

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH CASE NO. 2010010284

STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT, OPPORTUNITIES UNLIMITED
CHARTER HIGH SCHOOL AND NEW
VILLAGE CHARTER HIGH SCHOOL.

DECISION

Administrative Law Judge (ALJ) Robert F. Helfand, Office of Administrative Hearings (OAH), State of California, heard this matter in Los Angeles, California, on April 19, 20 and 21, 2010.

Nicole Hodge, Esq., of the Hodge Law Firm, represented Student (Student). Student was present throughout the hearing. Lakesha Harris, a consultant to Student, was present on the first day of the hearing.

Mary L. Kellogg, Esq., of Lozano Smith, represented the Los Angeles Unified School District and SELPA (District). Sharon Snyder, Due Process Specialist with the District, was also present throughout the hearing. Patrick Balucan, Assistant General Counsel for the District, was present on April 20, 2010.

Opportunities Unlimited Charter High School (OUCHS) was represented by its executive director, Angelique Jacques Marcoulis.

New Village Charter School (NVCS) was represented by William H. Edmonson, Esq., and Rachel N. Perahia, Esq., of Gibson, Dunn & Crutcher, LLP.

At the close of the hearing, at the parties' request, the parties were given time to file written closing arguments and rebuttal briefs. The matter was deemed submitted upon receipt of the closing rebuttal briefs on May 12, 2010. The parties stipulated that the decision due date would be June 11, 2010.

The following witnesses testified during the hearing: Student, Ethel Earley, Roichelle Hooks, Larry Weber, Student's Grandmother, Joe Bennett, Alicia Garcia, Lakesha Harris, Deanne Torvinen, and Angelique Jacques Marcoulis.

PROCEDURAL MATTERS

Student filed a request for due process on December 3, 2009, which named the District as the respondent.¹ On January 14, 2010, Student filed an amended request for due process (amended complaint) which added as respondents NVCS, OUCHS, and the Los Angeles County Office of Education (LACOE). On January 25, 2010, OAH issued an order granting Student leave to file the amended complaint. On March 15, 2010, Student moved to dismiss LACOE which was granted on March 17, 2010. On April 8, 2010, the parties stipulated to continue the due process hearing scheduled for April 12, 2010, to April 19, 2010. On April 8, 2010, OAH granted the request to continue.

On April 6, 2010, OUCHS filed a motion to dismiss Student's claims alleged against it which accrued after September 18, 2010, Student's last day attending OUCHS. On April 19, 2010, the ALJ heard oral arguments on the motion. Student did not oppose the motion which was granted orally.² On April 21, 2010, the District moved to strike the last two paragraphs of Issue 3 in the amended complaint on grounds that these

¹ OAH did not file the due process request until January 11, 2010.

² A written order to this effect was filed on April 22, 2010.

paragraphs raised new issues from the original complaint and that the amended complaint had never been served on the District. Student did not oppose the motion and agreed to strike the two paragraphs. Accordingly, the ALJ orally granted the District's motion without prejudice.

ISSUES

- 1) Whether the District and charter schools failed to provide Student with a free and appropriate public education (FAPE) during the 2007-2008, 2008-2009, and 2009-2010 school years by:
 - (a) Failing to provide counseling services pursuant to Student's last agreed upon Individualized Education Program (IEP);
 - (b) Failing to conduct 30-day reviews and annual IEPs each year; and
 - (c) Failing to draft appropriate and measurable IEP goals each year?
- 2) Whether the District failed to offer Student a FAPE by failing to provide a transition assessment and a transition plan for the 2008-2009 and 2009-2010 school years?

PROPOSED RESOLUTION

Student's proposed resolution is that (1) an independent transition assessment and plan be funded, (2) Student be provided with a cosmetologist kit (estimated cost of \$400) so as to permit her to attend cosmetology school, and (3) she be provided three years of dance classes at the Debbie Allen Dance Academy (estimated monthly cost of \$665).

FACTUAL FINDINGS

1. Student is an 18-year-old female who currently attends Crenshaw High School within the District. Student has had an unstable home life as her parents have

had periods of imprisonment. During these times, Student lived with her grandmother or aunt, who would become her guardians. Student's initial IEP meeting occurred on October 3, 2002. Student had been found eligible for special education and related services under the eligibility category of emotional disturbance (ED).

2. During school year 2006-2007, Student was dually enrolled for the ninth grade at a non-public school, Little Citizens Westside Academy (Little Citizens), and Gardena High School, a District school. Little Citizens is a non-public school (elementary through high school) that provides small-group instruction, academic remediation and addresses emotional/behavioral issues in a structured setting for special education students.

