

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

ST. HELENA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007060718

AMENDED DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on October 9 through 12 and 15 through 16, 2007, in St. Helena, California.

Margaret M. Broussard and Annie P. Cox, Attorneys at Law, represented Student. Student's grandparents (Grandparents) attended the hearing.

Dora J. Dome, Attorney at Law, represented St. Helena Unified School District (District). Dr. Robert A. Haley, Director of Curriculum and Instruction for District, also attended.

Student filed a request for due process hearing (complaint) on June 25, 2007. OAH

granted Student permission to file an amended complaint on August 31, 2007, and the amended complaint was deemed filed on that date. The record remained open until November 8, 2007, when closing briefs were received, and the record was closed.

ISSUES¹

1. Is Student entitled to an IEE at public expense because District failed to request a due process hearing to show that its psychoeducational assessment was appropriate?
2. Did District deny Student a free appropriate public education (FAPE) during the 2006-2007 and 2007-2008 school years by:
 - a. Failing to offer a placement beginning in January 2007 that was reasonably calculated to provide Student with educational benefit?
 - b. Failing to include the mental health services recommended in the community mental health assessment in the April 2007 individualized education program (IEP)?
 - c. Predetermining placement prior to, and failing to consider any other placement options at the August 21, 2007, IEP team meeting?
 - d. Failing to make a placement offer in the August 21, 2007, IEP that was sufficiently clear concerning special education services and behavioral supports?
 - e. Failing to offer placement at Star Academy (Star) in the August 21, 2007, IEP?
 - f. Failing to comply with procedural requirements regarding the August 21, 2007, IEP meeting by:
 - (1) Holding the meeting without proper notice to Grandparents?
 - (2) Holding the meeting without a general education teacher?

¹ The issues were reframed and reorganized.

- (3) Changing Student's placement in violation of the stay-put provision?
- g. Failing to provide prior written notice of the following:
 - (1) District's refusal to provide an independent educational evaluation (IEE)?
 - (2) District's refusal to place Student at Star for the 2007-2008 school year?
 - (3) District's proposed change to Student's placement at the August 21, 2007, IEP meeting?

CONTENTIONS OF THE PARTIES

Student contends District did not offer him an appropriate placement beginning January 2007 through the 2006-2007 school year because he did not progress in his goals and experienced bullying, teasing and poor relationships with peers at school. Student contends that District did not offer him an appropriate placement for the 2007-2008 school year because it did not place him at Star. District contends it met Student's needs in the 2006-2007 school year by increasing the time he spent in a resource classroom and providing a behavior support plan that met his needs. District contends its offer for the current school year met his needs in the least restrictive environment in District's middle school.

Student contends District failed to include all of the community mental health services in his IEP. District contends that they offered and provided him all of the recommended services.

Student contends District failed to provide Grandparents notice of an August 2007 IEP meeting because they did not receive written notice, and were not informed of the purpose of the meeting, or of their right to have individuals participate in the meeting.

District contends that the school's principal provided the required notice to Grandparents during a phone call.

Student contends District failed to include a general education teacher in the August 2007 IEP team meeting. District argues that although a general education teacher

did not attend the meeting, Student's general education curriculum was not modified, he did not lose educational opportunity, and Grandparents were not denied an opportunity to participate.

Student contends District predetermined the placement offered at the August 2007 meeting without considering other options because it offered only those special education services that it had unilaterally decided to provide him. Student contends that the offer made at the meeting failed to adequately describe the special education services and behavioral supports District offered. Student also contends District was required to offer him placement at Star for the 2007-2008 school year. District contends it did not predetermine the placement offered in August because Student's schedule had not been finalized during the prior IEP meeting in June, and the offer was made as a result of information from his teachers that he was performing well. District contends that Grandmother participated in the discussion, its offer was clear, and the offer met Student's needs.

Student contends that District violated his stay put placement at the August 2007 IEP meeting. District contends it did not violate Student's stay put because Grandmother agreed to change his placement by signing the August IEP amendment.

Student contends District failed to provide prior written notice of its refusal to provide an IEE at public expense. Student also contends that he is entitled to an IEE at public expense because he disagreed with District's psychoeducational assessment and District failed to either provide an IEE or request a due process hearing to show its assessment was appropriate. District contends that Grandparents never requested an IEE. Student contends District failed to provide prior written notice of its refusal to place Student at Star. District argues that it denied Grandparents' request in its response to the initial complaint in this matter less than one month after the request was made. Student contends District did not give him prior written notice of changes made at the August

2007 IEP team meeting. District contends it was not required to give prior written notice of changes it made to Student's schedule in order to conform it to his IEP. District also contends that the changes were fully discussed at the August IEP meeting and Grandmother consented to those changes.

REQUESTED RELIEF

Student seeks the following relief: (1) Placement at Star, including transportation for the remainder of the 2007-2008 school year; (2) Reimbursement for travel expenses to Star through the date of the order; (3) Compensatory education services in reading, writing, and math in the amount of 20 hours per subject; (4) Funding of an IEE with a qualified assessor of Grandparents' choice; and (5) Revision of his IEP to include all recommended community mental health services.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student is an 11-year-old boy currently in the sixth grade. He first attended school in District in the 2002-2003 school year when he was in the first grade. His family moved to Carmel Unified School District, where he attended the second grade and was first found eligible for special education services in the category of specific learning disability. Student and his family returned to District during the 2004-2005 school year when he was in third grade. He attended District's St. Helena Elementary School (Elementary School) for third through fifth grades.

2. An IEP team meeting was held on October 12, 2006, to conduct Student's triennial review. The team reviewed a psychoeducational evaluation prepared by Ramah Commanday, Ph.D., school psychologist for District, and an educational evaluation by

Peter McCauley, Student's special education teacher.² The team adopted goals in the areas of behavior, math calculations and reasoning, reading comprehension, word reading, and writing, and a behavior support plan. The behavior support plan concerned Student's excessive talking off subject, lack of sustained visual attention during instruction, and problems with organization.

3. The October 2006 IEP provided Student 105 minutes of small group specialized instruction in mathematics and English language arts, which was an increase of 25 minutes over his IEP during fourth grade. The IEP also provided that Student have preferred seating close to the teacher, an environment with fewer distractions, and repeated instructions. Grandparents agreed to the IEP.

4. As part of Student's triennial psychoeducational assessment, Dr. Commanday administered the Wechsler Intelligence Scale for Children - IV. Student's verbal comprehension and perceptual reasoning scores were average; his processing speed and working memory scores were below average. Student's scores in processing speed and working memory are consistent with his inattentiveness, and distractibility, and difficulty completing work.

5. Student, Grandparents, and Ms. Fowler completed the Behavior Assessment Scale for Children (BASC), which is a standardized rating measurement of various dimensions of behavior. Student rated himself in the clinically-significant range in attitude to teachers, social stress, and interpersonal relations. His grandparents each rated him in the clinically-significant range in all areas, including hyperactivity, aggression, conduct

² Dr. Commanday holds master's and doctoral degrees in educational psychology. She has been a school psychologist for 13 years, and has worked with District for three years. Mr. McCauley has been a resource specialist with District for 10 years. He holds special education and multiple subjects credentials and a resource specialist certificate.

problems, anxiety, withdrawal, and attention problems. As scored by Dr. Commanday when she prepared her assessment report, Ms. Fowler rated Student in the at-risk range in anxiety, low range in aggression, depression, and withdrawal, and in the average range in all other areas.

