

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS on behalf of STUDENT,

v.

SEQUOIA UNION HIGH SCHOOL DISTRICT,

OAH CASE NO. 2008080102

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SEQUOIA UNION HIGH SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008100144

DECISION

Administrative Law Judge (ALJ) Steven Charles Smith, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Redwood City, California on February 23, 24, 25 and 26, and March 4, 2009.

Susan Foley, Attorney at Law, appeared on behalf of Student. Mother was present at the hearing on all days. Father was present intermittently. Student did not appear.

Eugene Whitlock, Attorney at Law, appeared on behalf of Sequoia Union High School District (District). District Chief Administrator of Special Education, Linda Common, Ed.D. (Dr. Common), was present at the hearing on all days.

On July 29, 2008, Student filed a Request for Due Process Hearing (Student's Complaint) naming District and Summit Preparatory Charter School (Summit Charter) as respondents. Summit Charter was later dismissed at Student's request. On October 6, 2008,

District filed a Request for Due Process Hearing (District's Complaint) naming Student as the respondent. By OAH orders, the matters were consolidated and continued to February 23, 2009, for due process hearing (DPH). On the last day of hearing, the parties were granted permission to file written closing briefs by March 23, 2009. Upon receipt of the closing briefs on March 23, 2009, the record was closed and the matters were submitted.

## ISSUES<sup>1</sup>

### STUDENT'S ISSUES

1. Did District deny Student a free appropriate public education (FAPE) for the 2006-2007 school year by:
  - a) failing to comply with the June 6, 2006 Individualized Education Program (IEP), by failing to reconvene the IEP meeting during August 2006, to "finalize" the June 6, 2006 IEP?
  - b) failing to have an IEP in place for Student at the beginning of the 2006-2007 school year?
  - c) failing to hold an IEP meeting in November 2006 at Parents' request?
2. Did District deny Student a FAPE for the 2007-2008 school year by:
  - a) failing to provide the attendance of a general education teacher at the September 5, 2007 IEP team meeting?

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<sup>1</sup> The parties' issues have been restated for clarity and continuity of discussion. Additionally, during the first day of DPH, Student withdrew all claimed failures by District regarding assessment and services related to physical education and speech and language. Accordingly, none of those issues are addressed in this decision, notwithstanding that Student's closing brief referenced the physical education issue.

- b) failing to assess Student's need for Occupational Therapy (OT) prior to the September 5, 2007 IEP team meeting?
  - c) failing to set goals and offer services to address Student's fine-motor functioning needs at the September 5, 2007 IEP team meeting?
  - d) failing to provide Student with a low teacher-student ratio to meet Student's unique need for direct teaching at the September 5, 2007 IEP team meeting?
3. Did District deny Student a FAPE for the 2008-2009 school year by:
- a) failing to make a clear and concise written offer of placement at the March 27, 2008 IEP meeting?
  - b) denying Parents meaningful participation in the June 5, 2008 IEP meeting by District's failure to allow Parents to observe the classroom setting in which District proposed to place student?
  - c) failing to make a clear and concise written offer of placement at the June 5, 2008 IEP meeting?
  - d) failing to make a clear and concise written offer of related services at the June 5, 2008 IEP meeting?
  - e) failing to offer Student a low teacher-student ratio to meet Student's unique need for direct teaching at the June 5, 2008 IEP meeting?
  - f) failing to offer Student placement in classes for the same length of school day as his chronologically aged peers at the June 5, 2008 IEP meeting?
  - g) failing to offer Student occupational therapy (OT) at the June 5, 2008 IEP meeting?

#### DISTRICT'S ISSUE

4. May the District initiate a referral to a mental health agency, without parental consent, so that a mental health assessment of Student can be conducted?

## FINDINGS OF FACT

### JURISDICTION, GENERAL BACKGROUND AND STUDENT'S ELEMENTARY SCHOOL YEARS:

1. At the time of the DPH, Student was a boy aged 17 and one-half years who, at all relevant times, resided with Parents within the boundaries of District.

2. Student was held back in the first grade. Student was eventually found eligible for special education services in 2001, while enrolled in the third grade in Las Lomitas Elementary School District (Las Lomitas SD), a member of the San Mateo Special Education Local Plan Area (SM-SELPA)<sup>2</sup>. Student's eligibility was under the category of Specific Learning Disability (SLD) related to written expression, reading fluency and math reasoning. He also had indicators for attention deficit disorder (ADD). Student's 2001 special education evaluation (2001 Evaluation),<sup>3</sup> noted that Student had significant playground conflicts. Mother reportedly dismissed Student's playground behavioral difficulties as the result of Student having low self-esteem due to having been held back in the first grade. There was no evidence that Parents requested, or Student was offered or received, counseling or other services related to these playground conflicts.

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<sup>2</sup> A SELPA is, generally, the local service area covered by a local plan designed to coordinate responsibility for the special education services among the school districts which comprise its membership. (Ed. Code, § 56195 et seq.) In this case, all public school districts mentioned, elementary or secondary, were in the SM-SELPA.

<sup>3</sup> "Evaluation" and "assessment" have the same legal meaning in this Decision and are used interchangeably consistent with the terminology used by the parties, the witnesses and documentary evidence. (Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

3. In March, 2003, while Student was nearing the end of fifth grade, he was evaluated (2003 Evaluation) by a school psychologist in preparation for an IEP meeting (2003 IEP). Cognitively, Student presented as “solidly average” based on standardized testing. However, continued differences between Student’s cognitive ability and academic achievement reaffirmed his original SLD assessment. Student also demonstrated resistance to authority, a sense of persecution, and, consistent with the 2001 Evaluation, aggressiveness in the educational setting, all of which contributed to his attention difficulties. The school psychologist recommended that a behavioral support plan (BSP) be put in place that would moderate Student’s issues of non-compliance, school work completion and anger control. The school psychologist also recommended that a consultation with San Mateo County Mental Health be undertaken with a view toward determining whether mental health counseling would be appropriate for Student.

4. On March 27, 2003, Mother attended and participated in the 2003 IEP meeting. The IEP team concluded that Student demonstrated behavior that did not support his learning and then agreed to meet at the beginning of Student’s sixth grade year to develop a BSP and to discuss a referral for mental health services. Mother agreed with and signed the IEP. Although Mother was aware of the IEP team’s concerns over Student’s behavior and mental health, no evidence was presented that Mother took, or requested, any action to facilitate the development of the recommended BSP or mental health referral.

5. In February 2004, Student, then a second-semester sixth-grader, was in a sporting accident and suffered a closed head trauma. As a result of his injuries, Student suffered post-traumatic stress disorder with overwhelming fear and panic (i.e., generalized anxiety disorder, with panic-attacks). It was at this time that Student’s already difficult behavior deteriorated. Student began to regularly display irritability and volatile bouts of anger. A few months after the accident, when Student was well enough to walk again, he

returned to school. Student was less able to mentally focus and concentrate than prior to his accident. However, Student's most significant problem was his increased emotional reactivity and anger. Shortly following his return, Student was expelled from his public elementary school (First Expulsion) for unspecified misconduct. Student was home schooled for the next few months. On June 8, 2004, an IEP team meeting was held to discuss placement options for Student and to modify Student's IEP of January 26, 2004. The IEP team included Mother, who agreed with, and signed, the addendum to the January 26, 2004 IEP (2004 IEP Addendum). The 2004 Addendum offered the suggestion that Student be given a functional behavior analysis (FBA) and that a mental health referral be accomplished. There was no evidence presented that Student was given the suggested behavior analysis, or that the mental health referral was accomplished, or that Parents requested or consented to either one. Parents then located the School for Independent Learners (SIL), a local private school that specialized in educating children with difficult behavior issues. In September, 2004, Las Lomitas SD, in agreement with Parents, and at public expense, placed Student in SIL as a seventh-grader.

6. While attending SIL, Student made some academic progress, but also manifested such difficult behaviors that he could not be controlled in a classroom setting. In order to reduce the frequency of Student's explosive reactions toward other students, SIL developed a "highly individualized" program just for Student that frequently involved "all day 1:1 instruction." During this time, Student met other students who were described as having a "gang-member type of orientation," including an apparent mindset of "I'm not afraid of anything, including death." According to one psychologist, Student adopted this persona as a coping strategy for his overwhelming sense of fear and anxiety that had become evident following his accident. Student's adopted persona reportedly "required him to walk, talk, and operate in an icy-cold, controlling, and intimidating gangster-type manner, both at school and in his home." Sometime during the 2004-2005 school year,

Student was diagnosed by Dr. Harry Verby, a Behavioral Medicine Physician,<sup>4</sup> as having Attention-Deficit/Hyperactivity Disorder (ADHD) and Student was given medication to moderate his condition. Student found the medicine to be somewhat effective in helping him focus and complete his school work, and in helping him manage his emotional reactivity. However, Student's stomach was extremely sensitive to the medicine and Student suffered nausea and stomach pain for several hours after every dose. After approximately 2 years, Student could no longer tolerate the daily physical side-effects of the medicine and discontinued using it.

7. In September 2005, the beginning of Student's eighth grade school year, Dr. Verby referred Student to psychologist John Martin, Ph.D., for assessment and treatment of Student's non-medical issues at home and at school. Dr. Martin obtained his Bachelor of Science in Psychology from University of South Florida in 1976, his Master of Arts in Education from Boston College in 1978, and his Doctor of Philosophy in Counseling Psychology from University of California, Berkeley in 1989. Dr. Martin's experience working with students who were academically and emotionally compromised had ranged from maximum security psychiatric facilities to group adolescent homes to outpatient counseling. He had attended and participated in 40-50 IEP meetings. Since the 1980's, Dr. Martin had worked with students at various schools of District and San Mateo County Mental Health. At all times relevant to this matter, Dr. Martin had been in private practice. Dr. Martin responded to questions from both parties with apparent thoughtfulness and acknowledged the limits of his interactions with Student. Given Dr. Martin's professional education and experience, his personal interaction with Student and Student's family, and

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<sup>4</sup> Dr. Verby did not appear at the DPH, and evidence of his specific credentials was not provided. He is mentioned here only to provide continuity to Student's background story.

his demeanor, Dr. Martin's testimony was given significant weight.