2006-2007 SCHOOL YEAR

The September 26, 2006 IEP Meeting and the Fall Semester

3. On September 26, 2006, an IEP meeting was held at Little Citizens. Attending the meeting were Student's grandmother (Grandmother); Howard Gellerman, administrative designee; Teisha Chambliss, special education teacher; Marilyn Hagoes, counselor; and Regina Spencer, an agency representative. The team found Student to be "making excellent behavioral and academic progress." Student was an active participant in weekly counseling sessions working on her goals of improving relationships with peers and school staff. The team noted that learning conflict resolution skills and how to effectively express her needs, wants, and feelings were currently impeding Student's academic performance. Student's teachers reported that she attended class regularly, was on task, completed assignments, and was well behaved. The team found that Student had achieved all her goals.

4. The team adopted six goals in the areas of counseling, behavioral support, least restrictive environment, reading, writing, and math. Student's goals in counseling

and least restrictive environment were that she would transition successfully to a public school campus including coping with the increased academic and social pressures. Her behavior goal was to learn and implement conflict resolution skills. The team noted that it hoped that Student would be able to be re-integrated into public school full-time. Grandmother consented to the IEP on October 3, 2006. Grandmother commented in writing on the IEP that she felt that Student was "clinging to [Little Citizens] Westside Academy and not wanting to move on" and was using Little Citizens as a "crutch."

5. At Little Citizens, Student received a grade of B in Language Skills, Spanish 1A and Physical Education. Student's grades at Gardena were A in Health, D in English 9A and B in Algebra 1A.

The January 29, 2007 IEP Meeting and Spring Semester 2008

6. On January 27, 2007, the IEP team reconvened at Little Citizens. Student's Grandmother and then guardian attended. Also in attendance were Larry Weber, District administrative designee who is also a school psychologist; Annette Gordon, a least restrictive environment counselor; Hagoes; Spenser; and Amy Gardener, the IEP coordinator at Gardena. The team determined that Student had already met each and every one of her annual goals and objectives. Student's teachers reported that she was doing well at Gardena, and she regularly attended, completed assignments, and there were no behavioral concerns. The team was of the opinion that Student's significant improvements in academic task completion and interpersonal relationships allowed Student to access the general education curriculum. The team recommended that Student be enrolled in general education classes at Gardena. The team also recommended that Student receive 30 minutes of counseling per month in case any issues arose as to her transition to full-time general education on a public school campus. The team also did not require any other services as the team did not feel

Student was in need of any services. Grandmother consented to the IEP and signed it that day.

7. Student attended the second semester at Gardena. She received an A in Introduction Composition; B in English 9B and Chorus; C in Physical Education; and D in Algebra 1B and Life Skills. Student received S (satisfactory) in both work habits and conduct in all her classes except for Algebra 1B where she received a U (unsatisfactory) in both.

2007-2008 SCHOOL YEAR

8. OUCHS is a charter school chartered by the District. OUCHS is part of the Los Angeles Unified School District Special Education Local Planning Area (SELPA). OUCHS educates students who have been historically academically low-achieving and prepares them to be successful adults in careers and/or college. As part of the school's program, OUCHS provides its students with an advisory class which includes personal as well as career counseling. Each student at OUCHS has a transition plan as part of the program.

9. In early or mid-July 2007, Student visited OUCHS and spoke to the school's director, Angelique Jacques Marcoulis. Student did not inform Marcoulis that she had an IEP which was being implemented at Gardena. On July 24, 2007, Grandmother, on behalf of Student, submitted a written pre-application to OUCHS. The application process also calls for the applicant to assist in providing school records from the applicant's former school including transcripts and IEPs. No mention was made by Student or Grandmother that Student had in effect an IEP at Gardena. Student believed that she no longer had an IEP apparently because of her successful transition to public school. OUCHS was told that Student had had an IEP in the past, but there was none currently in effect. OUCHS submitted a written request to Gardena for a copy of transcripts for Student on August 8, 2007. On August 30, 2007, OUCHS forwarded an

authorization for release of school records, including the transcript and cumulative file, signed by Gist. On October 31, 2007, Gardena provided OUCHS with a one-page transcript which failed to include any mention that Student had an IEP.³

10. Student performed well at OUCHS. OUCHS is on a trimester system. Student's first trimester grades were B in Geometry, World History, Physical Education and Literature Analysis; C in Biology; and A in Spanish 1. She received all satisfactory marks for work habits and conduct. In the second trimester, Student received B in Literature Analysis, Standard Enrichment, and U.S. History; and A in Geometry and Earth Science. She was marked satisfactory in work habits and conduct with an excellent in work habits in Earth Science and Standard Enrichment. During the third trimester, Student received satisfactory in work habits in half her courses and excellent in the other half. She received either an excellent or satisfactory in conduct in all her courses except for Standard Enrichment where she received an unsatisfactory. Student's third trimester grades were C in Physical Education; B in Earth Science and Standard Enrichment; and A in Geometry, Community Health Issues, and Literature Analysis.

11. Starting in October 2007, Student also received two counseling sessions per month for approximately 60 to 90 minutes from Cheryl Woodruff of the California Institute of Health and Social Services, Inc. Issues covered in the sessions involved family matters, peer relationships and school. This counseling was provided by the Los Angeles County Department of Children and Family Services and was conducted at the OUCHS campus. The counseling continued for a four-month period.

³ It appears that Gardena forwarded copies of Student's cumulative file to the wrong location. A reference on Gardena records indicated that Student's records may have been sent to a charter school named Youth Opportunity Alternatives in lieu of OUCHS.

12. During the school year, Student took and passed the California High School Exit Examination with scores of 385 in English Language Arts and 359 in Math.

2008-2009 SCHOOL YEAR

13. In or before September 2008, Student was placed by her social worker from the Los Angeles County Department of Children and Family Services at St. Anne's, a program for pregnant girls. St. Anne's has a partnership with NVCS, which is located adjacent to it, to educate those at St. Anne's. NVCS is a small charter high school chartered by the District specializing in educating girls with challenges.⁴ NVCS provides its students with counseling for emotional issues along with a program designed to prepare its students for careers and/or college. The school employs a part-time school psychologist and utilizes interns from the University of Southern California to act as counselors and mentors to its students. NVCS is part of the District SELPA. The school also employs a special education teacher and a second is provided by St. Anne's. Complementary services, such as personal counseling and tutoring, are offered by St. Anne's.

14. On September 22, 2008, Student submitted a two-page enrollment application. She listed only OUCHS under the heading "Previous School/Program Information," although there was room to enter four entities. In the section entitled "Special Services," there is a specific box listing five questions involving special education services. Student checked "no" in responding to whether she received special education services, had an IEP, 504 plan, or had difficulties that interfere with her ability to go to school and learn.

⁴ NVCS has between 150 and 160 female students of which approximately 13 are receiving special education services.

15. NVCS sent requests for Student's educational records to OUCHS on October 14, 2008, and to Little Citizens and Gardena one week later. Deanne Torvinen, NVCS school psychologist, first learned that Student had an IEP because of a notation in the Gardena records. About the beginning of November 2008, NVCS received copies of Student's IEPs.

16. After receiving the IEP, Torvinen met with Student and informed her that NVCS would need to "update" the IEP and start from scratch. Student informed her that the IEP was no longer in effect. NVCS also implemented the IEP by making available one 30-minute counseling session per month. Torvinen conducted five or six sessions with Student for an approximate total of four hours. Torvinen testified that she also spent additional time meeting with Student. Additionally, Student met on a number of occasions with Joe Bennett, NVCS principal, and Vasquez for counseling relating to personal issues. Student admits that as of this date she no longer was emotionally disturbed and/or required special education and related services.

17. As part of its program, NVCS assigns each of its students to an academic counselor. Student was assigned to Marlyn Gomez. Student planned to graduate high school early. Student and Gomez designed an academic plan in accord with her plans by having Student take an additional English course and extra electives each semester. Student also investigated attending college and signed up to take the Scholastic Aptitude Test (SAT) on December 6, 2008, sending her results to U.C.L.A. and three campuses of the California State University.⁵

18. NVCS requires its students to take a career transition class called Workforce Development and an advisory class which provided academic direction and

⁵ The three California State University campuses were Long Beach, Los Angeles and Dominguez Hills.

counseling. This class is taught by Brenda Vasquez of St. Anne's. It is designed to focus students on their plans following high school including career planning, procuring internships, and learning independent living skills.⁶ Students are taught resume writing, interview and self-advocacy skills. Vasquez also assists students in obtaining job internships as part of the St. Anne's program, of which Student is still a participant. Student did admit that she received instruction on how to obtain employment, resume writing, and internships in Workforce Development.

19. During the 2008-2009 school year, Student was absent for about 61 percent of all class periods due to health problems, medical appointments and maternity leave.⁷ During the first semester, Student took 11 classes for credit. She received an A in Custom Fashion Design, Hip-Hop Aerobics, and Introductory Piano. She received a B in Chemistry and a C in Senior Project, Cosmetology Make-up, Yoga, American Government, and Custom Fashion Illustration. Student received a D in Algebra 2A and failed Mosaic Art.

20. During the second semester, Student took ten classes. She received an A in Latin Hip-Hop Dance and 3-D Art, and a B in Parenting with Passion. Student received a C in Economics and Advisory class. She received a D in Chemistry and U.S. History while failing Language Arts. Prior to the start of the 2009-2010 school year, Lakesha Harris, an educational counselor who is an independent contractor with the Los Angeles County Department of Children and Family Services notified Torvinen that Student elected to go to Crenshaw High School so as to experience a "more normal senior year."

⁶ Additionally, Student took a life skills course on parenting.

⁷ This equals approximately 618 class periods.

THE NEW VILLAGE ASSESSMENT

21. After being notified of the existence of an IEP from Gardena in November 2008, Torvinen prepared a Special Education Assessment Notification and Assessment Plan on January 30, 2009. The assessment plan was signed by Grandmother on February 17, 2009. Student left school on maternity leave on March 16, 2009, and returned on May 13, 2009. