Grandison readily acknowledged, she observed only a brief snapshot of Student's attendance at these classes, and Student's teachers had more information about how Student performed in those classes. In light of all evidence, Student was able to receive some academic benefit from the general education classes she attended in spring and fall 2008. There was no evidence about how that level of academic benefit compared to the academic benefit she could have received in the alternative had she attended special education classes for subjects such as history or science.

82. Evidence including testimony from Mr. Mills, Ms. Rowland, Dr. Commanday, and behaviorist Dana Sabin established that Student received non-academic benefit from her general education classes. Student modeled her behavior after that of her typically developing peers in those classes. She was well-behaved and tried hard to do the work. Ms. Rowland also established that Student interacted socially with peers during art class.

83. There was no evidence that Student's attendance had any negative effect on the teachers and other students in general education. There was evidence of a positive effect. Both Mr. Mills and Ms. Rowland enjoyed having Student in their classes. Evidence of the April 2008 IEP meeting indicates that Student's science teacher felt the same way.

84. There was no evidence regarding cost of mainstreaming Student. In Student's closing brief, Student's argument about cost was entirely speculative and not supported by the evidence. Contrary to Student's theory, there was no evidence that the \_\_\_\_\_ grade not been modified, she would have received a "B" grade. Thus, Student was able to participate in the art class without modification.

modifications and accommodations the general education teachers made for Student were costly.

85. Weighing all of these factors, Student received some academic benefit in her general education classes, and received greater non-academic benefit. Her presence had only a positive effect on the teachers and other pupils in those classes. There was no evidence regarding cost. With the use of modifications and accommodations, Student was able to be educated in these general education classes and did not require removal to a more restrictive setting. Thus, the evidence established that these general education classes were Student's LRE. Moreover, these classes allowed Student to work on several goal areas and make educational progress. Accordingly, placement in these classes provided Student a FAPE during spring and fall 2008.

#### OCTOBER 2008 IEP: PARENTS' MEANINGFUL PARTICIPATION IN IEP PROCESS

86. Student argues that the District denied Parents meaningful participation in the October 2008 IEP process by predetermining the offer and by failing to provide sufficient information about the proposed program. The District argues that it did not predetermine the offer, that it provided sufficient information about the proposed program, and that Parents meaningfully participated in the IEP.

87. As noted above, parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of FAPE to their child. An LEA must fairly and honestly consider the views of parents expressed in an IEP meeting. An LEA that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process, which constitutes a procedural denial of FAPE. Moreover, school officials may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized.

88. The transcripts of the October 2008 IEP meetings, along with the IEP document and testimony from IEP team members, established that District members of the team listened and responded to the questions and concerns of Mother, Father, and their family friend who was present at the meeting. On several occasions, District staff asked for parental input, or made changes based on parental input. There was no evidence of predetermination. To the contrary, at the October 14 meeting, when Mother asked if the draft IEP constituted the District's offer, the District special education coordinator responded that it was not the District's offer because they needed to get Parents' input and the offer could change. At other points, District staff emphasized how much they wanted to "work with" Parents to design an appropriate program, and asked to hear more about options that Mother had mentioned. Hence, the evidence indicated that District staff were open-minded and considered Parents' opinions.

89. Prior to and during the October 2008 IEP meetings, the District provided Parents with a large amount of information about Student's progress and proposed program. Student's teachers and service providers communicated regularly with Parents, including providing frequent handwritten updates in a communication log. During the three IEP meetings in October 2008, the IEP team members spent hours discussing and explaining the proposed program as it related to addressing Student's needs.

90. Student contends that the District failed to provide sufficient information about the methodology used for her reading program. At the April and May 2008 IEP meetings, the District had informed Parents that Student would be using the Read 180 program. In September 2008, the Reading teacher, Ms. O'Donnell, provided a class description that listed Read 180 as one part of the curriculum, along with novels and the Read Naturally program. Also in September 2008, Ms. O'Donnell told Mother during a parent/teacher meeting that the class had not yet begun Read 180 but would do so in the future. However, subsequently Ms. O'Donnell did not use the Read 180 program in

the Reading class, and instead used other materials and programs to work on reading. Student did not receive Read 180 instruction in fall 2008, and it would not have been part of her program for the 2008-2009 school year.

91. During the October 2008 IEP meetings, Ms. O'Donnell discussed how she was working with Student on reading. Ms. O'Donnell mentioned working with novels, Read Naturally, and the Rewards program. No one at the October 2008 IEP meetings mentioned Read 180, and it is not part of Student's October 2008 IEP. Given the information the District previously gave to Parents about Read 180, it would have been preferable if the District clarified to Parents that Student's Reading class was using different programs in the new school year. However, in the context of all of circumstances, and in consideration of the law according a school district the authority to determine methodology, this omission did not rise to the level of denying Parents' right to meaningfully participate in the IEP process. The District provided extensive information to Parents about the proposed programs. The failure to clarify that the prior year's methodology was no longer being used did not significantly impede Parents' right to participate in the IEP decision-making process.

92. Accordingly, Parents had the opportunity to meaningfully participate in development of the IEP. Therefore, the District did not procedurally deny Student a FAPE on this basis.

#### OCTOBER 2008 IEP: FAILURE TO PROPERLY AND TIMELY ASSESS

93. A pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. A reassessment shall occur at least once every three years, unless the parent and LEA agree in writing that a

reassessment is unnecessary. When developing a pupil's IEP, the IEP team must consider the results of the most recent assessment of the pupil.

94. Student's last triennial reassessment occurred in 2007. Thereafter, her SLP and occupational therapist at Pathways conducted additional reassessments before she entered the District. Dr. Grandison also conducted an additional evaluation of Student in spring 2007. In October 2008, District staff conducted additional assessments of Student in academic achievement, social and emotional development, OT, speech-language, and behavior. Ms. O'Donnell conducted an academic assessment of Student using the Woodcock Johnson-III Tests of Achievement, and Ms. Sabin observed Student for a behavioral evaluation. Some of the District's other assessors were not able to complete all of the tests they attempted, because Student was not cooperative with the testing.

95. Dr. Commanday, school psychologist, conducted a psychoeducational assessment of Student that included reviewing Student's records, talking to Student's Mother and teachers, and administering the Behavior Assessment System for Children (BASC II). Dr. Commanday also sought to administer a cognitive test, the Cognitive Assessment System (CAS) and the Sentence Completion Projective Task, but Student did not cooperate with that testing. However, because of the extensive nature of other recent assessments, Dr. Commanday was able to rely on recent past testing, such as the 2007 administration of the Wechsler Intelligence Scales for Children-IV (WISC-IV), which results are considered valid for at least three years following administration. Dr. Commanday and Dr. Grandison both explained that a pupil's cognitive scores generally do not change over time, absent an event such as brain injury. There is no dispute that Student's 2007 WISC-IV scores were still valid in October 2008.

96. Linda Molinari, occupational therapist, administered the Motor-Free Visual Perceptual Test to Student. Ms. Molinari also evaluated Student based on a review of records and observation of Student's performance during OT sessions. Ms. Molinari also

sought to assess Student's handwriting using the Evaluation Tool For Children's Handwriting (ETCH), but Student did not cooperate. Instead, Ms. Molinari was able to evaluate Student's handwriting based on Student's past writing samples.

97. Nick Joy, SLP, also attempted to conduct testing of Student, but she was not cooperative. Instead, Mr. Joy reported to the IEP team about Student's functioning based on how Student was performing during their thrice-weekly speech-language sessions, and his knowledge of Student's needs from her past assessment reports and IEPs.

98. Student argues that, because the District assessors did not complete all of the tests they attempted, the October 2008 IEP was, in essence, automatically inappropriate. This argument is not persuasive for a number of reasons. Student must be assessed in all areas related to her suspected disability, but the District may rely on recent past assessments for that information. Here, while the District attempted to gather updated information about Student, the results of her recent triennial assessments and Dr. Grandison's IEE were still valid, and there is no dispute about the accuracy, reliability, or validity of those results.<sup>12</sup> Thus, while additional updated information would have been helpful, the IEP team was still able to rely on valid and reliable information about all areas related to Student's disability, based on the information gathered by District assessors and supplemented by assessment results from Student's recent Pathways assessments and Dr. Grandison's IEE. The IEP team relied on all of that information to develop Student's present levels of performance, IEP goals, and proposed placement and services. There is no evidence that the IEP team

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<sup>12</sup> For example, Student asserts in her closing brief that she "had been thoroughly assessed by [Pathways] in 2006-2007 in all areas of suspected disability [citations omitted] and by Dr. Grandison who updated her '03 assessment [citations omitted]."

lacked sufficient information about any area related to Student's disability, and thus Student has not established that any procedural violation occurred regarding assessment. Moreover, even if there had been a procedural violation related to failure to assess, there is no evidence that any violation impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

#### OCTOBER 2008 IEP: ESY

99. An important aspect of the parents' right to participate in the IEP process is the LEA's obligation to make a formal written offer which clearly identifies the proposed program. The requirement of a formal, written offer creates a clear record that helps eliminate troublesome factual disputes years later, and alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services.

100. ESY services shall be offered and provided if the IEP team determines that the services are necessary for the provision of a FAPE to the pupil. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoument capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability.

101. During the October 27, 2008 IEP meeting, District staff proposed that the IEP team would determine later in the school year whether Student required ESY in summer 2009. The District special education coordinator explained that the team should review Student's grades and progress on IEP goals after the third quarter of the school year, to determine at that point whether she needed ESY.

102. The District's proposal regarding ESY did not constitute either a procedural or substantive denial of FAPE. The District was not required to make its offer for ESY in October. The proposal to determine based on subsequent information whether Student needed ESY was consistent with the District's obligation to offer a program designed to address Student's unique needs and reasonably calculated to result in meaningful educational benefit.

#### OCTOBER 2008 IEP: GOALS

103. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability.

104. The October 2008 IEP proposed a total of 11 goals in areas of self-regulation/OT, behavior, communication, pragmatic communication, higher-order thinking skills/semantics, decoding, writing and editing, math calculation, problem solving, and reading comprehension. Testimony from Ms. Molinari, Ms. O'Donnell, Mr. Joy, Mr. Mills, and Ms. Sabin established that these goals were measurable and designed to meet Student's unique needs.

105. None of Student's criticisms of the goals established that the goals failed to meet the legal requirements. Ms. Markham offered opinions about how some of the goals could have been written differently, but none of that evidence established that the goals failed to comply with the law, or that Student needed additional goals. Ms. Markham's testimony did not override the persuasiveness of the credible evidence that the proposed goals were appropriate.



## OCTOBER 2008 IEP: PLACEMENT IN SPECIAL EDUCATION CLASSES

106. The October 2008 IEP proposed specialized academic instruction for a total of 23 special education class periods per week at 50 minutes per class. For the 2008-2009 school year, those special education classes would be in Reading, Math, Learning Center, and Life Skills.

107. Pursuant to previous Factual Findings, the Reading class was designed to address Student's needs in reading, writing, and language arts in the LRE. The proposed placement would include instruction using novels, the Read Naturally program, the Rewards program, and the Step Up To Writing program. Because the class had only three students, Ms. O'Donnell would be able to provide intensive instruction to Student, with frequent one-on-one assistance. Moreover, this Decision has already determined that Student made educational gains in reading, writing, and communication goals for the first two months of the 2008-2009 school year, which indicates that continued placement in the class was reasonably calculated to lead to meaningful, educational benefit.

108. Similarly, pursuant to Factual Finding 71, testimony from Ms. O'Donnell established that continued placement in the Math special education class was designed to address Student's unique needs in math calculation, problem solving, and other math topics. Moreover, as determined above, placement in the special education math class was reasonably calculated to result in educational benefit in the LRE for the 2008-2009 school year. As determined in Factual Finding 72, the Learning Center class was also designed to address Student's unique needs, was reasonably calculated to result in educational benefit, and was in the LRE.

109. As determined in Factual Findings 74 to 77, the Life Skills class was not the LRE for Student, and that information was reasonably available to the IEP team in October 2008. Although the IEP team discussed the option of removing Student from

that class, ultimately the team continued to offer that class, and instead proposed strategies and interventions to address the negative behaviors that Student exhibited in that class. District staff stated that they were temporarily having Student work one-on-one with an aide during that period, but the class remained part of the District's offer. The more restrictive environment of the Life Skills class impacted Student's ability to benefit from the class, because her negative behaviors appeared related to her boredom and discomfort at being placed in a class with lower-functioning students, and the absence of typically developing peer models who demonstrated appropriate social behavior. Hence, the Life Skills class did not substantively offer Student a FAPE in the LRE.

#### OCTOBER 2008 IEP: PLACEMENT IN GENERAL EDUCATION CLASSES

110. The October 2008 IEP team offered to continue Student's placement in general education classes for history, art, and PE. As noted above, this placement was consistent with the recommendation from Student's last psychoeducational report from Pathways, which recommended placement on a regular school campus with a combination of SDCs and mainstream classes.

111. As determined above in Factual Findings 78 to 85, in fall 2008, Student received some academic benefit and greater non-academic benefit in her general education classes, and her presence had only a positive effect on the teachers and other pupils in those classes. These findings remained true for the District's offer at the October 2008 IEP. Thus, the general education classes in history, art, and PE were Student's LRE, and would comport with the District's obligation to educate Student with nondisabled peers to the maximum extent appropriate. Moreover, placement in these classes would allow Student to work on several areas of need, including reading comprehension and social development. Accordingly, the October 2008 IEP offer to continue Student's placement in those general education classes constituted an offer

designed to address her unique needs and reasonably calculated to result in educational benefit in the LRE.

#### OCTOBER 2008 IEP: BEHAVIOR

112. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

113. Student had some behaviors that impeded learning in her special education classes only, and primarily in the Life Skills class. The October 2008 IEP proposed strategies and supports to address that behavior, in the form of behavioral goals. The team proposed that, if implementation of those goals was not successful in eliminating the behaviors, then the next step would be a behavioral assessment, conducted for the purpose of developing a behavior plan.

114. It has been previously determined in this Decision that placement in the Life Skills class was not in Student's LRE. However, to the extent that a separate question exists regarding the need for behavioral interventions, Ms. Sabin, the District behaviorist, and Dr. Commanday, school psychologist, both established that the behavioral goals and incremental process towards developing a behavior plan were appropriate strategies to address Student's behaviors. There was no persuasive evidence to the contrary.

#### OCTOBER 2008 IEP: SPEECH-LANGUAGE THERAPY

115. A school district must offer a pupil related services as may be required to assist the child to benefit from special education.

116. There is no dispute that Student needed speech-language therapy to address her unique needs and benefit from special education. The October 2008 IEP offered Student two sessions of speech-language therapy per week, at 45 minutes per

session, for a total of 90 minutes a week. The sessions would be delivered in a small group to work on pragmatics, and delivered one-on-one for other goal areas. Evidence established that these speech-language sessions were designed to address Student's unique needs in areas including pragmatics/social skills, communication, and semantics. Hence, the offer was designed to address Student's unique needs and reasonably calculated to result in meaningful educational benefit in pragmatics, social skills, communication, and related areas. Pursuant to Factual Finding 24, 90 minutes per week was a sufficient amount of speech-language therapy time to address Student's needs in those areas, given that Student was receiving her reading instruction from a special education teacher instead of an SLP. Accordingly, the District's offer of 90 minutes of speech-language therapy per week was designed to meet Student's unique needs and assisted Student in benefiting from special education.

#### OCTOBER 2008 IEP: OT

117. The October 2008 IEP offered Student OT consultation twice a month for 30 minutes per session. The occupational therapist would consult with Student's teachers and Parents regarding topics such as how to implement Student's sensory diet, to address her sensory regulation needs.

118. Testimony from both Linda Molinari, Student's occupational therapist in the District, and Kristi Harris, Student's occupational therapist at Pathways, established that the proposed sensory diet was appropriate and designed to address Student's unique needs related to sensory regulation. Ms. Harris and Ms. Molinari were both experienced, knowledgeable, credible witnesses.

119. Ms. Molinari's testimony established that the sensory diet and OT consultation services were designed to address Student's needs related to OT. Ms. Molinari explained that Student no longer needed direct OT services, and that switching to OT consultation would promote generalization of OT skills in other settings, instead

of just developing Student's OT skills in one-to-one OT sessions. Ms. Harris testified to her recommendation for continued direct OT sessions. Ms. Harris's testimony established that Student would benefit from direct OT services. However, in light of Ms. Molinari's testimony, the evidence did not establish that Student needed direct OT services to benefit from her education, because the OT consultation services would allow Student's teachers to implement the sensory diet and OT techniques in the classroom. Thus, the District's offer of OT consultation was designed to address Student's unique needs and allowed her to benefit from her education.

#### OCTOBER 2008 IEP: AT

120. On the October 2008 IEP document, following a question about whether Student requires AT devices and/or services, there is a check mark next to the "No" box, followed by the statement that Student "has access to assistive technology hardware and software, which can help her progress on her goals, in special education settings, general education and at home." However, the District has offered and provided AT to Student during this period, so it is unclear why the IEP document has the "No" box checked. The District has provided Student with a laptop computer that contains "Dragon Speak Naturally" software that addresses her language arts needs. Student also has access to computers and other AT on campus. While additional AT may have been beneficial, there was no persuasive evidence that Student needed any additional AT that she was not already receiving.

#### OCTOBER 2008 IEP: ACCOMMODATIONS, MODIFICATIONS, AND SUPPORTS

121. The October 2008 IEP proposed extensive accommodations, modifications, and supports to be implemented in all of Student's classrooms. A sampling of those accommodations, modifications, and supports includes: Repeated instructions; frequent check-in to make sure Student understands task; breaks to maintain alertness; visual

models when explaining tasks; previews of upcoming topics; graphic organizers, outlines, and think sheets as scaffolding for writing assignments; shortened assignments; extended time on assignments and tests; sensory integration breaks/tools; refocusing area to allow Student to self-regulate and have access to sensory tools; assignments adapted to Student's level; modified assignments as needed; note-taking support; large print; books on tape; use of calculator; access to computer on campus; preferential seating; flexible setting and scheduling for tests; consistent scheduling and provision of a daily schedule with warning of forthcoming changes; multi-sensory visual information and prompts; rehearsal opportunities; and behaviorally-specific positive feedback.

122. There appears to be no dispute that these accommodations, modifications, and supports were appropriate for Student. Testimony from witnesses including Mr. Mills, Ms. Molinari, Ms. O'Donnell, Ms. Pritchett, and Ms. Harris established that several of these accommodations, modifications, and supports allowed Student to benefit from her education in various ways, such as by allowing her to self-regulate and address her sensory integration issues so that she could focus on instruction. In light of testimony from those witnesses, Ms. Markham's testimony about the need for additional individualized curriculum was not persuasive. There was no persuasive evidence that Student needed additional accommodations, modifications, or supports not already offered or provided.

## REMEDIES

123. Appropriate equitable relief can be awarded in a due process hearing. An award of compensatory education need not automatically provide day-for-day or session-for-session replacement for the opportunities missed. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE. Parents need not provide the

exact proper placement or services required under IDEA, but rather are required to provide a placement or services that address the student's needs and provide the student with meaningful educational benefit.

124. This decision has determined that the District met its legal obligations to offer Student a FAPE in most areas, except regarding Student's Life Skills class for the 2008-2009 school year. As determined in Factual Findings 75, 76, and 109, the Life Skills class was not in Student's LRE, which also negatively impacted the benefit she was able to receive from the class.

125. The next question is how to determine an equitable remedy for this denial of FAPE, which occurred only during the 2008-2009 school year. Student's proposed remedy is reimbursement for Parents' expenses for her attendance at STAR Academy, a certified NPS. The District stipulated that, if its offer was determined not to be a FAPE, it would not contest the appropriateness of the STAR Academy placement for purposes of reimbursement. Testimony from Ms. Camp described how STAR Academy addressed Student's unique needs, including those related to social skills.

126. Life Skills was one class period out of a seven-period school day offered for the 2008-2009 school year. The remainder of the District's offer for the 2008-2009 school year was appropriate. Although the Life Skills class was intended to address Student's needs related to social skills and pragmatics, the class was not the only aspect of Student's program to address those needs; for example, Student's speech-language therapy and general education classes also addressed those needs. Hence, the denial of FAPE due to the Life Skills class was limited. District staff at the October 2008 IEP team meetings suggested moving Student out of the Life Skills class. Parents expressed some concerns about that class, primarily related to Student being the only girl in the class, but they did not request placement in a different class, and thus ultimately the team continued to offer the class. Given these factors, the denial of FAPE related to the Life

Skills class did not necessarily require removing Student from her full-time attendance at RLS. Indeed, placement in the Life Skills class was not Parents' primary dispute with the District.

127. Even so, attendance at STAR Academy addressed Student's needs in social skills, and thus can be treated as compensatory education that remedied the District's denial of FAPE related to the Life Skills class. Considering all of the above factors, the District shall reimburse Parents for 25 percent of their expenses for Student's placement at STAR Academy for the 2008-2009 school year, to remedy the denial of FAPE related to the Life Skills class for that same school year. Based on Student's evidence of those expenses, tuition at STAR Academy cost \$24,944.10 for 2008-2009 regular school year. The District shall reimburse Parents for 25 percent of that amount, which equals \$6,236.03. Upon the District's receipt of proof, the District shall also reimburse Parents for 25 percent of their mileage for transporting Student to STAR Academy, at the mileage rate the District uses to reimburse its own employees.<sup>13</sup>

## LEGAL CONCLUSIONS

1. In an administrative hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Here, the Student has the burden of proof on her issues and affirmative defenses, and the District has the burden of proof on its issue and affirmative defenses.

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<sup>13</sup> Because the parties' documentary exhibits were due to the opposing party in March 2009, and because the school year has not yet ended, Student's evidence of mileage did not cover the entire 2008-2009 regular school year, which necessitates Student's submission of further proof to the District.



2. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) To the extent new issues may have been raised during the hearing or in written closing arguments, those issues are beyond the scope of the hearing and are not addressed in this decision.

3. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent or guardian, that meet the State educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26).) In California, the term designated instruction and services (DIS) means related services. (Ed. Code, § 56363, subd. (a).)

FOR THE 2007-2008 SCHOOL YEAR, DID THE DISTRICT'S 30-DAY INTERIM IEP OF MARCH 2008 DENY STUDENT A FAPE BY FAILING TO OFFER SERVICES COMPARABLE TO THOSE IN HER LAST IEP IN EFFECT AT HER PREVIOUS SCHOOL, PATHWAYS, IN ANOTHER SCHOOL DISTRICT?

4. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the LEA shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the LEA adopts the previously held

IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.<sup>14</sup> (20 U.S.C. §1414 (d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e) (2006).)

5. California Education Code section 56325 similarly addresses the situation in which a child transfers from one school district to another school district. Section 56325, subdivision (a)(1), mirrors section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same special education local plan area (SELPA), the LEA shall provide the interim program “in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law.”

6. Based on Factual Findings 17 to 29, and Legal Conclusions 4 to 5, the District’s 30-day interim IEP was comparable to Student’s last agreed-upon and implemented IEP from Pathways.

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<sup>14</sup> The U.S. Department of Education’s comments to this regulation state that “the Department interprets ‘comparable’ to have the plain meaning of the word, which is ‘similar’ or ‘equivalent.’” (Federal Register, Vol. 71, No. 156, p. 46681.) Additionally, the comments to a similar regulation, which applies to IEPs for students who transfer from another state, note that if there is a dispute between the parent and the public agency regarding what constitutes comparable services, the dispute could be resolved through mediation or due process. (*Id.* at 46682.)

DID THE DISTRICT'S IEP OF APRIL 29 AND MAY 16, 2008, PROCEDURALLY AND SUBSTANTIVELY DENY STUDENT A FAPE THROUGH OCTOBER 13, 2008, BY PREDETERMINING STUDENT'S SPECIAL EDUCATION PLACEMENT AND SERVICES PRIOR TO THE APRIL AND MAY 2008 IEP MEETINGS, AND/OR FAILING TO CONSIDER ANY OTHER PLACEMENT AND SERVICES OPTIONS AT THE IEP MEETINGS?

7. There are two parts to the legal analysis in claims brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].)

8. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the 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 Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

9. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (34 C.F.R. § 300.501(b)(3)(2006); Ed. Code, § 56341.5.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Among the information that an IEP team must consider when developing a pupil's IEP are the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).)

10. In *W.G. v. Target Range Unif. Sch. Dist.*, *supra*, 960 F.2d at p.1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental

participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131("A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification." (citing *W.G. v. Target Range Unif. Sch. Dist., supra*, 960 F.2d at p.1484).)

11. School officials are permitted to engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting. (34 C.F.R. § 300.501(b)(1) & (b)(3)(2006); *T.P. and S.P. on behalf of S.P. v. Mamaroneck Union Free School District* (3d Cir. 2009) 554 F.3d 247, 253.) School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed.Reg. 12478 (Mar. 12, 1999); see *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, n. 10.)

12. There is no requirement that the IEP team members discuss all placement options, so long as alternative options are available. (See *L.S. v. Newark Unified School District*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

13. Based on Factual Findings 30 to 34 and Legal Conclusions 7 to 12, Parents had the opportunity to meaningfully participate in the development of the April/May 2008 IEP, the District considered Parents' input, and was willing to consider alternative

placement options. Hence, the District did not predetermine the April/May 2008 IEP, and therefore did not procedurally deny Student a FAPE on that basis.

DID THE DISTRICT'S IEP OF APRIL 29 AND MAY 16, 2008, DENY STUDENT A FAPE THROUGH OCTOBER 13, 2008, BY FAILING TO PROVIDE PARENTS WITH MEANINGFUL, TIMELY AND ACCURATE INFORMATION ON THE CURRICULUM, METHODOLOGY, AND PROGRAMS IN CONNECTION WITH THE PLACEMENT AND SERVICES OFFERED OR PROVIDED, SO THAT PARENTS HAD SUFFICIENT INFORMATION TO MAKE AN INFORMED DECISION REGARDING THE PLACEMENT AND SERVICES?

14. Based on Factual Findings 35 to 40, and Legal Conclusions 7 to 10, Parents received sufficient information about the proposed curriculum, methodology, and programs to knowledgeably and meaningfully participate in the IEP process and make an informed decision about the proposed placement and services. Therefore, there was no procedural violation on this basis.

DID THE DISTRICT'S IEP OF APRIL 29 AND MAY 16, 2008, DENY STUDENT A FAPE THROUGH OCTOBER 13, 2008, BY FAILING TO PROVIDE STUDENT'S COMPLETE EDUCATIONAL RECORDS WHEN REQUESTED BY PARENTS?

15. The parent in a special education due process hearing has the right to examine pupil records. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.613(a) (2006); Ed. Code §§ 56501, subd. (b)(3), 56504.) The parent may examine his or her child's school records and receive copies of them within five business days after request, and before any IEP meeting or any due process hearing. (Ed. Code §§ 56043, subd. (n); 56504.) The right to inspect and review records includes the right to a response to reasonable requests for explanations and interpretations of the records. (34 C.F.R. § 300.613(b) (2006); Ed. Code § 56504.)

16. Pupil or education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3

(2006).) Pupil records include any item of information "directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Pupil records do not include informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker, and are not accessible or revealed to any other person except a substitute. (20 U.S.C. § 1232g(4)(b); Ed. Code, § 49061, subd. (b).)

17. Based on Factual Findings 41 to 46, and Legal Conclusions 7 to 8 and 15 to 16, the District complied with its obligation to produce Student's educational records. Because no procedural violation occurred on this basis, the District did not deny Student a FAPE.

**DID THE DISTRICT'S IEP OF APRIL 29 AND MAY 16, 2008, DENY STUDENT A FAPE THROUGH OCTOBER 13, 2008, BY FAILING TO PROVIDE MEANINGFUL, TIMELY AND ACCURATE INFORMATION REGARDING STUDENT'S PROGRESS TOWARD HER ANNUAL IEP GOALS?**

18. An IEP must include a statement of the student's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

19. Based on Factual Findings 47 to 51, and Legal Conclusions 7 to 10 and 18, the District provided sufficient information about Student's progress on all of her IEP goals, and there was no failure to provide information that denied Parents meaningful participation in the IEP process. Furthermore, any failure to provide such data did not

constitute a procedural violation, nor did the evidence establish that any procedural violation impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

DID THE DISTRICT'S IEP OF APRIL 29 AND MAY 16, 2008, DENY STUDENT A FAPE THROUGH OCTOBER 13, 2008, BY OFFERING OR PROVIDING INAPPROPRIATE SPECIAL EDUCATION PROGRAM, PLACEMENT AND SERVICES IN THE APRIL/MAY 2008 IEP?

20. The second part of the legal analysis for IDEA claims requires analysis of whether the LEA's proposed program was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp.206-07.)

21. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) 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 and provides a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley's* "some educational benefit" standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) It has also referred to the standard simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645.)

22. A special education student must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the nature or severity of the student's disabilities 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 (2006); see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).) Whether a student can be mainstreamed in a regular education class is determined by balancing four factors: (1) the educational benefits of placement in a regular education class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) costs of mainstreaming the student. (*Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404; cert. denied (1994) 512 U.S. 1207.)

23. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, 458 U.S. at p.208.) As the First Circuit Court of Appeal noted, the legal standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 [citing *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 993].)

24. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon, supra*, 195



F.3d at p. 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

25. Based on Factual Findings 52 to 85, and Legal Conclusions 20 to 24, the District's April/May 2008 IEP offered Student a FAPE, except to the limited extent that Student's placement in the Life Skills class in Fall 2008 was not in the LRE. The District's reading program, including the Read 180 program, was designed to meet Student's unique needs and reasonably calculated to result in educational benefit. Because the District offered an appropriate reading program, it was not required to offer Parent's preferred program, Lindamood Bell's LiPS program. Other than the Life Skills class in fall 2008, Student's placement in special education classes for spring and fall 2008 was designed to address her unique needs and reasonably calculated to result in educational benefit in the LRE. In addition, Student's placement in general education classes in spring and fall 2008 was designed to address her unique needs and reasonably calculated to result in educational benefit in the LRE.

FOR THE 2008-2009 SCHOOL YEAR, DID THE DISTRICT'S IEP OF OCTOBER 14, 20, AND 27, 2008, PROCEDURALLY AND SUBSTANTIVELY OFFER STUDENT A FAPE IN THE LRE?

26. Based on Factual Findings 86 to 92, and Legal Conclusions 7 to 12, Parents had the opportunity to meaningfully participate in development of the October 2008 IEP. Therefore, the District did not procedurally deny Student a FAPE on that basis.

27. A pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds.(e), (f).) A reassessment shall occur at least once every three years,

unless the parent and LEA agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a); 20 U.S.C. § 1414(a)(2).) When developing a pupil's IEP, the IEP team must consider the results of the most recent assessment of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, §56341.1, subd. (a)(3).)

28. Based on Factual Findings 93 to 98, and Legal Conclusions 7 to 8, and 27, the District did not procedurally deny Student a FAPE due to a failure to properly or timely assess.

29. An important aspect of the parents' right to participate in the IEP process is the LEA's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal, written offer creates a clear record that helps eliminate troublesome factual disputes years later, and alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at p. 1526).)

30. ESY services shall be offered and provided if the IEP team determines that the services are necessary for the provision of a FAPE to the pupil. (Ed. Code, § 56345, subd. (b)(3).) Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability. (Cal. Code Regs., tit. 5, § 3043, subd. (a).)

31. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).)

32. Based on Factual Findings 99 to 122, and Legal Conclusion 7 to 8, 20 to 24, and 29 to 31, except for the placement in the Life Skills class, the October 2008 IEP constituted an offer of FAPE. The proposal to determine ESY at a later date did not constitute a procedural or substantive denial of FAPE. The IEP's goals were measurable and met Student's unique needs. The Life Skills class was not in the LRE, but the proposed placement in the special education classes for math and English were designed to meet Student's unique needs and reasonably calculated to result in educational benefit in the LRE. The proposed placement in general education classes for history, art, and PE were also designed to meet Student's unique needs and reasonably calculated to result in educational benefit in the LRE. The behavioral goals and process towards developing a behavior plan were appropriate strategies to address Student's behaviors. The offers of speech-language therapy, AT, OT, and accommodations, modifications, and supports were also appropriate offers designed to meet Student's unique needs and to allow Student to benefit from special education.

## REMEDIES

33. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is appropriate in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when: (1) the school district failed to provide a FAPE; and (2) the private placement or services procured are (a) proper under IDEA and (b) reasonably calculated to provide educational benefit to the child. (20 U.S.C. §

1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-370; *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents need not provide the exact proper placement or services required under IDEA, but rather must only provide a placement or services that address the student's needs and provide the student with educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 510 U.S. 7, 13 [114 S.Ct. 361]; *Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County, supra*, 510 U.S. at p. 16; *Parents of Student W., supra*, 31 F.3d at p. 1496.)

34. Based on Factual Findings 74 to 77, and 109, and Legal Conclusions 20 to 24, the District denied Student a FAPE for the 2008-2009 school year to the extent that her Life Skills class was not in the LRE. Life Skills was one of Student's seven class periods, and the needs addressed in that class could have been addressed without removing Student from her full-time attendance at RLS. Based on Factual Findings 123 to 127, and Legal Conclusion 33, the District shall reimburse Parents for 25 percent of their expenses for Student's placement at STAR Academy for the 2008-2009 school year, to remedy the denial of FAPE related to the Life Skills class for that school year. Based on Student's evidence of those expenses, tuition at STAR Academy cost \$24,944.10 for 2008-2009 regular school year. The District shall reimburse Parents for 25 percent of that amount, which equals \$6,236.03. Upon receipt of proof, the District shall also reimburse Parents for 25 percent of their mileage for transporting Student to STAR Academy, at the mileage rate the District uses to reimburse its own employees.

## ORDER

1. Within 60 days of the date of this order, the District shall reimburse Parents in the amount of \$6,236.03, which constitutes 25 percent of Student's tuition for STAR Academy for the 2008-2009 regular school year. Upon the District's receipt of

proof, the District shall also reimburse Parents for 25 percent of their mileage for transporting Student to STAR Academy, at the mileage rate the District uses to reimburse its own employees.

2. Other than the proposed placement in the Life Skills class, the District's October 2008 IEP constituted an offer of FAPE for the 2008-2009 school year.

3. All other claims 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. The following findings are made in accordance with this statute: The District prevailed on Student's Issues 1 and 2.A through 2.D. The District prevailed on Student's Issue 2.E and the District's sole issue, except to the extent that the Life Skills class was determined substantively inappropriate.

## 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 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 15, 2009

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SUZANNE B. BROWN

Administrative Law Judge

Office of Administrative Hearings