8. Initially, Student resisted treatment with Dr. Martin. However, after an unspecified law enforcement encounter in October 2005, which resulted in a diversion contract between Student and law enforcement, Student attended weekly counseling sessions with Dr. Martin through August 2006, in lieu of placement in a juvenile detention facility. Dr. Martin found that Student was willing, but unable, to understand himself or others to the degree necessary to function well in society. This was borne out by Student's inability to understand why or how his conduct drove away new friends after a very short time. Only minor emotional progress was made by Student while treating with Dr. Martin.

9. By June 2006, the end of Student's eighth grade school year at SIL, Student's grades had improved as to school work he was willing to complete: algebra – B (30 percent completion); Art – A (75 percent completion); and, History – B (60 percent completion). However, Student's gangster-like persona, which his parents described as "thug gangster," was continuing to be synergized by Student's relationships with other SIL students. Therefore, Parents sought a different school environment in which to begin Student's high school years. Student pushed for a return to public school. Ultimately, Student and Parents agreed that Student could try attending Woodside High School (Woodside), one of District's High Schools within SM-SELPA.

#### THE JUNE 6, 2006 IEP AND STUDENT'S FIRST ATTENDANCE AT WOODSIDE HIGH SCHOOL

10. In May 2006, Student was referred to Las Lomitas SD's Special Education Teacher/Evaluator (2006 Evaluator) for a review of Student's educational progress and to aid in planning for Student's high school education program and expected transition from SIL to Woodside (2006 Evaluation). The 2006 Evaluation found significant improvement over the 2003 Evaluation in Student's reading and written language skills, as had been seen by Las Lomitas SD special education staff in achievement testing in February 2005.



However, there remained math fluency weaknesses (i.e., lack of mastery of basic math facts). The battery of tests administered to Student revealed academic achievement in the "Low Average to Average Range." It was noted that Student would only complete those tests (tasks) that he chose, and only for so long as he chose. For example, Student reportedly completed the reading tests through the sixth grade level, but then refused to go on. Therefore, the reading test results could not be considered fully valid, and Student may have had more ability in this area. Although SIL teachers reported Student's grades and lack of school work completion, there was no indication in the 2006 Evaluation that the 2006 Evaluator was made aware of Student's explosive reactivity and gangster-like persona.

11. Following the 2006 Evaluation, an IEP team meeting was held June 6, 2006. Without reference to Student's social, emotional or behavioral issues, the resulting IEP called for an annual measurable goal that, within one year, Student would demonstrate self-awareness and self-regulation. The responsible parties identified to help student achieve that goal were listed simply as "General Ed[ucation] and RSP (Resource Specialist Program)." RSP services were to constitute one period per school day, while the remainder of the time (87 percent), Student would attend General Education classes. Student was to be supported in his transition from SIL to public high school through summer attendance at Woodside's Compass Program. The Compass Program, described generally as a "head start" for new high school students to learn what to expect when regular classes started in the fall, was voluntary and not part of any Extended School Year (ESY) IEP for Student. Finally, the June 6, 2006 IEP stated that, "[Student's] IEP team at Woodside/Sequoia High School District will reconvene during the month of August [2006] to finalize Student's educational program for the 06-07 school year." Mother understood the term "finalize" to mean Woodside would provide Student with a specific class schedule for his new school year and orientation regarding school rules. As a member of the June 6, 2006 IEP team,

Mother participated in the development of, and approved, the IEP. Mother was provided with a copy and explanation of her "Procedural Safeguards."

12. On June 7, 2006, Mother completed and signed District's New Student Registration Form for Woodside High School (Woodside Regform). Mother left the Woodside Regform blank regarding Student's special education status. She delivered the Woodside Regform to Woodside on June 8, 2006. On June 20, 2006, Student attended his first day at Woodside's summer Compass Program. Student was removed from his Woodside class about one or two hours after he arrived, based, in part, on a perception by Woodside staff and security that Student was acting as though Student might have been under the influence of some intoxicating substance. While Student was initially detained regarding the suspected intoxicant use, a search of Student's belongings revealed a cigarette lighter which was then deemed a weapon.

13. Based on the combination of concerns (intoxication and weapon possession), Student was summarily and immediately expelled from Woodside's summer Compass Program (Second Expulsion). Mother informally talked with Woodside staff and attempted to explain Student's appearance as the result of his reaction to ADHD medication he was taking, but that explanation did not prevent the expulsion. In an email exchange on August 8, 2006, Woodside's Special Education staff discussed the need to arrange academic classes for Student for upcoming 2006-2007 school year. The email exchange discussing the need for classes was evidence that Student's expulsion applied only to the voluntary summer Compass Program, not to the upcoming regular school year.

14. In August and September 2006, Summit Charter was a California Charter School that was also its own local education agency (LEA). Thus, Summit Charter was the equivalent of a separate school district as regarded its special education obligations to its enrolled students. During summer 2006, Mother saw a local newspaper article about Summit Charter having been granted status as its own LEA and needing to increase its

enrollment of students with special needs. Summit Charter was within SM-SELPA as were Woodside/District and Las Lomas SD. From the newspaper article and her personal investigation, Mother decided that Summit Charter would be "a better fit" for Student than Woodside. So, approximately August 14, 2006, Mother decided to enroll Student in Summit Charter. Student's formal enrollment process took place on or before August 28, 2006. Prior to Student's enrollment at Summit Charter, Mother had no further discussions with Woodside or District staff regarding Student's returning to regular session classes at Woodside in Fall, 2006. Mother did not inform Woodside or District that she was in any way dissatisfied with Woodside or District, or with the June 6, 2006 IEP.

#### STUDENT'S ATTENDANCE AT SUMMIT CHARTER AND MID-PENINSULA HIGH SCHOOL

15. Student attended Summit Charter for approximately one to two weeks, then quit during the first or second week of September, 2006. Mother allowed Student to quit Summit Charter because she felt that Summit Charter "was not an appropriate placement for Student," in that Student had difficulty following Summit Charter's rules restricting cell-phone use, left some classes early, and "skipped" other classes altogether. During Student's brief period of attendance, Summit Charter did not hold an IEP meeting or review Student's June 6, 2006 IEP.

16. On September 22, 2006, without prior notice to Summit Charter or District as to change of enrollment or any intention to seek tuition reimbursement from either LEA, Parents unilaterally enrolled Student in Mid-Peninsula High School, a private high school located within the service boundaries of District and accredited by the Western Association of Schools and Colleges (Mid-Peninsula). Unlike School for Independent Learners, Student's former private elementary school, Mid-Peninsula was not a special education school, nor was it staffed to provide special education classes to Student.

17. Shortly after Student was enrolled at Mid-Peninsula, Mother sought special

education assistance from District in the form of a request for an IEP meeting. On October 25, 2006, Mother met with District's then Chief Administrator of Special Education, Ms. Nikki Washington (Ms. Washington) and discussed the requested IEP meeting. By letter of November 2, 2006, Ms. Washington confirmed the conversation with Mother and the information regarding Student's enrollment at Mid-Peninsula, then informed Parents that the District had received Student's most recent IEP from Las Lomitas SD. Ms. Washington said she would "set up an IEP meeting." Mother offered testimony that she had originally notified District in writing about September 14, 2006, by noting on a District form, of Student's desire to transfer enrollment from Summit Charter to Woodside. District denied receiving any notice from Mother around that time. Mother's testimony was not credible, because the document she introduced into evidence was not an enrollment form, was not completed, was not signed, and was contrary to the logical inferences drawn by the ALJ from Mother's other testimony (Findings of Fact 3-5, 9-16, 20, 31-39, 42-46, 49, 58) regarding the facts surrounding her unilateral placement of Student into Mid-Peninsula. Based on the weight of the evidence, October 25, 2006, is deemed the first date following Student's enrollment at Summit Charter that District was made aware of any possible desire to return Student to a District school or to hold an IEP meeting for Student.

18. On November 6, 2006, on behalf of District, Ms. Washington set an IEP team meeting for November 27, 2006, and sent Parents a letter notifying them of the date. On November 15, 2006, again on behalf of District, Ms. Washington sent a letter to Parents canceling the scheduled IEP on the premise that Summit Charter, as its own LEA and the last public school Student had attended, was solely responsible for Student's special education needs. At this time, District knew that Student had left Summit Charter and resided within District's boundaries. Ms. Washington's November 15, 2006 letter further advised Parents to contact Summit Charter for any needed assistance. Mother was not given notice of any Special Education Procedural Safeguards by District when District

cancelled the scheduled November 27, 2006 IEP meeting. Mother had received notice of Special Education Procedural Safeguards at the June 6, 2006 IEP meeting, approximately 5 months earlier. At no time during Mother's October through November 2006 contact with District, did Mother inform District of any intent to seek tuition reimbursement from District for Student's attendance at Mid-Peninsula.

19. During Student's enrollment at Mid-Peninsula, Douglas Thompson, Ph.D. (Dr. Thompson) was Head of School (e.g., Principal). Dr. Thompson received his Bachelor of Arts, Master of Arts, and Doctor of Philosophy degrees in English and Comparative Literature from University of California, Los Angeles. Dr. Thompson had been a professional educator for approximately 20 years. His demeanor was calm, respectful, attentive and forthright. Based on Dr. Thompson's education, experience, demeanor and professional knowledge of Student, Dr. Thompson's testimony was credible and was given significant weight.