6. Based on these scores, Dr. Commanday found a sharp contrast between Student's behavior at school and at home. At school, Student had difficulty making friends, understanding others' points of view, and solving peer conflicts. At home, Student's behavior was extremely challenging, highly oppositional, and occasionally violent. Much of his behavior was directed at Grandmother upon his return from school. Student was so upset one day by an incident at school that he returned home and killed his pet mouse. However, Dr. Commanday concluded that emotional disturbance was not interfering with Student's ability to progress in school to a significant degree.

7. During Dr. Commanday's cross examination it was discovered that she did not correctly score Ms. Fowler's BASC ratings. Ms. Fowler's corrected scores rated Student in the clinically-significant range in all areas, except withdrawal, which was in the at-risk range, and anxiety, which was in the average range. Ms. Fowler's corrected scores indicate that Student engaged in problematic behaviors at school that were similar to those at home.

8. Mr. McCauley administered the Wechsler Individual Assessment Tool to assess Student's math, reading and written language abilities. Student scored in the below average range in math calculations. He worked slowly, had difficulty with more advanced addition and subtraction, was not fluent with multiplication facts, and did not know basic division facts. He scored in the average range in math reasoning. Student's overall reading score was in the average range. His decoding score was in the average range and his comprehension score was in the low average range. Student scored in the below average range in both spelling and written expression. Student had difficulty with sustained reading

and reading for meaning. Mr. McCauley determined that his instructional reading level was fourth grade; his independent reading level was third grade.

9. Student participated in a social skills group conducted by a school counselor and a school psychologist intern. The group worked on improving social interactions, friendships, and other social skills. The group met once a week for an hour. Constance Fowler, Student's general education teacher, integrated social and life skills development into her classroom and the curriculum. This methodology was used throughout Elementary School, and taught students active listening skills, cooperation, and conflict resolution skills. Neither the social skills group nor the life skills curriculum were required by or included in the IEP.

10. The IEP team met on November 14, 2006, because Student was overwhelmed with academic and social difficulties, was highly distracted and disorganized, and his work production was very low. He was unable to keep up with the grade level standards in Ms. Fowler's general education math class. The IEP team increased his time in Mr. McCauley's resource classroom by 75 minutes, for a total of 180 minutes a day. Student now received three periods a day of specialized instruction from Mr. McCauley, including math. Grandparent consented to the IEP amendment.

STUDENT'S UNIQUE NEEDS

11. A school district must provide special education and related services to meet a student's unique needs, which include the student's academic, social and emotional needs. Student has unique needs in the areas of mathematical fluency, mathematical calculations and reasoning, basic reading skills, reading fluency, written expression, and behavior. Student's behavioral needs include completing work, remaining on task, following classroom instructions, and developing appropriate peer relationships.

REQUEST FOR AN IEE

12. A parent has the right to obtain an IEE of a child at public expense if the parent disagrees with the assessment obtained by the school district. When a parent requests an IEE, the school district must either provide it, or initiate a due process hearing to show that its assessment is appropriate.

13. In a letter to the principal of Elementary School dated January 21, 2007, Grandparents requested that District conduct an additional assessment. Student contends that Grandparents requested an IEE at this time; District contends that Grandparents never requested an IEE.

14. In their letter, Grandparents communicated their disagreement with Dr. Commanday's assessment. They indicated they did not believe Student was making progress and his emotional difficulties in the classroom were more significant than Dr. Commanday described in her assessment. Grandparents expressed their dissatisfaction with District's assessment, and described their disagreement with it. They also communicated their request that District conduct an additional assessment.

15. Grandparents also enclosed a letter from J. William Evans, M.D., Student's treating psychiatrist for over four years. In his letter, Dr. Evans stated his disagreement with Dr. Commanday's assessment. He opined that Student's emotional illness, bipolar disorder, interfered with his educational progress. He believed that Dr. Commanday's interpretation of the test data did not reflect the degree of academic struggle that Student suffered. Dr. Evans believed Student should be referred for community mental health services. He also recommended that Student receive an independent neuropsychological evaluation to further define his areas of deficit and guide their remediation efforts.

16. Grandparents did not expressly request "an independent assessment at public expense." However, Dr. Evans' letter advocated that student receive neuropsychological testing performed by specific private practitioners, and expressly

referenced an independent evaluation of Student's needs. Taken as a whole, Grandparents communicated their disagreement with District's assessment and their desire for District to fund an independent assessment. Grandparents were not represented by an attorney at this time. They followed a sample form provided by an advocacy group for requesting an IEE. They were not experienced with the intricacies and jargon of special education law. They did what was legally required of them to request an IEE at public expense.

17. The principal of Elementary School replied to Grandparents on January 26, 2007. He informed them that Dr. Commanday would contact them within the required timeline. Instead, District scheduled an IEP team meeting on February 9, 2007.

IEP TEAM MEETING OF FEBRUARY 9, 2007

18. The IEP team met on February 9, 2007 to discuss the concerns Grandparents raised in their January 2007 letter, and determine if the services added by the November 14, 2006, IEP addendum were beneficial. District presented Grandparents with an assessment plan for a social/adaptive behavior assessment which indicated that the BASC - II may be administered. While Dr. Commanday prepared the plan, she did not identify on the plan the name or title of the person performing the assessment. District did not inform Grandparents it was performing this assessment either in response to Grandparent's request, or instead of an IEE. Grandmother signed the assessment plan at the meeting. Grandfather persuasively testified that Grandparents did not object to District staff conducting another assessment, but they did not intend that it substitute for an IEE. They did not communicate this to the IEP team.

19. The typewritten IEP amendment Mr. McCauley prepared before the meeting stated that Grandparents had not requested that District implement any of the recommendations in Dr. Evans' letter, and that if they wished District to implement them in the future, District would formally respond to any request. According to Dr. Commanday and Mr. McCauley, the typewritten IEP amendment was discussed at the meeting.

However, no specific evidence was offered about any discussion by the IEP team concerning the contents of the IEP amendment, the letters from Grandparents or Dr. Evans. The IEP team did not discuss the nature of Grandparents' letter, the IEE process, or what Grandparents wanted District to do in response to either their concerns about Dr. Commanday's assessment or Dr. Evans' recommendations.

20. Grandparents requested an IEE in their letter. District was obligated to respond without unnecessary delay by either providing the IEE or filing for a due process hearing. District did neither. To the extent District was uncertain about the nature of the request, it was obligated to seek clarification in a manner reasonably likely to elicit meaningful dialogue without unnecessary delay. District presented Grandparents a typewritten IEP amendment that placed the burden on them to make their request again. Because Grandparents did not object to the pre-typed statements on the amendment, District contends that they never requested an IEE and District had no obligation to take any action. District cannot rely on its self-serving, pre-typed IEP amendment to extinguish its obligation and place the burden to act on Grandparents.

21. During the meeting, District initiated, and Grandparents consented to, a referral to Napa County for a community mental health assessment of Student. Mr. McCauley reported that Student had made progress on all goals as a result of the increase in his resource time made in the November 2006 IEP amendment. Student also increased the amount of work that he produced.

22. Grandparents expressed concern about Student going to Robert Louis Stevenson Middle School (RLS), District's middle school, for sixth grade and interest in considering a private school placement. District members of the team explained that they needed to review all placement options and evaluate them for FAPE in the least restrictive environment. No substantive changes were made to Student's program by the IEP

amendment.³ Grandparent consented to the IEP amendment.

23. Student contends that District did not offer him an appropriate placement in this IEP amendment. There was little evidence presented by either party concerning Student's needs or performance at the time of the February 2007 IEP team meeting. Mr. McCauley reported that Student was progressing toward his goals and was benefiting from the special education services added by the November 2006 IEP. Mr. McCauley clarified at hearing that the progress he saw in math was that Student was completing more work. According to Grandfather, Student had improved, but not as much as Mr. McCauley reported. Grandfather's testimony, although sincere, is not sufficient to show that Student's needs were not met or that the February 2007 IEP was not reasonably calculated to provide educational benefit. The placement in the February 2007 IEP was appropriate.

IEP TEAM MEETINGS OF APRIL 27 AND MAY 7, 2007

24. The IEP team met on April 27 and May 7, 2007, to discuss Dr. Commanday's psychoeducational reassessment, Napa County's mental health assessment and recommendation for services, Student's academic progress, and placement. Student contends that District did not offer him an appropriate placement at this meeting.

25. Mr. McCauley observed significant improvement in Student's behavior since October. Student used better strategies for dealing with peer conflict, and responded more quickly to Mr. McCauley's interventions when conflicts arose. Student's time on task improved and he was less distractible. He was able to stay on task for reading and writing assignments for about 40 minutes, and for math tasks for about 25 minutes, which had significantly improved since October.

³ The amendment corrected the prior IEP to indicate that Student had a behavior support plan and not a behavior intervention plan.

PSYCHOEDUCATIONAL REASSESSMENT OF APRIL 2007

26. As provided by the February 2007 assessment plan, Dr. Commanday administered the BASC-II to Student, Grandparents, Ms. Fowler, and Mr. McCauley. Student rated himself in the clinically-significant range in interpersonal relations, which was the same as the BASC in October. He rated attitude to teachers as average, which had been clinically significant in October. Anxiety, depression, and relations with parents, which had been at-risk in October, were now rated as average. Grandmother rated Student at-risk in anxiety and average in somatization, both of which she rated as clinically significant in October. Grandfather rated him at-risk in aggression, which was previously rated as clinically significant. Mr. McCauley rated Student in the clinically-significant range in anxiety, depression, and learning problems.

27. Ms. Fowler rated Student in the clinically-significant range in the areas of depression and learning problems, and at-risk in the areas of hyperactivity, aggression, conduct problems, anxiety, attention problems, and withdrawal. Dr. Commanday found that Ms. Fowler's and Mr. McCauley's ratings were generally consistent, although unlike Ms. Fowler, Mr. McCauley did not find that Student had significant conduct problems in the classroom.

28. Dr. Commanday concluded that Grandparents' and teachers' ratings were consistent with anecdotal observations that Student had increased reluctance to complete or attempt school assignments, a reduced attention span, a greater tendency toward social isolation, and made more frequent inappropriate remarks to peers. She concluded that Student was now exhibiting the high level of emotional disturbance at school that he previously showed at home. Based on this, Dr. Commanday recommended that Student be found to also qualify for special education in the category of emotional disturbance.

NAPA COUNTY COMMUNITY MENTAL HEALTH ASSESSMENT

29. Lorraine Crockford, MFT, Napa County Child and Family Behavioral Health (Napa County), assessed Student for community mental health services. She interviewed Student, Grandparents and Mr. McCauley, observed Student in Mr. McCauley's and Ms. Fowler's classrooms and other locations at school, and reviewed records.

30. Ms. Crockford observed Student disengaging from class work and his teacher's instructions in the classroom. He repeatedly moved around in his chair, got out of his seat, and required redirection by the teacher. She observed him engage in hostility toward a peer by making gestures behind the peer's back. During lunch time, she observed Student retreat from peers and have minimal social contact with peers. Student reported that he had no friends and felt bullied by peers who made hurtful comments to him.

31. Ms. Crockford determined that Student's emotional and behavioral issues negatively affected his ability to function independently in a regular academic environment. He internalized conflict from school and became aggressive and threatening at home, which impeded his ability to benefit from his education. Ms. Crockford recommended that Student's behavior plan and goals provide consistency in school and at home, and focus on reducing his internalized stress, and increasing his interpersonal and concentration skills.

32. Napa County offered Student case management services, individual and family therapy, psychiatric medication support, family support, and three goals to address his areas of need. The goals concerned reducing Student's aggressive feelings pent up from school, increasing work production, and remaining on task.

33. Grandparents consented to the services. The April 27, 2007, IEP amendment inaccurately stated that District offered Student only case management services and the goals and objectives that Napa County recommended. It is undisputed that District offered all of the services recommended by Napa County.

34. Student's placement, including the new mental health services and goals, was appropriate. Mr. McCauley established that Student's behavior was improving, he was able to remain on task and perform work for longer periods of time, and he was better able to respond to peer conflicts.

IEP TEAM MEETING OF JUNE 7, 2007

35. The IEP team met on June 7, 2007, to continue discussing Student's placement for the following school year. Student contends District did not offer him an appropriate placement at this meeting.

36. Mr. McCauley reported that Student's work completion had improved. The team did not specifically discuss Student's progress on his goals. Student met the short-term objective on his work completion goal. He completed tasks with full compliance. Student did not meet the objective for the writing goal. He improved his organizational skills, wrote neatly, and wrote a persuasive essay. However, the sentences were very simple and he required assistance throughout the process. Student did not meet the objective for the reading goal. He identified statements that supported the main idea of a passage, but he required assistance to do so. While Student did not meet the objectives for his reading and writing goals, he made some progress during the year.

37. Student did not make progress in math. Student did not meet the objective for his math goal, and did not show progress since the January progress report. While his ability to complete math work improved, the amount of work he produced remained low. Student was not able to retain math facts or consistently perform calculations. He was able to perform calculations using a specialized, multisensory method, but he was unable to generalize these skills to other formats. The IEP team neither discussed Student's lack of progress in math, nor considered revising his math goal.

38. Much of the time at the meeting was spent discussing the placement at RLS that would be offered. Teachers had not yet been hired and the class schedule for 2007-

2008 had not been developed, so District was unable to describe the specific classes available to Student. District offered the following at the meeting: specialized academic instruction in all areas; special education instruction in reading, math, writing, and learning center; general education electives and physical education; support to interpret social input⁴; and continuation mental health services.

39. Grandparents did not consent to the offer. Grandparents had visited the private schools previously suggested by District staff. They did not believe the schools were appropriate because the students were more impaired by their disabilities than Student. Grandparents requested District to place Student at Star, which they believed would provide the environment and services that Student needed.

40. The team agreed that they would meet again before the beginning of the school year so that Grandparents could meet the teachers and finalize Student's schedule. District staff agreed that they would talk with Student's attorney and further clarify the offer.

41. District's Director of Special Education at the time, David Miller, wrote Grandparents a letter dated June 8, 2007, clarifying District's offer of placement for the 2007-2008 school year. He reiterated that District was offering Student placement at RLS. He clarified that District was offering specialized academic instruction, as provided by a special education teacher, in all core academic areas, including reading, math, and written language, and a learning center period for special education support, for four school periods of special education services and supports. Student was offered three school periods of a general education program in the areas of physical education, geography, and an elective, and the community mental health services offered by Napa County at the April meeting. Mr. Miller's letter constituted District's offer for the 2007-2008 school year.

⁴ This was not further described or defined.

42. Student was about to move from elementary school to middle school, a significant step for any child, but especially for Student with his academic and emotional disabilities. There was no discussion during the IEP team meeting of his lack of progress in mathematics, an area in which he has consistently shown the greatest need. District neither considered nor revised Student's goal or special education services in math. Student's behavior plan remain unchanged since October 2006. The behavior plan did not address Student's most pressing behavioral need, developing appropriate peer relationships. It remained unclear how Student's behavior plan interfaced with the additional goals adopted from Napa County. District did not offer Student any services to address his needs in the areas of math, social skills, or improving his relationships with peers. District's offer of placement was not appropriate for Student in the areas of math and behavior.

IEP TEAM MEETING OF AUGUST 20, 2007

43. Student began sixth grade on August 15, 2007, at RLS. For the first two days of school, he had one special education class, English support, and seven general education classes, including reading, math, and English. On the third day of school, August 17, he had two special education classes, English support and learning center, and six general education classes, including reading, math, and English. On August 23, Student had four special education classes, including reading support, English support, modified language arts, and learning center, and four general education classes, including math.

44. An IEP team meeting was held on August 20, 2007. District offered Student two periods (100 minutes) per day of pull out special education instruction.⁵ District offered him "special education monitoring and support" while in the general education setting, including collaboration between general education and special education teachers,

⁵ Pull out services are provided in a setting other than a general education classroom.

modifications included in the November 2006, IEP, and the additional accommodations of more time for homework and tests, and the option of taking tests in the special education room. The IEP also provided that the special education teacher would monitor Student's social behavior and "provide support as needed." Grandmother consented to the IEP amendment.

45. Student contends that District failed to give Grandparents proper notice of the IEP meeting, held the meeting without a general education teacher, predetermined the placement offer prior to the meeting, failed to consider other placement options at the meeting, failed to make a clear offer, changed his placement in violation of stay put, and failed to offer an appropriate placement.

Notice of IEP Team Meeting

46. A school district must provide notice to a parent of an IEP team meeting that includes the purpose, time and location of the meeting, the participants, and their right to bring other people to the meeting.

47. On August 15, 2007, Grandmother sent a letter to Mary Allen, Principal of RLS, because she learned that an aide was with Student during the school day.⁶ Ms. Allen called Grandmother on August 16, to schedule a meeting on August 20 to discuss the concerns in the letter. An IEP team meeting was held on August 20, 2007.

48. Ms. Allen testified that she called Grandmother on August 16 to schedule a "parent-teacher conference" to discuss Grandparents' concerns about the aide and also to discuss Student's schedule. Ms. Allen testified that during the call with Grandmother, she told her that an addendum to the IEP might be done at the meeting. Grandmother testified that Ms. Allen called her and scheduled a meeting to discuss Grandmother's

⁶ Ms. Allen holds an administrative services credential. She has worked with District for one year, as the principal of RLS.

concerns about the aide. According to Grandmother, Ms. Allen did not inform her it would be an IEP team meeting. District did not provide written, or any other additional notice of the meeting.

49. Grandmother's testimony concerning Ms. Allen's phone call is credible. Grandparents had retained the assistance of legal counsel, who had attended the June IEP team meeting. It is likely that if Ms. Allen told Grandmother she wanted to talk about Student's schedule, or that District was proposing to amend the IEP, Grandmother would have ensured that her attorney attended the meeting. District did not provide complete notice of the meeting's purpose, and did not provide notice of any kind to Grandparents of the meeting's participants, or of Grandparents' right to bring others to the meeting.

Meeting Participants

50. A general education teacher is required to participate in an IEP team meeting if the student is participating in the regular education environment. The parents and school district may agree to excuse a required member of an IEP team from attending a meeting if the member's area of curriculum or service will not be discussed. District contends that a general education teacher was not required because Student's general education curriculum was not modified.

51. Ms. Allen and Melissa Pritchett, Student's special education teacher at RLS, were the only District staff who attended the meeting.⁷ Grandparents both initially attended the meeting. Grandfather left before the meeting was finished, and Grandmother remained.

52. A general education teacher was required to attend the IEP team meeting

⁷ Ms. Pritchett holds single subject and special education credentials. She began teaching at District at the beginning of the 2007-2008 school year. She has 12 years' experience teaching special education

because Student participated in general education classes and Grandparents did not agree to the teacher's absence. Without a general education teacher at the meeting, Grandmother was unable to obtain reliable information concerning Student's performance in the general education classroom. The failure to have a general education teacher present at the IEP team meeting denied Grandmother an opportunity to meaningfully participate in the decision-making process.

Discussion at Meeting

53. There was a brief discussion at the beginning of the meeting about whether Student needed an aide. Grandparents and District staff agreed that he did not. The discussion then turned to Student's class schedule. Ms. Allen and Ms. Pritchett believed that Student would be successful in four general education classes and only two special education classes. Ms. Allen reported that Student was doing well in the general education environment. According to Ms. Allen, Grandmother participated in the discussion, and she ensured that Grandmother was comfortable with the schedule change.

54. Grandmother's recollection of the meeting was different. After the brief discussion about the aide, Ms. Allen showed her what she described as a "little addendum" for her to sign concerning Student's schedule. Grandmother felt "ambushed," because she did not know it was going to be an IEP team meeting, or that Student's schedule was going to be discussed. She asked whether the meeting was an IEP meeting and explained that she did not want to be in an IEP meeting without her attorney. Ms. Allen downplayed the significance of the meeting.

55. Grandmother felt "intimidated" and "at their mercy." She did not believe that Student progressed during the fifth grade and was confused by what was offered. She wanted to try to get along with the new principal, Ms. Allen, and she wanted help for her grandson. After she left the meeting, she spoke with her attorney, who immediately sent a letter to District rescinding consent to change Student's services.

56. Grandmother's testimony was credible. She testified sincerely and spontaneously. She did not know that she was attending an IEP team meeting. She did not expect to discuss anything other than District's use of an aide. It is reasonable that she would feel overwhelmed and confused and unable to participate fully in the discussion. She respected educational professionals, and relied upon their professional opinions when she consented to the amendment.

57. Ms. Allen's testimony is given little weight. She did not understand the legal requirements for an IEP team meeting. She had not responded to Grandmother's letter of August 10 concerning an incident with Student during the orientation at RLS. She was not familiar with Student's needs or his IEP. Her description of the discussion about the schedule change was not consistent with other credible evidence, and her demeanor conveyed a lack of concern about Student and his needs.

58. According to Ms. Pritchett, the supports that would be provided to Student while in general education classes and what would be done to monitor his behavior were discussed in the meeting. She did not indicate who provided this information, or what specific information was given. None of this information was documented in the IEP amendment or notes of the meeting. Her testimony is given little weight. Much of her testimony in important areas was in response to leading questions. She did not elaborate or provide any details concerning the meeting, and at times seemed to merely track the language from the IEP amendment.

59. The decision to reduce Student's special education services was predetermined before the meeting. The primary purpose of the meeting was to conform District's offer to the schedule that Student was already following at RLS. District staff neither considered nor discussed any other placement options for Student. The circumstances and conduct of the meeting precluded Grandparents from full and meaningful participation in the IEP process.

Stay Put Placement

60. While a due process proceeding is pending, a student shall remain in his current educational placement, which is usually the last agreed-upon and implemented IEP, unless the parents and school district agree otherwise.

61. Student contends that Grandparents agreed that his stay put placement was the placement described in Mr. Miller's letter of June 8, 2007. Student contends that District improperly changed the stay put placement in the August 2007 IEP team meeting.⁸ District contends that Grandmother agreed to change Student's stay put placement by signing the August IEP addendum.

62. District's contention has merit. Grandmother altered Student's stay put placement by agreeing to the August IEP amendment. Even if District violated his stay put placement at the August meeting or by the IEP amendment, it was quickly remedied. Grandmother rescinded her consent and Student was placed into four special education classes on August 23, three days after the meeting.

Specificity of Offer

63. A school district must provide a specific, coherent, written offer of the placement and services it will provide a student. Student contends that District's August 2007 offer was unclear concerning the special education services and behavioral supports it would provide.

64. District offered Student two periods per day of pull out special education instruction, "special education monitoring and support" while in the general education setting, and provided that the special education teacher would monitor Student's social

⁸ For the first time in his closing argument, Student contends District violated stay put by failing to provide four special education classes when he first began at RLS. This issue was not presented for hearing and is not decided.

behavior and “provide support as needed.” The August 2007 IEP amendment failed to describe with the required specificity the special education services and behavioral supports it offered Student.

65. No additional information was provided during the meeting concerning the special education and behavior services District offered. During the IEP team meeting, District staff did not discuss either the specific classes Student was currently attending, or the classes he would have as a result of the proposed change. There was no discussion or description of what, if any, special education monitoring and support he would receive in the general education classes. There was no discussion concerning how Student’s social behavior would be monitored and what supports would be provided.

66. District’s offer was vague and ambiguous about the special education services being offered. While it provides for two periods of pull out services, District staff testified that the offer include additional “push in” services provided in the general education classroom. No push in services were specified in the offer. District offered to provide behavioral support services as needed. This lack of specificity gives District personnel the discretion to decide what, if any, Student requires to meet his needs. The offer did not comport with the law.

Appropriateness of Offered Placement

67. Student has needs in the areas of mathematical fluency, calculations, and reasoning; basic reading skills; reading fluency; written expression; and behavior. Student’s behavioral needs include completing work, remaining on task, following classroom instructions, and developing appropriate peer relationships.

68. In August 2007, District offered Student, in pertinent part, two periods per day of pull out special education instruction; unspecified “special education monitoring and support” while in the general education setting; unspecified monitoring of Student’s social behavior; and unspecified behavioral support as needed.

69. As determined in Factual Finding 42, District's June 2007 offer failed to meet Student's needs in the areas of mathematics and behavior. The August offer, to the extent it can be discerned, significantly reduced Student's special education services. Instead of four special education classes in all core academic areas, District offered two special education classes in unspecified areas. Assuming that the offer mirrored the program that Student was receiving at RLS as of August 17, District offered English support and the learning center as his two special education classes.

70. Ms. Pritchett teaches the English support class along with an aide. The class has 20 students who are in the sixth through eighth grades. Ms. Pritchett provides whole group and small group instruction. Student's level of work was consistent with the other sixth graders in the class.

71. Ms. Pritchett teaches the learning center class along with an aide. The class has 13 students who are both special education and general education students. Ms. Pritchett and the aide would work with Student in the learning center on both his IEP goals and work from his general education classes.

72. As discussed in Factual Finding 8, in October 2006, Mr. McCauley found Student's instructional reading level was at fourth grade and his independent reading level was at third grade. According to Ms. Pritchett, Student's reading comprehension when he began at RLS in August 2007 remained at the third grade level. Thus, in one year's time at Elementary School, where Student was in a program with more intensive special education services than District offered on August 20, he had not progressed in his reading level. District did not offer Student any specialized instruction in the area of reading other than the support that could be provided in the learning center. Because Student needed more support than the District offered, District's offer did not meet Student's needs in the area of reading.

73. As discussed in Factual Finding 37, Student made no progress in math during

the fifth grade in spite of receiving math instruction in a special education classroom from an experienced special education teacher. District's offer placed Student in a general education, remedial math class with 20 students that included both general education and special education students. A general education teacher instructs the class with the assistance of Ms. Pritchett's aide. District did not revise Student's math goal. Student requires more intensive, specialized instruction in math than District offer. Because of this, District's offer did not meet Student's needs in the area of math.

74. Finally, the August 2007 offer failed to meet Student's needs in the area of behavior as described in Factual Finding 42 concerning the June offer. During his short time at RLS, Student was sent out of class or to the office on several occasions because of difficult interactions with peers. Student needed instruction and services in social skills, such as the social skills group and curriculum provided at Elementary School, but those were not offered at RLS. As determined in Factual Findings 64 through 66, District's offer concerning behavioral support was so vague as to be meaningless. For these reasons, the August 2007 offer failed to meet Student's behavioral needs.

Placement at Star

75. Student contends that District should have placed him at Star at the August 2007 IEP meeting. The evidence does not support finding that at the time of the August meeting, District was unable to provide a program at RLS to meet Student's educational needs, or that District was required to place Student at Star to provide a FAPE.

76. Grandparents informed District by a letter dated August 21, 2007, that they would be placing Student at Star due to District's failure to offer him a FAPE and seeking reimbursement for his placement. Student remained at RLS until September 6, 2007, ten business days after the notice.

PRIOR WRITTEN NOTICE

77. Student contends District failed to give prior written notice of its refusal to provide an IEE at public expense, its refusal to place him at Star, and its proposed change to his placement at the August 2007 IEP team meeting. District contends it was not required to provide prior written notice regarding the IEE because Grandparents never requested one; it provided prior written notice denying the request for placement at Star in its response to the initial complaint; and it was not required to provide prior written notice of the change to Student's schedule in August because Grandmother agreed to it.

78. A school district must provide written prior notice whenever it proposes to change, or refuses to initiate or change, the evaluation, or educational placement of the child. The notice shall include a description of the proposed or refused action; an explanation for the proposed or refused action; a description of each evaluation assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the proposed or refused action.

79. District was required to provide prior written notice of its refusal to provide an IEE at public expense, but it failed to do so. The only notice provided concerning the proposed change of placement at the August 2007 IEP team meeting was the IEP amendment presented at the meeting, which failed to include any of the required information other than the change to Student's program. Therefore, District failed to provide prior written notice of its decision to change Student's placement in August 2007.

80. District provided prior written notice to Student of its refusal to place him at Star in early July 2007, in its response to his initial complaint. The prior written notice did not include a statement that Grandparents have procedural safeguards, the procedure to

obtain a copy of the safeguards, or sources they may contact to obtain assistance. Since Grandparents had already filed a complaint and were represented by counsel when the prior written notice was given, District's failure to provide complete notice was harmless.

IEE AT PUBLIC EXPENSE

81. As described in Legal Conclusion 32, a school district's failure to respond as required to a request for an IEE at public expense may warrant relief.

82. As determined in Factual Finding 7, District's psychoeducational assessment of Student performed in October 2006 and relied upon in April 2007 included data from the BASC that were not accurate because Ms. Fowler's ratings were not properly scored. As described in Legal Conclusion 33, assessments must be administered in accordance with the requirements of the author of the assessment instrument. The integrity of an assessment, and all decisions that made after considering an assessment, depend upon the correct administration and scoring of the instruments that were used. Both the October 2006 psychoeducational assessment and the April 2007 reassessment are tainted by the error. As a result of this, neither the October 2006 psychoeducational assessment nor the April 2007 reassessment were appropriate.

REIMBURSEMENT FOR STUDENT'S PLACEMENT AT STAR

83. As discussed in Legal Conclusion 41, a school district may be required to reimburse a parent for the costs of a private school if the child previously received special education services from the district, and the district failed to make a FAPE available to the child. As determined in Factual Findings 42, and 72 through 74, District failed to make an offer for the 2007-2008 school year that met Student's needs, which denied him a FAPE.

84. As discussed in Legal Conclusion 42, reimbursement for the cost of a private school may be reduced or denied if the parents did not provide notice, prior to removing the child from the public school, that rejects the proposed placement, states their

concerns, and expresses the intent to enroll the student in a private school. As determined in Factual Finding 76, Grandparents provided District the required notice prior to unilaterally placing him at Star.

85. As discussed in Legal Conclusions 40 and 43, equitable considerations, such as the conduct of both parties may be evaluated when determining what, if any, relief is appropriate. Several factors may be considered when determining the amount of reimbursement to be ordered: the effort parents expended in securing alternative placements; the availability of other more suitable placements; and the cooperative or uncooperative position of the school district.

86. Grandparents worked in good faith with District in order to obtain services that met Student's needs. They obtained recommendations from District staff concerning nonpublic schools that might meet Student's needs. They visited the schools District staff suggested and reasonably determined that they would not meet Student's needs. Dr. Evans, Student's psychiatrist, had patients who had good experiences at Star. Parents visited Star, spoke with school personnel, and determined that it was an appropriate placement.

87. There is no evidence of other more suitable placements for the 2007-2008 school year. As determined in Factual Finding 22, Grandparents first informed District at the February 9, 2007, IEP team meeting that they were concerned about whether RLS had an appropriate program for Student and wanted to consider private school placement. They cooperated with District and attended three IEP team meetings prior to the end of the 2006-2007 school year, hoping that District would provide the program Student needed. Student began the new school year at RLS, an indication of Grandparents' continued effort to see if District could meet his needs. Given the effort spent attempting to fashion an appropriate program for Student, District had sufficient opportunity to offer Student a more suitable placement.

88. District made some effort to respond to Grandparents' concerns. District increased Student's special education services in October and November 2006; had him participate in a social skills group at Elementary School; provided a psychoeducational reassessment in April 2007; and referred him to Napa County for a mental health assessment in February 2007.

89. As determined in Factual Findings 19 and 20, District also failed to respond appropriately to Grandparents' request for an IEE; failed to offer a program that met Student's needs; and conducted an IEP team meeting without adequate notice to Grandparents, without the required team members present, and in a manner that denied them meaningful participation. At the August 2007 IEP meeting, District sought to reduce Student's services in spite of his lack of progress and without regard for Grandparents' concerns.

90. Weighing all of the evidence, in light of District's failure to offer Student a FAPE for the 2007-2008 school year, the evidence supports granting Grandparent's request for reimbursement of their expenses at Star. The only expense requested is mileage for two trips a day between home and Star. No evidence was submitted showing the round trip mileage or the number of trips that were made.

COMPENSATORY EDUCATION

91. As discussed in Legal Conclusion 40, compensatory education is an equitable remedy. Relief must be reasonably calculated to provide the educational benefit that would have likely accrued from the special education services that the school district should have provided.

92. Student requests compensatory educational services in reading, writing, and math in the amount of 20 hours in each subject area for the denial of FAPE from January through his placement at Star. As determined in Factual Findings²³ and 34, District provided Student a FAPE from January 2007 through the end of the 2006-2007 school

year. However, District denied Student a FAPE when he attended RLS, from August 15 to September 5, 2007. It is likely that Student lost educational opportunity during this relatively short period of time. The beginning of a school year is usually spent recouping knowledge and skills lost over the summer, and everything that follows is based upon those regained skills and knowledge.

PROSPECTIVE PLACEMENT AT STAR ACADEMY

93. Star is a certified, nonpublic school serving students ages eight to 18. Student is in the intermediate class for grades four to six. His class has 12 students and three teachers. The low teacher to student ratio allows students to receive individualized attention and additional assistance as needed. He is in the elementary class for math, where he is working at the second grade level. Social skills are integrated throughout the curriculum in addition to structured social skills lessons in the classroom. Student is receiving the following each week: three and one-half hours of elementary math; two hours of Lindamood Bell class, which addresses reading, writing and spelling; two hours of Slingerland class, which addresses language arts; three hours of language arts; one and one-half hours of writing; 45 minutes of reading; one hour each of social studies, science, occupational therapy, and speech; and one-half hour of social skills and partner time, which also develops social skills.

94. Student's mood and attitude toward school have markedly improved since attending Star. He enjoys going to school, likes his teachers, does not complain about being picked on by peers. Student is benefiting from the small classes, lower teacher-student ratio, and individualized attention and services that Star provides.

95. According to Mr. McCauley, Student requires a placement that offers him a structured environment with few distractions and academic work at a level at which he can progress without frustration. He felt Student would benefit from being exposed to peers who model higher levels of speech. He believed that the quality of Student's teacher and

how he responds to the teacher are important factors. Mr. McCauley's opinion is worthy of significant weight, since he taught Student for three years. Mr. McCauley's description of a placement that Student needs is consistent with Star, except for its lack of a general education peer group.

96. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. The following factors should be considered when determining which placement is the least restrictive environment for a student: the educational benefits of placement in the less restrictive environment; the non-academic benefits of placement in the less restrictive environment; and the effect the presence of the child with a disability has on the teacher and children in the less restrictive environment.

97. After three years at Elementary School with a capable and dedicated teacher, Student has failed to make adequate academic progress. This would likely continue if he returns to RLS. Thus, the educational benefits of Star are greater than those available to Student at RLS. It is likely that Student would benefit to some extent from the non-academic activities he could participate in at RLS, but any benefit would likely be limited by his emotional disability. There is no evidence that Student's presence at RLS had a detrimental effect on other students or his teachers. Weighing these factors and carefully considering the legal mandate for placement in the least restrictive environment, the likely academic benefit Student will receive at Star significantly outweighs the lack of exposure to the general education environment at this time. These factors weigh in favor of having Student continue at Star for the remainder of the 2007-2008 school year.

LEGAL CONCLUSIONS

1. As the petitioner, Student has the burden of proving that District did not offer or provide him a FAPE. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities in Education Improvement Act (IDEA) and California law. (20 U.S.C.

§1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

DID DISTRICT OFFER STUDENT A FAPE FROM JANUARY THROUGH AUGUST 2007?

3. A school district must provide "a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) A school district must offer a program that meets the student's unique needs and is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

4. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by and Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The IEP's goals and methods are evaluated as of the time they were developed to determine whether they were reasonably calculated to confer an educational benefit to the student. (*Ibid*)

5. An IEP must include annual goals designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child's other education needs that result from his or

her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriate toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1) (A)(IV); Ed. Code, § 56345, subd. (a)(4).)

IEP of February 9, 2007

6. Based on Factual Finding 23, District's offer of placement in the February 9, 2007, IEP, met his unique needs and was reasonably calculated to provide educational benefit. He was progressing toward his goals and his work productivity had increased.

IEPs of April 27 and May 7, 2007

7. Based on Factual Finding 34, District's offer of placement resulting from the April 27 and May 7, 2007, IEP team meetings was appropriate. Student was able to remain on task and perform academic work for longer periods of time. Student's behavior had improved and he was responding to peer conflicts in a more appropriate manner.

Mental Health Services Recommended by Napa County

8. Based on Factual Finding 33, District offered all community mental health services recommended by Napa County. However, the IEP amendment failed to accurately document this. District shall provide Student an IEP clearly documenting its offer of all mental health services recommended by Napa County in its mental health services addendum dated April 27, 2007.

IEP of June 7, 2007

9. Based on Factual Finding 42, District's offer of placement for the 2007-2008 school year in the June 7, 2007, IEP, did not meet Student's needs in the areas of math and

behavior. Student had not progressed in math during the 2006-2007 school year, but District neither revised his math goal, nor offered additional or different special education services in math. District did not offer services to address Student's behavioral needs in the areas of social skills and improving his relationships with peers.

IEP of August 20, 2007

10. Based on Factual Findings 72 through 74, District's offer of placement for the 2007-2008 school year in the August 20, 2007, IEP did not meet Student's needs in the area of reading, math, and behavior. Student's reading level had not progressed during the 2006-2007 school year, but District did not offer any specific specialized instruction to address his deficit. Student had not progressed in math during the 2006-2007 school year, but District did not revise his math goal and reduced the amount of special education services he was to receive in math. Student continued to have difficulty with peer relationships, yet District did not offer services to address his needs in the areas of social skills or peer relationships.

DID DISTRICT PREDETERMINE ITS PLACEMENT OFFER AND FAIL TO CONSIDER OTHER PLACEMENT OPTIONS AT THE IEP TEAM MEETING OF AUGUST 20, 2007?

11. The Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. (*Bd. of Educ. v. Rowley, supra*, 458 U.S. at pp. 206-207.) To constitute a denial of a FAPE, procedural violations must result in the loss of educational opportunity; a serious infringement of the parents' opportunity to participate in the IEP process; or a deprivation of educational benefits. (*Amanda J. v. Clark County Sch. Dist., supra*, 267 F.3d at p. 892. This is codified in both federal and state law. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

12. The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a

unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. v. Clark County Sch. Dist., supra*, 267 F.3d at p. 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.*, at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*)

13. A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) 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. (71 Fed. Reg. 46678 (Aug. 14, 2006).)

14. Based on Factual Finding 59, District's decision to reduce Student's time in special education classes was predetermined before the August 20, 2007, IEP team meeting. District neither considered nor discussed any other placement options at the meeting. District staff neither considered nor discussed any other placement options for Student, which prevented Grandparents from meaningfully participating in the meeting.

DID DISTRICT FAIL TO MAKE A PLACEMENT OFFER IN THE AUGUST 20, 2007, IEP THAT WAS SUFFICIENTLY CLEAR CONCERNING SPECIAL EDUCATION SERVICES AND BEHAVIORAL SUPPORTS?

15. A school district must provide a parent with a specific, formal written offer of the placement and services it is offering a student. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Calif. 2000) 122 F.Supp.2d 1093, 1107.) A formal written offer is necessary for the parents to understand exactly what the school district is offering so that the parent can determine whether the offer is appropriate. (*Ibid.*) The requirement of a specific, formal written offer serves an important

purpose that is not merely technical and must be enforced rigorously. (*Ibid*) A school district must provide a parent a clear, coherent written offer that the parent can reasonably evaluate in order to decide whether to accept or appeal the offer. (*Glendale Unified Sch. Dist. v. Almasi, supra*, 122 F.Supp.2d at p. 1108.)

16. Based on Factual Findings 64 through 66, District's August 2007 offer was unclear concerning the special education and behavioral services to be provided. It did not identify which special education services would be provided on a pull out or push in basis. The offer was vague and ambiguous concerning the behavioral services that District offered. The lack of specificity gave District unilateral discretion to determine the services to be provided, and denied Grandparents the opportunity to participate in the decision-making process.

WAS DISTRICT REQUIRED TO OFFER PLACEMENT AT STAR IN THE AUGUST 20, 2007, IEP?

17. Based on Factual Finding 75, District was not required to offer Student placement at Star in the August 2007 IEP in order to provide him a FAPE.

DID DISTRICT FAIL TO PROVIDE PROPER NOTICE OF THE AUGUST 20, 2007, IEP TEAM MEETING?

18. A school district shall notify a parent of an IEP team meeting early enough to ensure an opportunity to attend. (34 C.F.R. § 300.322(a)(1); Ed. Code, §§ 56043, subd. (e), 56341.5, subd. (b).) The notice of the meeting shall include the purpose, time, and location of the meeting, and who shall be in attendance. (34 C.F.R. § 300.322(b); Ed. Code, § 56341.5, subd. (c).) Parents shall be informed in the notice of the right to bring other people to the meeting who have knowledge or special expertise regarding the student. (*Ibid.*)

19. Neither federal nor state law expressly requires a school district to send

written notice to parents of an IEP team meeting. However, comments to the federal regulations repeatedly refer to the IEP team meeting notice being “sent,” which implies that a written notice is required. (71 Fed. Reg. p 46678 (Aug.14, 2006).) Similarly, the Education Code refers to parents being informed “in the notice” of their right to bring others to the meeting, which implies a written notice. (See Ed. Code, § 56341.5, subd. (c).)

20. Based on Factual Finding 49, District did not provide Grandparents written notice of the August 2007 IEP team meeting. District did not fully inform them of the purpose of the meeting. District did not inform them of the participants in the meeting, or of their right to bring others to the meeting. District’s failure to provide the required notice to Grandparents precluded them from meaningfully participating in the meeting. They were precluded from having an attorney, or others with them at the meeting who could participate in the discussion and assist Grandparents in reaching a sound decision about District’s offer. They were not prepared to discuss Student’s schedule, which was the primary subject of the meeting, or formulate appropriate questions about District’s proposal. District denied Grandparents the opportunity to meaningfully participate in the decision-making process.

DID DISTRICT HOLD THE AUGUST 20, 2007, IEP TEAM MEETING WITHOUT A GENERAL EDUCATION TEACHER?

21. The IEP team must include a regular education teacher if the student is or may be participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2); Ed. Code, § 56341, subd. (b)(2).) A regular education teacher who is a member of the IEP team shall participate in the review and revision of the IEP. (20 U.S.C. § 1414(d)(4)(B); 34 C.F.R. § 300.324(a)(3); Ed. Code, § 56341, subd. (b)(2).) The requirement that the IEP team include a regular education teacher is a mandatory, not discretionary, requirement. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394F.3d 634, 643.)

22. A member of the IEP team may be excused from attending a meeting if the

parent and the school district agree that the person's attendance is not necessary because the person's area of curriculum or service is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i); 34 C.F.R. § 300.321(e); Ed. Code, § 56341, subd. (f).) The parent's agreement to excuse the member shall be in writing. (20 U.S.C. § 1414(d)(1)(C)(iii); 34 C.F.R. § 300.321(e); Ed. Code, § 56341, subd. (h).)

23. Based on Factual Findings 51 and 52, District conducted the August 2007 IEP team meeting without the participation of a general education teacher. Grandparents did not agree to the teacher's absence. The primary purpose of the meeting concerned changing Student's placement concerning the number of general education and special education classes he would take. Because a general education teacher was not present, Grandparents did not have access to reliable information concerning how Student was performing in his general education classes. District's failure to have a general education teacher at the meeting precluded Grandparents from being able to meaningfully participate in the meeting.

DID DISTRICT VIOLATE STAY PUT BY CHANGING HIS PLACEMENT IN THE AUGUST 20, 2007, IEP?

24. During the pendency of a due process proceeding, the child shall remain in the child's then current educational placement, unless the parents and school district agree otherwise. (20 U.S.C. § 1414(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505, subd. (d).) These provisions are commonly referred to as "stay put." For purposes of stay put, a student's current educational placement is typically the placement described in the child's most recently implemented IEP. (*Johnson v. Special Educ. Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1180; *Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) A school district's violation of the stay put provision may result in a denial of a FAPE. (See *L.M. v. Dept. of Educ.* (D.Hawaii Aug. 4, 2006, No. 05-00345 ACK/KSC), 2006 U.S. Dist. Lexis 55707.)

25. Based on Factual Finding 62, District did not violate stay put because

Grandmother agreed to the change in his placement in the August 20, 2007, IEP. Even if there was a violation, it was quickly remedied, since Grandmother rescinded her consent and District returned Student to his stay put placement three days after the meeting.

DID DISTRICT FAIL TO PROVIDE PRIOR WRITTEN NOTICE OF ITS REFUSAL TO PROVIDE AN IEE?

26. A school district must provide written prior notice to the parents of a child whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).) The notice shall include a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action; a statement that the parents have procedural safeguards; if the notice is not an initial referral for evaluation, the procedure to obtain a copy of the procedural safeguards; sources the parents may contact to obtain assistance; a description of other options considered by the IEP team and the reason those options were rejected; and a description of the factors relevant to the school district's proposed or refused action. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

27. The comments to the federal regulation indicate that prior written notice shall be provided at a reasonable time before the school district implements the proposal or refusal that is the subject of the notice. (71 Fed. Reg. 46691 (Aug. 14, 2006).) The comments assume that a school district will convene an IEP team meeting after it formulates its proposed action or refusal, and then provide prior written notice of its decision to implement the proposed action or refusal. (*Ibid*)

28. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329,

subd. (b).)

29. Based on Factual Findings 16 and 79, Grandparents requested that District provide an IEE at public expense on January 21, 2007. District never provided prior written notice of its refusal to provide an IEE at public expense. The failure to provide prior written prevented Grandparents from receiving information that may have assisted their decisions concerning Student's educational program. However, the evidence does not support finding that they were denied an opportunity to meaningfully participate in the decision-making process, or that Student was denied educational opportunity.

DID DISTRICT FAIL TO PROVIDE PRIOR WRITTEN NOTICE OF ITS REFUSAL TO PLACE STUDENT AT STAR?

30. Based on Factual Finding 80, District provided prior written notice to Student of its refusal to place him at Star in early July 2007, in its response to his initial complaint. While the prior written notice did not include all of the required information, it did not result in a loss of educational opportunity to Student, or the denial of an opportunity to meaningfully participate in the decision-making process.

DID DISTRICT FAIL TO PROVIDE PRIOR WRITTEN NOTICE OF ITS PROPOSED CHANGE TO STUDENT'S PLACEMENT AT THE AUGUST 21, 2007 IEP TEAM MEETING?

31. Based on Factual Finding 79, the only notice District provided concerning its proposed change to Student's placement at the August 2007 IEP team meeting was the IEP amendment prepared before the meeting and given to Grandmother at the meeting. The IEP amendment failed to include all of the information required by law. The evidence does not support finding that this failure denied Grandparents an opportunity to meaningfully participate in the decision-making process, or that Student was denied educational opportunity.

IS STUDENT ENTITLED TO AN IEE AT PUBLIC EXPENSE?

32. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) Federal law requires that when a parent requests an IEE at public expense, the school district must “without unnecessary delay” either file a request for a hearing to show that its evaluation is appropriate, or provide an IEE at public expense. (34 C.F.R. § 300.502(b)(2).) California law authorizes a school district to request a due process hearing to show its assessment is appropriate, but does not require it to do so. (Ed. Code, § 56329, subd. (c).) A school district may not impose conditions or timelines relating to an independent educational evaluation at public expense that are not otherwise authorized by law. (34 C.F.R. § 300.502(e)(2).) A school district’s unexplained and unnecessary delay in filing for a due process hearing after parents request an IEE may warrant relief under the IDEA. *Pajaro Valley Unified Sch. Dist v. J.S.* (N.D.Cal. Dec. 15, 2006, C 06-0380 PVT) 2006 U.S.Dist. Lexis 90840, 47 IDELR 12.)

33. Assessments must be administered by in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3), 56324, subd (a) [any psychological assessment must comply with Education Code section 56320].)

34. Based on Factual Finding 16, Grandparents requested that District provide an IEE at public expense on January 21, 2007. District failed to either provide the requested IEE or request a due process hearing to show that its psychoeducational assessment was appropriate. District’s assessment was not appropriate because the BASC was not scored accurately. This error was compounded when District’s psychoeducational reassessment relied upon the incorrect data. Student is entitled to a psychoeducational IEE at public expense.

DID DISTRICT DENY STUDENT A FAPE?

35. Based on Legal Conclusions 9 and 10, District denied Student a FAPE by failing to offer him a placement for the 2007-2008 school year that met his needs.

36. Based on Legal Conclusion 20, District denied Student a FAPE by failing to provide adequate notice of the August 20, 2007, IEP team meeting.

37. Based on Legal Conclusion 23, District denied Student a FAPE by failing to have a general education teacher attend the August 20, 2007, IEP team meeting.

38. Based on Legal Conclusion 14, District denied Student a FAPE by predetermining its offer and failing to consider other placement options at the August 20, 2007, IEP team meeting.

39. Based on Legal Conclusion 16, District denied Student a FAPE by failing to provide an offer in the August 20, 2007, IEP that clearly described the special education and behavior services and supports being offered.

DETERMINATION OF RELIEF

40. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1497.) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.)

Reimbursement for Expenses at Star

41. A district may be required to reimburse a student's parents for the costs of a private school if the child previously received special education and related services from the district and the district failed to make a FAPE available to the child. (20 U.S.C. § 1412(a)(10) (C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.)

42. Reimbursement for the costs of a private school may be reduced or denied if the parents did not give written notice to the school district ten business days before removing their child from the public school that they were rejecting the proposed placement, state their concerns, and express their intent to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

43. Factors to be considered when determining the amount of reimbursement include the existence of other, more suitable placements, the effort expended by the parent in securing alternative placements and the general cooperative or uncooperative position of the school district. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra*, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi, supra*, 122 F.Supp.2d at p. 1109.)

44. Based on Factual Findings 83 through 90, Grandparent's request for reimbursement of travel expenses between home and Star is reasonable.

Compensatory Education

45. Based on Factual Finding 92, District denied Student a FAPE when he attended RLS. Student is entitled to compensatory educational services in the total amount of five hours of individual tutoring in math and reading.

Prospective Placement at Star

46. When determining whether a placement is the least restrictive environment

for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of fulltime placement in a regular classroom; (3) the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. RachelH.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

47. There is an obvious tension between the IDEA's requirement that a child with a disability receive a FAPE that meets the child's unique needs and the requirement that a child with a disability be educated alongside nondisabled children to the maximum extent appropriate. (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) While both are legally required, it is clear which prevails when there is a direct conflict: "the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom." (*Ibid.*, citing *DanielR. R. v. State Bd. of Education* (5th Cir. 1989) 874 F.2d 1036, 1045.)

48. Based on Factual Findings 93 through 95 and 97, Star offers the environment and services that are likely to meet all of Student's needs and result in meaningful academic progress. Weighing all of the evidence and giving careful consideration to the legal mandate for placement in the least restrictive environment, Student's placement at Star for the 2007-2008 school year will provide a FAPE in the least restrictive environment.

ORDER

1. Within 15 days of the date of this decision, District shall provide an IEP that includes all services recommended by Napa County in its mental health services addendum dated April 27, 2007.

2. Within 30 days of the date of this decision, District shall fund a psychoeducational IEE to be performed by a qualified assessor selected by Grandparents

in an amount not to exceed \$4,000, plus reasonable travel expenses, such as mileage reimbursement, required for the IEE to be performed.

3. District shall reimburse Grandparents for mileage expenses for two round trips per day from Student's home to Star for each day that Student attended Star and was transported by one or both Grandparents beginning September 6, 2007, until the date that District begins transporting Student as required by this decision. District shall reimburse Grandparents at the rate of \$.485 per mile. Grandparents shall submit a request for reimbursement that includes the date of each trip and mileage for each trip. District shall reimburse Grandparents within 30 days of receipt of the request for reimbursement.

4. District shall fund a total of five hours of individual tutoring in math and reading in a total amount not to exceed \$350 to be used prior to August 1, 2008. The tutoring services shall be provided by a special education teacher.

5. District shall fund Student's placement at Star for the 2007-2008 school year.

6. District shall provide transportation for Student to and from Star for the 2007-2008 school year.

7. All other relief is denied.

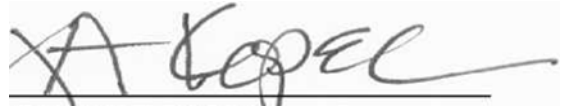
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on Issues 1, 2.c, 2.d, 2.f(1), and 2.f(2). District prevailed on Issues 2.b, 2.e, and 2.f(3). The parties equally prevailed on Issues 2.a, 2.g(1), 2.g(2), and 2.g(3).

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

Dated: February 5, 2008

A handwritten signature in black ink, reading "J. A. Kopec", written over a horizontal line.

JUDITH A. KOPEC
Administrative Law Judge
Office of Administrative Hearings