20. Dr. Thompson testified that during Student's period of enrollment as a ninth-grader (September 22, 2006 through July, 2007), Student made only marginal academic progress at Mid-Peninsula. Student's major challenge was his erratic attendance. Student earned only about one-third of the available and necessary course credits during his period of enrollment, and was not on track to graduate from high school with his chronological peers. Student often arrived late for classes or missed his classes altogether. He left classes and returned to them at will. He often failed to complete his school assignments. Student repeatedly violated the school's policy restricting cell-phone use. Student had angry and profane outbursts in his classes. Student often said that he needed to go home prior to the completion of his classes, then called Mother who, in turn, drove him home in a family car.

21. Initially, although not a special education school, Mid-Peninsula tried to assist Student with his attendance, behavior and academic progress issues, by allowing

Student to have fewer classes, to finish earlier, and to start later than normal for the school's other students. Student "struggled" to attend a full day of classes. As a result of Student's failure to make satisfactory academic progress after almost a full academic year, Mid-Peninsula considered not allowing Student to remain at the school beyond summer 2007. On July 11, 2007, in a final effort to make the seriousness of the situation well understood and to obtain a commitment for corrective conduct, Mid-Peninsula entered into a "contract" with Student and Mother detailing what would be required for Student to remain at Mid-Peninsula.

22. The behavior-based contract provided that: Student would show respect for the teachers, other students and school; Student would arrive on time and remain at school for his entire schedule of classes; Student would have 80 percent attendance and 80 percent course credits by the end of each grading period; and, Student would not use a cell-phone at school. The severity of Student's attendance problem was illustrated by the attendance chart kept by Mid-Peninsula from June 25 through July 23, 2007. During the 20 school-day period, Student was late or absent 12 days, and missed 41 out of 100 hours of classroom time, including 16 and a half hours immediately after he signed the contract.

23. Because Student's conduct did not meet the conditions of the contract, Student and his Parents knew that, if Student attempted to return to Mid-Peninsula in the fall, he would be denied continued enrollment. Therefore, in late August 2007, Student once again enrolled at Woodside.

24. By the time Student left Mid-Peninsula, Parents had paid Mid-Peninsula \$25,560 in tuition expenses for the 2006-2007 school year, plus summer session 2007, for which Student now seeks reimbursement. Student also seeks reimbursement for Mid-Peninsula related transportation expenses. However, Student's transportation claim was not supported by any evidence of travel dates, mode of transportation, mileage, or actual expenditures. There was no evidence that, prior to filing Student's Complaint, Parents

notified District of their intention to seek reimbursement for Mid-Peninsula related expenses.

25. During a portion of this same time (September 7, 2006 through December 7, 2006), Parents paid Dr. Martin \$621 for unspecified psychotherapy services for Student, for which Student now seeks reimbursement. This claim was not supported by evidence of how these services were related to Student's SLD or necessary for his access to educational opportunities. Student also seeks reimbursement for transportation expenses related to seeing Dr. Martin during this period. However, although Student's transportation claim included specific travel dates, it was not supported by evidence of mode of transportation, mileage, or actual expenditures. There was no evidence that, prior to filing Student's Complaint, Parents notified District of their intention to seek reimbursement for Dr. Martin's professional services.

#### STUDENT'S SECOND ENROLLMENT AT WOODSIDE AND THE SEPTEMBER 5, 2007 IEP MEETING

26. On September 5, 2007, based on Student's August 2007 reenrollment, Woodside held an IEP meeting (September 5, 2007 IEP) to develop Student's annual IEP for the 2007-2008 school year. Mother and Student were present at the September 5, 2007 IEP and actively participated in the development of Student's program. Neither Student, nor Mother, was precluded from presenting any information they desired. The September 5, 2007 IEP meeting was collaborative and friendly. The other members of the IEP team actively considered Mother's and Student's remarks, reviewed goals and accommodations, and made changes to the IEP based, in part, upon the input of Mother and Student. Mother was satisfied with the outcome of the meeting and recognized that the IEP could be modified as Student's conduct and progress required.

27. The September 5, 2007 IEP was detailed, specific, understandable, and based on the information then available to the team. It was appropriate to Student in that it not

only contained Student's then present levels of academic achievement and functional performance, and measurable, individualized goals and objectives, but also an initial Individual Transition Plan (ITP) from high school to college. The ITP provided for the exploration of career options, exploration of prerequisites to attend a four year college, and development of independent living skills, all based on Student's expressed interests. The IEP provided for "extensive support," including 28 percent of Student's time being in a special resource class. The IEP provided that the remaining 72 percent of Student's time would be in the general education setting. Student was also eligible, as were all Woodside students, for free, after-school, on-campus tutoring. By her signature on its documentation, Mother gave her approval of, and consent to, all parts of the IEP.

28. The September 5, 2007 IEP team included Student's IEP case manager, William Lipson (B.A. History, University of California; licensed, multi-subject, general education and resource specialist program (RSP) teacher), Woodside's RSP teacher who had over 30 years of teaching experience, including 25 years in a therapeutic day school (TDS) setting. Over his career, Mr. Lipson had participated on hundreds of IEP teams with general education teachers, had consulted with many general education teachers regarding their approach to IEP development and planning, and had been in contact with general education teachers regarding Student in particular. Mr. Lipson was able to share his information regarding Student with the IEP team. Mr. Lipson understood general education issues applicable to Student from his interaction with other general education teachers and from his own experience as a general education teacher.

29. The September 5, 2007 IEP team also included Karen McGee, Ed.D. (B.A./M.A. Psychology, Stanford; M.A. Education, Stanford; Ed.D., University of San Francisco, Specialist in Counseling and School Psychology), Woodside's School Psychologist, who had been a general education teacher of social studies. Like Mr. Lipson, Dr. McGee had previously attended hundreds of IEP meetings and understood general education issues



applicable to Student from her interaction with other general education teachers and from her own experience as a general education teacher.

30. The other members of the September 5, 2007 IEP team failed to sign the meeting attendance roster and were not specifically identified at the due process hearing by either party. No evidence was presented that the September 5, 2007 IEP team was improperly composed or incomplete. Therefore, the weight of the evidence was that the September 5, 2007 IEP team was complete and properly composed.

31. In developing Student's IEP, the Woodside/District members of the September 5, 2007 IEP team had available, and considered, information received from Mid-Peninsula, including an outside psycho-educational evaluation of Student (PlusFour Report) completed March 22, 2007, by Stephen Newton, Ph.D., a licensed psychologist (Dr. Newton), at the request of Dr. Martin. The PlusFour Report was the result of a battery of standard tests completed by Student, a Parent interview, and Student interviews and observations by Dr. Newton. Dr. Newton did not testify in this case. The parties stipulated that Dr. Newton's report be admitted into evidence and both parties supported their positions by reference to the PlusFour Report. Because Dr. Newton was selected by Dr. Martin for consultation, Dr. Newton's PlusFour Report was thorough and based on standard tests, interviews and observations of Student by Dr. Martin, neither party has challenged any aspect of the PlusFour Report, and both parties have sought to use portions of the report to support their respective cases, Dr. Newton's findings and opinions were given significant weight.

32. Regarding Student's physical condition as related to accessing his educational opportunities, the PlusFour Report noted that "[Student] displayed a normal level of activity and coordination for his age. There is no evidence of impairment in gross or fine motor control or abnormalities in coordination, praxis mobility, gait or balance. [Student] is right handed and has an awkward pencil grip." Later in his report, Dr. Newton

noted Student had difficulty completing some finger motion tests, but Dr. Newton did not contradict his prior statement that there was no evidence of fine motor control impairment, nor did Dr. Newton suggest that the finger motion tests indicated any fine motor interference with Student's ability to access his educational opportunities. Dr. Newton did not recommend any further testing or therapy (e.g., occupational therapy (OT)) in relation to Student's fine motor control. From the PlusFour Report, there was no reason for anyone to suspect that Student required an OT assessment or therapy in relation to accessing his educational opportunities.

33. Regarding Student's specific learning disability, Dr. Newton's testing confirmed the reading and processing deficits that led to Student's original eligibility for special education. Dr. Newton recommended remediation in both reading and writing, additional time for exams and projects, regular and routine access to tutorial help and campus resources for students with disabilities, and Books on Tape through Recordings for the Blind.

34. Emotionally, Student was determined to be highly impulsive (a condition at times exacerbated by drugs and alcohol), insecure and self-demeaning for which he compensated by demeaning others and adopting a "tough guy" persona. Student was possessed of highly troubled and unpredictable moods. He was highly irritable, pessimistic, unruly, given to belligerent outbursts, deeply untrusting, passive-aggressive, sometimes irrationally contentious, lacking in empathy, narcissistic, and chronically fatigued. Consistent with the foregoing, Student left early during each of the four days of testing with Dr. Newton, missed appointments, and presented as fatigued or feeling ill.

35. Scholastically, Dr. Newton opined that Student "requires a structured and therapeutic environment in which he can learn new skills and test them out in a therapeutic milieu that will provide appropriate feedback ..." and "... it is doubtful that weekly therapy is sufficient to address the complex emotional and behavioral needs that

[Student] presents.”

36. The PlusFour Report concluded with two pages of specific recommendations and diagnostic impressions, by Dr. Newton, including the following which were not showcased in the main body of the report: remediation in both reading and writing; 150 percent of normally allocated test time; negotiated homework and project due dates; use of the learning disabilities resource program; a shortened day; and, “as a ‘fall-back’ plan, consider a consultation with an educational consultant regarding boarding school placement ... [¶] ... consideration of intensive summer-based programs for therapeutic intervention ... and, medication consultation.” The completed PlusFour Report was given by Dr. Martin to Mother who delivered it to Mid-Peninsula. When the PlusFour Report was forwarded from Mid-Peninsula to Woodside, it did not contain the final two pages (specific recommendations and diagnostic impressions). District did not receive the final two pages until this case was underway. The information on the last two pages of the PlusFour Report was not made known by Mother to the September 5, 2007 IEP team.

37. In February 2007, when Dr. Martin first commissioned the PlusFour Report from Dr. Newton, Dr. Martin was working to assist Parents in convincing Mid-Peninsula to allow Student to remain enrolled. To that end, Dr. Martin prepared a letter “to whom it may concern,” dated February 16, 2007 (Dr. Martin’s February, 2007 Letter). The letter specified that the results of Dr. Newton’s testing (PlusFour Report) “should be available to you concurrently with this letter,” and thereby made clear that Dr. Martin’s February 2007 Letter and the PlusFour Report were to be considered in tandem.

38. In his February 2007 letter, based on one and one-half years of providing counseling and therapy to Student, Dr. Martin detailed Student’s lifetime educational, emotional and social challenges, including the issues surrounding the Compass Program and Summit Charter. Dr. Martin stated that Student required a very flexible scholastic environment, “in which the teachers tune into his emotional state and make adjustments in

their expectations on the fly to be in accord with what they think he can emotional[ly] handle at the moment.” Further, Dr. Martin stated that, even though Mid-Peninsula was trying to help Student, Student’s own motivation and academic progress were so low that Mid-Peninsula was likely to refuse Student’s continued enrollment, unless Student quickly proved himself. More importantly, Dr. Martin opined that, if Student was unwilling or unable to succeed at Mid-Peninsula, his failure would indicate that Student “requires more than [Mid-Peninsula] or any other non-residential school can provide (public or private).” Finally, Dr. Martin stated, “[Student’s] future scholastic placement considerations come down to only two viable options: [Mid-Peninsula] ... or a residential high school.”

39. As was the PlusFour Report of Dr. Newton, Dr. Martin’s February 2007 Letter was given by Dr. Martin to Mother for delivery to Mid-Peninsula. Mother did not deliver Dr. Martin’s February 2007 Letter to Mid-Peninsula, so it was not forwarded by Mid-Peninsula to Woodside or District. Mother did not make the existence of Dr. Martin’s February 2007 Letter, or the substance of its contents, known to Woodside or District during the September 5, 2007 IEP meeting, or at any other time prior to fall 2008. On September 5, 2007, Mother understood that the information contained on the last two pages of the PlusFour Report and throughout Dr. Martin’s February 2007 Letter would have been important to educators, including Woodside and District, when they attempted to develop Student’s IEP. On September 5, 2007 Mother was aware that the IEP developed for Student was not based on any consideration of the information contained on the last two pages of the PlusFour Report and throughout Dr. Martin’s February 2007 Letter, but did not advise the rest of the IEP team.

#### THE SEPTEMBER 25, 2007 AND MARCH 27, 2008 IEP MEETINGS

40. On September 25, 2007, the IEP team again met, this time to discuss Student’s academic difficulties. The team, including Mother, agreed that Student should drop physical education in order to add an additional study skills class and modified the

IEP accordingly (Sept. 25, 2007 IEP Addendum). Immediately following this IEP meeting, Mr. Lipson, who was, as a result of 25 years in a Therapeutic Day School (TDS) educational setting, qualified to notice when students seemed to need mental health assistance, informed Mother that he was concerned about Student's mental health. Mr. Lipson also informed Mother that Student might eventually need mental health services through San Mateo County Mental Health (SMCMH) and inquired whether she would be interested in more information about county mental health services. Mother responded that she would discuss the matter with her husband. Mother later reported to Mr. Lipson that Parents were not interested in SMCMH services for Student.

41. A few weeks following the Sept. 25, 2007 IEP meeting, Mr. Lipson, began informing Mother of Student's continuing difficulties at Woodside by email. Mother appreciated the emails and felt fully informed by District of Student's day-to-day circumstances at Woodside. Over the following several months, as Student's IEP case manager, Mr. Lipson reported to Mother a continuing and escalating number of Student absences, tardiness and declining performance.

42. On February 8, 2008, Mr. Lipson reminded Mother of his prior suggestion regarding SMCMH and informed her that he believed the time had come for a referral to get help for Student, whom Mr. Lipson described as in great emotional pain. Mr. Lipson requested that Mother consider another IEP team meeting that would also include Woodside's Principal. On February 11, 2008, Mother responded by requesting further information before agreeing to another IEP meeting. On February 19, 2008, Mother wrote, "at this time, we as a family are not comfortable with going forward for this kind of evaluation [mental health evaluation] and possible placement in the special class. What we have decided [is to provide Student with private therapy]. Please know that we value your thoughts and concerns. It is just something we are not comfortable with. ... [Student] feels most comfortable with this plan [which we know] is key to him finding success in his

schooling.”

43. During the period November 2007 through March 2008, Parents obtained private tutor services for Student from Advance Tutor. Parents paid \$950 for these tutoring services. Student’s evidence in support of this claim did not establish that the services were necessary, that Student benefited from them, or why Student did not obtain tutoring from District resources. Although Mother mentioned the tutoring services to Mr. Lipson in an email, she did not state that reimbursement for the services would be sought from District. Student also seeks reimbursement for Advance Tutor related transportation expenses. However, Student’s transportation claim was not supported by evidence of travel dates, mode of transportation, mileage, or actual expenditures. There was no evidence that, prior to filing Student’s Complaint, Parents notified District of their intention to seek reimbursement for Advance Tutor related expenses.

44. In early March 2008, Mr. Lipson reported to Mother that Student seemed to be absent more than he was present for classes. Then, on March 10, 2008, Mr. Lipson inquired of Mother what Student meant by a remark to a teacher that the prior week was to be Student’s last week at Woodside. On March 11, 2008 Mother replied to Mr. Lipson to the effect that the family was considering concurrent placement of Student at Woodside and Lydian Academy, a local private school that could provide tailored one-to-one education to Student. Then, Mother requested an IEP meeting to discuss the matter. Mr. Lipson arranged an IEP meeting for March 27, 2008, the soonest possible date, given the proximity of spring break 2008.

45. The March 27, 2008 IEP meeting was attended by Mother, Student, and Student’s Psychological Therapist, Dr. Martin, among others. During the meeting, Student agreed to undergo the assessment and to try out placement in the TDS. Based on Student’s apparent willingness to try TDS, Dr. Martin recommended the assessment to the IEP team. After considering Student’s circumstances, Mr. Lipson’s and other teachers

concerns, Student's comments, and Dr. Martin's recommendation, the IEP team decided to amend the September 5, 2007 IEP (March 27, 2008 IEP Amendment) to seek an SMCMH referral for assessment to determine whether Student would be eligible and appropriate for TDS placement. It was agreed that District would arrange for Mother and Student to meet with TDS staff to gain further information about the TDS program. The IEP team delegated to various Woodside staff members, other procedural tasks necessary to begin the referral for assessment and to determine answers to concerns, such as Student's possible concurrent attendance at Woodside and Lydian Academy.

46. At the meeting, Mother was informed that for the TDS/mental health assessment process to begin, she would have to give her written consent for Woodside and District to share Student's educational records with SMCMH for an initial review. If the SMCMH review resulted in a finding that TDS was potentially appropriate for Student, then a mental health assessment plan would be prepared for Parent's review and consent. It was agreed that the IEP team would reconvene within 30 days to make further decisions concerning Student's potential placement. The foregoing was reflected in a written IEP addendum, which Mother signed on March 27, 2008, thereby indicating her agreement with the March 27, 2008 IEP Amendment. Immediately following the March 27, 2008 IEP meeting, Student disclosed to Dr. Martin and Mother that Student had no actual intention of attending TDS, but had just agreed during the meeting "to get the meeting over with." Dr. Martin testified that, had he known Student's true feelings, he would not have recommended the TDS placement. Dr. Martin said that, in the absence of Student's desire to attend TDS, the placement would fail.

47. Ms. Nancy Littlefield (Ms. Littlefield), SMCMH Central Assessment Supervisor, testified on behalf of SMCMH about the process for placement into a TDS. Ms. Littlefield earned her B.A. in Psychology from Rutgers University, her M.A. in Sociology from the University of California, Berkeley, was a licensed clinical social worker, and had been

involved in providing mental health services since 1981. Given her education, experience, and position with SMCMH, her testimony as to the TDS admission process carried great weight. According to SMCMH's interpretation of law, as well as SMCMH policies, in order to initiate the referral for assessment, it would have been necessary for Student's Parents to sign a consent form to release Student's records to SMCMH for review. Based on a review of Student's records, if Student were found potentially appropriate, SMCMH would prepare a mental health assessment plan customized to Student's individual circumstances. Parents would again need to provide written consent, if they desired the assessment to be undertaken. Following the assessment, an IEP team meeting would have been convened and SMCMH, as an expanded IEP team member, would have presented its findings and recommendations for mental health services, if any, for Student. If the IEP team, including Parents, approved the findings and recommendations, then a specific offer of placement would have been made and, once again, Parents would have been entitled to give or withhold their written consent for services to Student.

48. SMCMH policy required that, prior to Student visiting a TDS class "in session," Student's assessment would need to have been completed. Prior to completion of the assessment, Parents and Student would have been allowed, and were encouraged, to visit the TDS facility, when not in session, and to speak with TDS staff. The reason for this procedure was for privacy concerns and to protect existing, "very fragile", TDS students from visits by those not actually likely to be involved in TDS.

49. Following the March 27, 2008 IEP meeting, Mother stated that she wanted to visit the TDS before she would sign her consent for release of Student's records. District arranged for the requested visit, as had been memorialized in the March 27, 2008 Addendum, but there was a disagreement over what was meant by the term "visit." Mother argued that the term meant a visit while the TDS was "in session," (e. g., with students present). District related the SMCMH policy regarding visits prior to assessments. Parents



had been given contact information for TDS and encouraged to visit and have all of their questions answered. They were told that the “in session” visit they requested could come after Student had been assessed, but before Student or Parents committed to treatment.

#### UNILATERAL PLACEMENT OF STUDENT AT LYDIAN ACADEMY, APRIL 2008

50. On April 2, 2008, Mother emailed Mr. Lipson and requested further information regarding the TDS placement process. In her email, Mother acknowledged Student’s recent absences and told Mr. Lipson to expect Student to be back at Woodside the next day. On April 7, 2008, Mr. Lipson emailed Mother and again expressed concern about Student’s absences. Mother responded that day by informing Mr. Lipson for the first time that Student was in the process of being unilaterally placed at Lydian Academy “for many reasons,” without further elaboration. Parents paid Student’s registration fee for Lydian Academy on April 10, 2008. Student’s first day of instruction at Lydian Academy was April 14, 2008. Although Parents had previously discussed the possibility of concurrent placement of Student at Lydian Academy and Woodside, prior to Mother’s April 7, 2008 email, Parents never informed District of the possibility of withdrawal of Student from Woodside. Parents’ April 7, 2008 email did not inform District of any intention to seek tuition reimbursement for Student’s attendance at Lydian Academy.

51. Following Mother’s April 7, 2008 notice of Student’s new private school placement, District, repeatedly tried to contact Mother to discover and resolve whatever might have been the particular reasons for the unilateral placement. District heard nothing from Mother until May 1, 2008, at which time Mother reconfirmed Student’s new placement and advised District that Mother’s attorney would make contact shortly. She provided no additional information.

52. Lydian Academy was a non-accredited, private school, within the service area of District. The school provided one-to-one tutorials for high school aged students. The school’s Director and Co-Founder was Ms. Rhonda Racine, (Bachelor of Arts, Psychology

and Master of Science, Computer Science and Electrical Engineering, from University of California, Santa Barbara; California State Teaching Credential, San Jose State University; Certificate in College and Career Planning, University of California, Berkeley). Ms. Racine was also a co-founder and former Principal of SIL (Student's former private elementary school). Except for Ms. Racine, none of the teachers at Lydian Academy was credentialed and they taught outside of their degree majors.

53. Mother, Dr. Martin, and Ms. Racine collectively testified that Student was doing well academically at Lydian Academy since arriving there. They pointed to Student's improved grades as proof of their proposition. However, upon cross-examination by District, it was learned that Lydian Academy did not give any grade less than an "A" (the standard scholastic mark of academic excellence). This was accomplished by several means, most notably, by not accepting for grading purposes any school work of less than "A" quality, even if that meant the student had to repeat the assignment numerous times. If multiple efforts to improve a school work project failed, then the project was reduced in difficulty until the student did achieve an "A." Examples of difficulty reduction methods included, "bullet point" answers, rather than full sentence answers; shortening exams, or lengthening the time to take exams; and, teachers typing assignments for students from student dictation. Given this method of grading and the absence of any evidence of grading standards applied to Student's school work, Student's claimed academic improvement at Lydian Academy was not established.

54. Lydian Academy did not offer any special education services to its students. Therefore, Student had not received any such services throughout his enrollment there. Student also did not receive any transition instruction to aid his transition from high school to college. Because Lydian Academy is one-to-one academic tutoring only, Student had received no assistance with his social/emotional issues or mental health needs, nor any opportunity to have significant interaction with Lydian Academy peers. Student's daily

course load was four classes from 9:30 a.m. to 1:00 p.m.

55. Mother testified that Student continued to have serious social skills needs, in addition to his special academic needs, and that neither of these were being addressed at Lydian Academy. Dr. Martin opined that, without a program to address Student's social skills needs, Student would likely continue to struggle in society and might never advance to college. District psychologist Dr. McGee testified that, based on her more than 20 years as a professional in public education (general and special), and her knowledge of Student's special needs, Lydian Academy was not appropriate for Student because it did not address Student's social skill needs. Accordingly, Lydian Academy was an inappropriate placement.

#### THE JUNE 5, 2008 IEP MEETING

56. Beginning May 22, 2008, Attorney Foley and Dr. Common (District's Chief Administrator of Special Education) exchanged correspondence in an attempt to set a date for an IEP team meeting. They agreed on June 5, 2008. The June 5, 2008 IEP meeting was attended by Mother, Father, their attorney Ms. Foley, Dr. Common, Mr. Lipson, Dr. McGee and District's attorney. Almost immediately after the IEP meeting started, Attorney Foley "demanded" an immediate offer of FAPE from District. District attempted to respond, but Attorney Foley rejected District's efforts. It was uncontested that emotions were high and Student's representatives' voices were raised. Within minutes of starting the IEP meeting, Attorney Foley, Mother and Father terminated the meeting and left its location without informing District of the specific reasons for the private placement at Lydian Academy or suggesting solutions. Neither Parents, nor Attorney Foley, informed District of any intention to seek public funds for payment of Student's private schooling. Attorney Foley and Parents had no valid reason to withdraw from the IEP meeting.

57. On June 13, 2008, Dr. Common wrote to Parents and attempted to provide continuing information regarding Student's SMCMH referral process and related options for Student and his family. Dr. Common also requested contact from the Parents to learn

the exact reason for the unilateral placement of Student.

58. Mother testified that the reason she did not consent to assessment of Student was that she felt she needed to see a TDS class in session and that nothing short of such a visit would be satisfactory. Mother was not credible in this area of her testimony because she had written email letters to Mr. Lipson that her family was “not interested” in, and “uncomfortable” with, the mental health services he recommended, and told him that the family would handle Student’s mental health needs on their own, before there was any discussion of the process of visiting a TDS class, in session or otherwise. Thus, Mother did not reject the District’s proposal of a mental health assessment referral and possible TDS for Student based on not getting to visit a TDS facility, “in session.” Rather, the weight of the evidence was that, SMCMH services, including TDS, were simply not acceptable for personal reasons known only to Mother and her family.

59. On July 29, 2008, Parents, on behalf of Student filed Student’s Complaint.<sup>5</sup> This was the first notice that District received as to the specific facts alleged to underlie the private placement of Student at Lydian Academy, and was the first notice that District received that Parents would seek public funding for Student’s private schooling at both Mid-Peninsula and Lydian Academy. At no time prior to filing Student’s Complaint, did Parents assist, or actively cooperate with, District regarding assessing the appropriateness of TDS to address Student’s life-long psycho-educational problems. At no time prior to the filing of Student’s Complaint, did either Parent consent to allow District to start the mental health services referral process by releasing Student’s records to SMCMH.

60. By the time Student’s Complaint was filed, Parents had paid Lydian Academy

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<sup>5</sup> The evidence offered by Student for events after the date Student’s Complaint was filed was not relevant and not considered.

\$5,508 in tuition expenses for which Student now seeks reimbursement.<sup>6</sup> Student also seeks reimbursement for Lydian Academy related transportation expenses. However, Student's transportation claim was not supported by evidence of travel dates, mode of transportation, mileage, or actual expenditures. There was no evidence that, prior to filing Student's Complaint, Parents notified District of their intention to seek reimbursement for Lydian Academy related expenses.

61. For the period February 20, 2008 through July 29, 2008,<sup>7</sup> Parents incurred expenses of \$3,325 for unspecified psychotherapy services for Student, from Dr. Martin, for which Student now seeks reimbursement. This claim was not supported by evidence of how these services were related to Student's SLD or necessary for his access to educational opportunities. Student also seeks reimbursement for transportation expenses related to seeing Dr. Martin during this period. However, although Student's transportation claim included specific travel dates, it was not supported by evidence of mode of transportation, mileage, or actual expenditures. There was no evidence that, prior to filing Student's Complaint, Parents notified District of their intention to seek reimbursement from District for Dr. Martin's professional services.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

1. In IDEA due process hearings, the petitioning party has the burden of proof.

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<sup>6</sup> Student's claim for reimbursement for tuition paid to Lydian Academy after the date Student's Complaint was filed was disregarded.

<sup>7</sup> Student's claim for reimbursement for expenses incurred for Dr. Martin's services after the date Student's Complaint was filed was disregarded.

(*Schaeffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].) Thus, Student had the burden of proof on the issues raised in Student's Complaint, and the District had the burden of proof on the sole issue raised in District's Complaint.

## GENERAL PRINCIPLES OF SPECIAL EDUCATION LAW

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley*, supra, at p. 200.) School districts are required to provide 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. (*Rowley*, supra, at p. 201.)

4. There is no one test for measuring the adequacy of educational benefits

conferred under an IEP. (Rowley, *supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under Rowley if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (Walczak v. Florida Union Free School District (2d Cir. 1998) 142 F.3d 119, 130; E.S. v. Independent School Dist., No. 196 (8th Cir. 1998) 135 F.3d 566, 569; In re Conklin (4th Cir. 1991) 946 F.2d 306, 313; Houston Indep. School Dist. v Caius R. (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; El Paso Indep. School Dist. v. Robert W. (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.)

5. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (Adams v. State of Oregon (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (Id. at p. 1149, citing Fuhrmann v. East Hanover Bd. of Education (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (Ibid.) Preparation of an IEP is "an inexact science." (Honig v Doe, (1988) 484 US 305, 321[108 S.Ct. 592].)

6. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); see also W.G. v. Board of Trustees of Target Range School District No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484 (Target Range).)

7. It has long been recognized that equitable considerations may be used 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 Comm. of Burlington v. Department of Education (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Reimbursement and compensatory

education are equitable remedies. (*Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, *supra*, 31 F.3d at p. 1497.) Equitable relief is proper when 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 LEA should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) In addition, an ALJ may order an LEA to comply with the procedural requirements of state and federal special education law. (Ed. Code, § 56505, subd. (f)(4).)

8. Due process complaints filed after October 9, 2006, are subject to a two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2) (2006); 34 C.F.R. 300.511(e) (2006); Ed. Code, § 56505, subs. (l) & (n).)

#### SCHOOL YEAR 2006-2007:

##### ISSUES 1A & 1B: DISTRICT'S FAILURE TO COMPLY WITH JUNE 6, 2006 IEP BY FAILING TO CONVENE IEP MEETING IN AUGUST 2006 AND FAILURE TO HAVE IEP IN PLACE AT BEGINNING OF 2006-2007 SCHOOL YEAR

9. Student contends he was denied FAPE for the 2006-2007 school year by District's failure to comply with the June 6, 2006 IEP requirement to convene an IEP meeting in August, 2006, and its failure to have an IEP in place for Student at the beginning of the 2006-2007 school year. District contends it had no responsibility to comply with the IEP until 30 days after the start of the 2006-2007 school year, by which time, Student had left District, enrolled at Summit Charter and was no longer District's responsibility.

10. California law provides that the local educational agency (LEA) is the responsible entity for providing special education services to eligible individuals with exceptional needs residing within the boundaries of the LEA. (Ed. Code, §§ 56300-56302.) A SELPA is, generally, the local service area covered by a local plan designed to coordinate



responsibility for the special education services among the school districts which comprise its membership. (Ed. Code, § 56195 et seq.) School districts such as District and Las Lomitas SD, and charter schools specifically designated as local educational agencies, such as Summit Charter, are LEA's. District, Las Lomitas SD and Summit Charter were each members of SM-SELPA. When a special education student with an existing IEP transfers within the same school year from one district into another district, where both districts operate special education programs within the same SELPA, the receiving district must continue, "without delay," to provide services comparable to those described in the existing IEP, unless otherwise agreed between the parents and receiving district. (Ed. Code, § 56325 subd. (c).) However, that is not the requirement when a student transfers to the receiving district during the summer vacation period to start a new academic year. In such a case, the receiving district must review, modify or adopt the existing IEP within 30 days after the commencement of the regular school year. (Ed. Code, §§ 56343, subds. (a)-(d), 56343.5, and 56344.)

11. Here, Student transferred from one district to another district within the same SELPA (Las Lomitas SD to Woodside/District), during summer 2006. The 2005-2006 school year had ended, so the "without delay" procedural requirement did not apply. The new school year had not started, so the 30 day procedural timeline had not begun. Thus, District had no obligation to review Student's IEP, or to hold an IEP meeting for Student, until 30 days after the start of the 2006-2007 school year which began the last week of August 2006. On or before August 28, 2006, Student left District and was enrolled at Summit Charter, an entirely independent LEA. Therefore District was relieved of any IEP obligations to Student during summer 2006, including either holding an IEP meeting in August 2006 or having an IEP in place for Student by the beginning of the 2006-2007 school year.

12. Student's contention implies that, despite the foregoing discussion, District

was somehow bound by an overriding effect of the remark in the June 6, 2006 IEP that Woodside would “finalize” the IEP during August 2006. However, Student has presented no evidence or legal authority to support his contention. For example, there was no evidence presented as to what aspect of the June 6, 2006 IEP needed to be “finalized”; no evidence of any specifically claimed defect in the IEP. Mother testified that “finalize” meant Woodside would provide a specific class schedule and orientation for Student. In any event, Student left District for Summit Charter LEA before August, 2006 ended and thereby defeated District’s opportunity to timely act (e.g. “finalize”), and terminated any claimed obligation of District. (Ed. Code, §§ 47640 & 56300-56302.)

13. Accordingly, pursuant to Legal Conclusions 1-12, and Findings of Fact 1-5, 9-15, Student has not met his burden of proof. District did not deny Student FAPE for the 2006-2007 school year by District’s failure to comply with the June 6, 2006 IEP by failing to convene an IEP meeting during August 2006, nor by failing to have an IEP in place for Student by the beginning of the 2006-2007 school year.

#### ISSUE 1C: DISTRICT’S FAILURE TO HOLD IEP MEETING IN NOVEMBER 2006 AT PARENTS’ REQUEST

14. Student contends he was denied FAPE for the 2006-2007 school year because District failed to hold an IEP meeting in November 2006 at Parents’ request. District contends that once Student enrolled at Summit Charter, which was its own LEA, Summit Charter remained solely responsible for Student’s special education services, including holding IEP meetings, until Student re-enrolled in a District school, notwithstanding that Student was, at all relevant times, a resident of District.

15. In general, an LEA is required to provide special education services for children in private schools, within the boundaries of its service area. (Ed. Code, §§ 56171-56175; 34 CFR §300.131(a).) A charter school, designated as an LEA, is responsible for the provision of FAPE to its enrolled students. (Ed. Code, §§ 47640, 56300-56302.) A charter

school must admit students from all areas within California, ("... admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or legal guardian, within this state ... .") (Ed. Code, § 47605, subd. (d)(1).) A charter school must admit all students who wish to attend, if they meet admission criteria and there is room. If there is insufficient room, then admission is by lottery. (Ed. Code, § 47605, subds. (d)(2)(A)-(B).) No student can be compelled to attend a charter school. (Ed. Code, § 47605, subd. (f).) When a student leaves a charter school, for any reason other than graduation, the charter school is required to notify the superintendent of the school district of the student's last known residence. (Ed. Code, § 47605, subds. (d)(3).)

16. There is no authority for District's contention that once a student enrolls in a charter school that is an LEA, that charter school remains responsible for the special education needs of the student, until the student enrolls in another public school district. District, pursuant to Education Code, sections 56171-56175, has responsibility to provide special education services for children placed in private schools within the boundaries of District's service area. It does not matter whether the child came to be in the service area by transferring from another private school or a public school, District is responsible to provide special education services to children residing in District's boundaries and to children residing outside District's service area boundaries, but attending school within those boundaries.

17. Logically, the reason for this is, unlike an ordinary school district, a charter school has no specific boundaries by which to determine a service area or residency area for which it will be responsible for students with special education needs. In fact, the only real boundaries of a charter school are those of its facility. If that were not true, then the Education Code mandate that admission to a charter school shall not be determined according to the place of residence of the pupil within California, would literally result in a charter school with a potential state-wide service area and a continuing responsibility for

former students wherever they might go within California, while the local school district would have no obligation to the privately placed student. This would be an absurdity which the law does not support.

18. A fair reading of the law related to charter schools designated as LEA's is that such charter schools are only responsible for FAPE as to their voluntarily enrolled students, for so long as the students remain enrolled. After that, responsibility for FAPE shifts to the student's school district of residence. This reading gives meaning to the statutory scheme that makes charter school enrollment voluntary and requires charter schools to notify local districts whenever a student ends enrollment.

19. Therefore, when Student enrolled at Summit Charter in August 2008, District was relieved of its FAPE obligations to Student, because Summit Charter was a charter school designated as its own LEA. However, after enrolling at Summit Charter, Student almost immediately ceased attending, following which, Student enrolled at Mid-Peninsula, thereby relieving Summit Charter of any continuing obligation to Student. Before, during, and after Student's enrollment at Summit Charter, Student continued to be a resident of District. When Student left Summit Charter, enrolled at Mid-Peninsula, and remained a resident within District boundaries, he once again became the responsibility of District for special education services and FAPE. Accordingly, District's cancellation of the IEP meeting, and subsequent, on-going refusal to conduct an IEP meeting, until Student re-enrolled at District in August 2007, was a continuing procedural violation of special education law as to Parent's right to attend an IEP for Student. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4.) Refusing to hold an IEP for a child within District's service area was ultimately a denial of Student's substantive right to FAPE in that he received no special education services at all.

20. Accordingly, pursuant to Legal Conclusions 1-8, 14-19, and Findings of Fact 1-19, Student has met his burden of proof. District denied Student FAPE by failing to hold

an IEP meeting at Parents' request in November 2006.

#### SCHOOL YEAR 2007-2008:

##### ISSUE 2A: DISTRICT'S FAILURE TO PROVIDE GENERAL EDUCATION TEACHER AT SEPTEMBER 5, 2007 IEP MEETING

21. Student contends he was denied FAPE for the 2007-2008 school year because a general education teacher was not present at the September 5, 2007 IEP team meeting. District contends that a general education teacher was present at the IEP team meeting.

22. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d. 1072, 1079, citing *Amanda J.*, supra, 267 F.3d. 877, 891.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.)

23. To facilitate meaningful parental discussion, IDEA requires that at least one regular (general) education teacher be included on the IEP team if the child is or may be participating in the regular school education environment. (20 U.S.C § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321(a)(2); Ed. Code, § 56341, subd. (b)(2).) IDEA does not require that the general education teacher be the student's current general education teacher. A school district's failure to obtain any input or participation from the Student's regular classroom teacher may be a serious procedural violation. The rationale for requiring the attendance of a regular education teacher is closely tied to Congress's "least restrictive environment"

mandate. The input provided by a regular education teacher is important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom. (Deal v. Hamilton County Board of Education, (6th Cir. 2004) 392 F.3d 840).

24. Here, Dr. McGee and Mr. Lipson, while not then actively engaged as general education teachers, were both credentialed as such and had prior general education classroom experience, and were present and participated in the September 5, 2007 IEP meeting. Both had participated on hundreds of IEP teams with general education teachers, had consulted with many general education teachers regarding their approach to IEP development and planning, and had been in contact with general education teachers regarding Student in particular. Both were able to share their information regarding Student with the IEP team. Both understood general education issues applicable to student from his interaction with other general education teachers and from his own experience as a general education teacher.

25. Accordingly, pursuant to Legal Conclusions 1-8, 21-24, and Findings of Fact 1-39, Student has not met his burden of proof. District did not deny Student FAPE for the 2007-2008 school year by District's failure to provide the attendance of a general education teacher at the September 5, 2007 IEP team meeting.

**ISSUES 2B & C: DISTRICT'S FAILURE TO ASSESS STUDENT'S NEED FOR  
OCCUPATIONAL THERAPY (OT) PRIOR TO THE SEPTEMBER 5, 2007 IEP MEETING,  
AND DISTRICT'S FAILURE TO SET GOALS AND OFFER SERVICES TO ADDRESS  
STUDENT'S FINE-MOTOR FUNCTIONING NEEDS**

26. Student contends he was denied FAPE for the 2007-2008 school year by District's failure to assess Student's need for Occupational Therapy (OT) in relation to Student's fine motor skills deficits, prior to the September 5, 2007 IEP team meeting, and by District's failure to set goals and offer services to address Student's fine-motor

functioning needs at the September 5, 2007 IEP team meeting. District contends that it had no reason to suspect any fine motor skills deficit for Student, and therefore, was not required to assess Student, set goals or offer services in relation to Student's claimed fine motor functioning needs.

27. A school district must assess a special education student in all areas of suspected disability including, if appropriate, the student's motor abilities. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); 34 C.F.R. § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).)

28. Dr. Newton, retained through Dr. Martin on behalf of Parents, thoroughly tested Student across a broad range of areas, deficits in which might cause Student difficulty in accessing his educational opportunities. It was upon Dr. Newton's "PlusFour Report" that Student bases his claim of a denial of FAPE for failure of District to have Student assessed for possible OT needs. But, an examination of the PlusFour Report reveals that Student's issue is not well taken. Dr. Newton wrote, "[Student] displayed a normal level of activity and coordination for his age. There is no evidence of impairment in gross or fine motor control ... ." Later, in his report, Dr. Newton noted Student having some difficulty in completing some finger motion tests, but Dr. Newton did not contradict his prior statement that there was no evidence of fine motor control impairment, nor did Dr. Newton suggest that the finger motion tests indicated any fine motor interference with Student's ability to access his educational opportunities. Dr. Newton did not recommend

any further testing or therapy (e.g., occupational therapy (OT)) in relation to Student's fine motor control. From the PlusFour Report, there was no reason for anyone to suspect that Student required OT assessment or therapy.

29. Student also contends that his failure to type an assignment should have been an indication of fine motor deficit. However, the evidence established that Student was unwilling, not incapable of, or hindered in, completing his school work assignment. No evidence beyond the PlusFour Report was presented that Student had a fine motor deficit, or that any such deficit interfered with Student's ability to access his educational opportunities. There was no evidence that Parents or Student brought any concern about Student's fine motor functioning to the attention of anyone at District. On balance, the weight of the evidence was that, during all times relevant to this case, Student had no apparent fine motor control deficits and that district did not have actual or constructive notice of any such deficits. Therefore, District had no obligation to provide Student with an OT assessment, or set goals, or offer services, in relation to Student's fine motor skills deficits.

30. Accordingly, pursuant to Legal Conclusions 1-8, 26-29, and Findings of Fact 1-39, Student has not met his burden of proof. District did not deny Student FAPE for the 2007-2008 school year by District's failure to provide Student with an OT assessment, or set goals, or offer services, in relation to Student's fine motor skills deficits

#### ISSUE 2D: DISTRICT'S FAILURE TO PROVIDE STUDENT WITH A LOW TEACHER-STUDENT RATIO

31. Student contends he was denied FAPE for the 2007-2008 school year by District's failure to provide Student with a low teacher-student ratio to meet Student's unique need for direct teaching at the September 5, 2007 IEP team meeting.

32. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20



U.S.C. § 1412(a)(1)(A)4; Ed. Code, § 56000.)

33. 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(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) In turn, 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. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

34. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

35. Student presented no evidence that, at the September 5, 2007 IEP team meeting, District was aware that Student required a low teacher-student ratio to meet his unique need for direct teaching. In fact, Student's Mother, who was an active participant at the IEP meeting, acknowledged her satisfaction with the IEP by her signature. She offered no dissent to the IEP, nor alternate suggestions. There was no evidence presented that Mother or Student (who was also present at the IEP meeting) mentioned any such concern. Dr. Martin, Student's therapist, who had such a concern for Student and who had significant contact with District, testified that he never told anyone at District of his concern. Student has failed to meet his burden of proof on this issue.

36. Accordingly, pursuant to Legal Conclusions 1-8, 31-35, and Findings of Fact 1-39, Student has not met his burden of proof. District did not deny Student FAPE for the 2007-2008 school year by District's failure to provide Student with a low teacher-student ratio to meet Student's unique need for direct teaching at the September 5, 2007 IEP team meeting.

SCHOOL YEAR 2008-2009:

ISSUE 3A: DISTRICT'S FAILURE TO MAKE A CLEAR AND CONCISE WRITTEN OFFER OF PLACEMENT AT THE MARCH 27, 2008 IEP MEETING

37. Student contends he was denied FAPE for the 2008-2009 school year by District's failure to make a clear and concise written offer of placement at the March 27, 2008 IEP meeting. District contends that it did not fail to make a clear and concise written offer.

38. Initially, an annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP be in writing and contain: a statement of the student's present level of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education services and supplementary aids to be provided to the student; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345(a).)

39. After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (20 U.S.C. § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(4) &(6); Ed. Code, § 56380.1.)

40. Here, Student's annual IEP was developed and approved by Mother on September 5, 2007, and was in material compliance with the requirements of IDEA. Student

does not contend to the contrary. The September 5, 2007 IEP was first amended September 25, 2007, with a short, written document, signed by Mother. The March 27, 2008 amendment to the September 5, 2007 annual IEP was similarly reduced to writing and signed by Mother. As such, the March 27, 2008 amendment must be read together with the annual IEP and the first amendment, as one combined document. When so read, the combined document constitutes a “clear and concise” offer of placement, pursuant to the original terms, as amended. The March 27, 2008 amendment was an IEP team decision, which included Mother, Student and Student’s therapist. The March amendment was a decision by the IEP team to start the referral process for Student to be assessed by the county mental health agency, in an effort to determine whether Student needed and was eligible for county mental health services through a TDS. (Ed. Code, § 56331(a); Cal. Gov. Code, § 7576, subds. (a)-(b).) Mother understood this when she signed the amendment, without dissent. Student has not met his burden of proof on this issue.

41. Accordingly, pursuant to Legal Conclusions 1-8, 37-40, and Findings of Fact 1-49, Student has not met his burden of proof. District did not deny Student FAPE for the 2008-2009 school year due to lack of clarity as to the March 27, 2008 amendment to the September 5, 2007 IEP.

#### ISSUES 3B-F: THE JUNE 5, 2008 IEP MEETING

42. Student contends he was denied FAPE for the 2008-2009 school year at the June 5, 2008 IEP meeting by District’s conduct. Specifically: Denial to Parents of meaningful participation in the June 5, 2008 IEP meeting by District’s failure to allow Parents to observe the classroom setting in which District proposed to place student (Issue 3b); and, District’s failure to make a clear and concise written offer of placement (Issue 3c), offer of related services (Issue 3d), offer of low teacher-student ratio (Issue 3e), or offer of class placement for the same amount of time as Student’s chronological peers (Issue 3f). District contends that in each instance, District met any obligation that it might have had to

Student; that to the extent any obligation of District was unmet at the time, District still had approximately three months remaining until the next scheduled annual IEP meeting during which to remedy the unmet obligation; and, that in any event, the unreasonable withdrawal of Student's Parents and attorney from the IEP meeting relieved District of any obligation to Student at the June 5, 2008 IEP meeting.

43. A parent is an integral and required member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education. (See 20 U.S.C. § 1414(d)(3)(A)(ii); Ed. Code, § 56341.1, subd. (a)(2).) Under IDEA, the process of the development of an IEP is a collaborative one. The collaborative concept applies to both LEA's and parents. Parents cannot simply abandon the process, then effectively complain that an imperfect or incomplete IEP resulted in a denial of FAPE. (*Systema ex. rel. Systema v. Academy School Dist. No. 20*, (10th Cir. 2008) 538 F.3d 1306, (even though the IEP had not been finalized, parents' rejection of the IEP and withdrawal from the process bars their claim for a denial of FAPE); see also, *MM ex rel. DM v. School Dist. Of Greenville County*, (4th Cir. 2002) 303 F.3d 523 (parents' lack of cooperation with the development process prevented their claim of lost educational opportunities for their student); *Hjortness ex rel. Neenah Joint Sch. Dist.*, (7th Cir. 2007) 507 F3d 1060 (parents chose not to avail themselves of the IEP process, therefore there was no denial of FAPE to student).)

44. Here, Parents and their attorney arrived at the June 5, 2008 IEP meeting, stayed for a short time while conducting themselves in a non-collaborative manner, then within minutes of their arrival, they left, without any valid reason. Nothing was accomplished toward the joint creation of an IEP for Student. Following the meeting, District tried to revive communications, but none were forthcoming from Parents or their attorney, until Student's instant complaint was filed. Under those circumstances, there was no denial of FAPE for any defect in the attempted IEP development by District. In light of

this conclusion, it is unnecessary to address the remainder of District's contentions regarding issues 3b-3f.

45. Accordingly, pursuant to Legal Conclusions 1-8, 42-44, and Findings of Fact 1-61, Student has not met his burden of proof. District did not deny Student FAPE for the 2008-2009 school year based on Student's Issues 3b-3f.

#### ISSUE 3G: DISTRICT'S FAILURE TO OFFER STUDENT OCCUPATIONAL THERAPY (OT) AT THE JUNE 5, 2008 IEP MEETING

46. Student contends he was denied FAPE for the 2008-2009 school year by District's failure to offer Student occupational therapy (OT) at the June 5, 2008 IEP meeting. District contends that it had no obligation to offer Student OT at the June 5, 2008 IEP meeting, because District had no knowledge of any OT needs of Student, and the withdrawal of the Student's Parents and attorney from the IEP meeting relieved District of any claimed responsibility to provide FAPE at that time.

47. In light of the Legal Conclusions and Findings of Fact related to Student's Issues 2b-2c, District had no knowledge or suspicion of any disability, therefore, no obligation to assess, set goals or offer services with regard to OT and Student's fine motor skills through September 5, 2007; the absence of any evidence that District acquired knowledge of, or suspected, a deficit as to Student's fine motor skills between the September 5, 2007 IEP meeting and the June 5, 2008 IEP meeting; and, the Legal Conclusions and Findings of Fact related to Student's 3b-3f, Parents' withdrawal from the June 5, 2008 IEP meeting, Student has failed his burden of proof. District did not deny Student FAPE.

#### DISTRICT'S ISSUE: DISTRICT'S REFERRAL OF STUDENT FOR COUNTY MENTAL HEALTH ASSESSMENT

48. District contends that it can initiate a referral to a mental health agency,

without parental consent, so that a mental health assessment of Student can be conducted. Student contends that District has no basis for a mental health referral without consent, and has not met procedural requisites in any event.

49. In general, a student must be assessed in all areas of suspected disability, including "social and emotional status." (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. §300.532(g); Ed. Code, § 56320, subd. (f).) Assessment requires parental consent. (34 C.F.R. § 300.300; Ed. Code, § 56320, et seq.) "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329 [detailing the numerous procedural safeguards associated with assessments]. (Cal. Code Regs., tit. 2, § 60020, subd. (g).)

50. A local educational agency, an IEP team, or a parent, may initiate a referral to community mental health services for a special education student or a student who may be eligible for special education, who is suspected of needing mental health services. (Gov. Code, § 7576, subd. (b); Ed. Code, § 56320; Cal. Code Regs., tit. 2, § 60040, subd. (a).) Before conducting a mental health assessment, a local educational agency must obtain parental consent. (See 20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c); Gov. Code, § 7576, subd. (b)(2); Cal. Code Regs., tit. 2, § 60040, subd. (a)(2).) Generally, a local educational agency may proceed with an assessment, without parental consent, by seeking a determination through a due process hearing that such assessment is necessary. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code, §§ 56321(c), 56501(a)(3).) However, if the parent of the child sought to be assessed has placed the child in home school or private school at the parent's own expense, and that parent does not consent to the evaluation (assessment), then the public agency may not use the consent override procedure. (34 C.F.R. § 300.300(d)(4)(i).)

51. In this case, Parents have placed Student in Lydian Academy, a private

school, at their own expense. Parents have denied consent for any mental health assessment process, including the initial referral for records review which would ordinarily start the assessment process.

52. Accordingly, pursuant to Legal Conclusions 1-8, 48-51 and Findings of Fact 1-61, District has not met its burden of proof. As long as Student remains in private school at Parent's expense, District is not allowed to refer Student for mental health services over the objections of Students parents.

## REMEDIES

53. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).)

54. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).) Reimbursement may be denied if, at least ten days prior to the private school enrollment, the parent failed to give written notice to the district about the parent's concerns, their intention to reject the district's

placement and their intention to enroll the student in a private school at public expense. The lack of notice may not reduce the reimbursement, if LEA failed to provide notice of parent's obligation to give notice (i.e., Procedural Safeguards). (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).)

55. Equitable considerations may be used 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 Comm. of Burlington v. Department of Education (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Reimbursement and compensatory education are equitable remedies. (Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra, 31 F.3d at p. 1497.) Equitable relief is proper when 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 LEA should have supplied. (Reid ex rel. Reid v. District of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524.) In addition, an ALJ may order an LEA to comply with the procedural requirements of state and federal special education law. (Ed. Code, § 56505, subd. (f)(4).)

56. "An [IEP] team shall meet whenever any of the following occurs: [¶] ...[¶] (c) The parent ... requests a meeting to develop, review, or revise the [IEP]." (Ed. Code, § 56343.) The timeline for a parent requested IEP team meeting, excluding vacations and school session breaks is "within 30 days" of parent's written request. If an oral request is made, the District must notify the parent of the need for a written request and the procedure for filing it. (Ed. Code, § 56343.5.) Written Procedural Safeguards must be given to parents by LEA, when, among other times, a parent requests an IEP and is denied. (20 U.S.C. §§1415(a)-(d); Ed. Code, §§ 56301, 56500.3, 56502.)

57. On October 25, 2006, while Student was enrolled at Mid-Peninsula, Mother met with Ms. Washington, informed her of Student's enrollment at Mid-Peninsula, and



requested an IEP meeting. Mother's request triggered District's obligation to conduct an IEP review. Here, the request was oral; however, District accepted the oral notice and scheduled an IEP meeting for November 27, 2006, which District confirmed in writing. By letter dated November 15, 2006, District then cancelled the IEP meeting on the basis that Summit Charter, being an LEA, remained solely responsible for Student's special education services and informed Mother that she must contact Summit Charter for further discussions regarding Student's school placement. District erred. Because, as discussed above, District, not Summit Charter, was responsible for Student's special education, District's cancellation of the IEP meeting, and subsequent, on-going refusal to conduct an IEP meeting, until Student re-enrolled at District in August 2007, was a continuing procedural violation of special education law as to Parent's right to attend an IEP for Student. Refusing to hold an IEP for a child within District's service area was ultimately a denial of Student's substantive right to FAPE in that he received no special education services at all.

58. Mother did not give prior notice to Summit Charter, or District, that she was going to place Student at Mid-Peninsula. And, when Mother made contact with Ms. Washington, she did not inform District that she intended to hold District responsible for Student's tuition reimbursement. Mother's failure to give District notice of her intention to seek reimbursement from District. However, District failed to give Mother a copy of her Procedural Safeguards when District cancelled the IEP.

59. Because both parties made procedural errors, it is appropriate to base Student's remedy for denial of FAPE on equitable considerations. In weighing the equities, Student is not entitled to tuition reimbursement for the period between his departure from Summit Charter and November 15, 2006, the date that IEP was cancelled. The tuition reimbursement period shall be from November 16, 2006 through the end of summer school 2007 at Mid-Peninsula. However, equitable consideration requires that District not

be held to the full cost of Student's tuition, because Student's record of attendance at Mid-Peninsula, as chronicled in June and July 2007 averaged approximately 50 percent, so at least one-half of the tuition paid, was wasted. In light of the foregoing, District should only be responsible to reimburse Student's Parents in the sum of \$12,780. (Legal Conclusions 1-8, 53-59, and Findings of Fact 1-26.)

60. Student's claim for reimbursement for Dr. Martin's services for unspecified psychotherapy services for Student was not supported by evidence of how these services were related to Student's SLD or necessary for his access to educational opportunities. Additionally, District had not been notified before Student's Complaint was filed, that reimbursement for this claim would be sought. Accordingly, the claim is denied. (Legal Conclusions 1-8, 53-55, and Findings of Fact 24, 25, 61.)

61. Student's claim for reimbursement for Advance Tutor's services was not supported by the evidence. Student did not establish that the services were necessary, that Student benefited from them, or why Student did not obtain tutoring from District resources. Additionally, District had not been notified before Student's Complaint was filed, that reimbursement for this claim would be sought. Accordingly, the claim is denied. (Legal Conclusions 1-8, 53-55, and Findings of Fact 43.)

62. Student's claim for reimbursement for tuition paid to Lydian Academy was not supported by the evidence in that Student did not prove a denial of FAPE by District. Therefore, the unilateral placement of Student was not reimbursable. Additionally, the placement was not appropriate. Finally, District had not been notified before Student's Complaint was filed, that reimbursement for this claim would be sought. Accordingly, the claim is denied. (Legal Conclusions 1-8, 53-55, and Findings of Fact 60.)

63. For each of the foregoing reimbursement claims, Student has sought an additional amount for reimbursement of related travel expenses. Student did not prevail as to any underlying claim related to travel, except as to Issue 1c (Mid-Peninsula tuition

reimbursement), so Student would not be entitled to any transportation component of any of those claims, except Mid-Peninsula. However, Student failed to support any of his travel claims with adequate evidence of travel dates, mode of transportation, mileage, or actual expenditures. Additionally, District had not been notified before Student's Complaint was filed, that reimbursement for any of Student's travel would be sought. Accordingly, all travel reimbursement claims are denied. (Legal Conclusions 1-8, 53-55, 13, 20, 25, 30, 36, 41, 45, 47, 52, and Findings of Fact 24, 25, 42, 60, 64.)

## ORDER

Within 45 days of the date of this order, District shall pay to Parents the sum of \$12,780 as equitable reimbursement to Parents of the tuition expenses they incurred for placement of Student at Mid-Peninsula from November 16, 2006 through the end of summer school 2007.

District shall not refer Student to county mental health, over the objections of Parents, as long as Student remains in a private school placement at Parents' expense.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student has prevailed on Issue 1c and on District's Issue. District has prevailed on all other issues.

## RIGHT TO APPEAL THIS DECISION

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

Dated: April 20, 2009

\_\_\_\_\_/s/\_\_\_\_

Steven Charles Smith

Administrative Law Judge

Office of Administrative Hearings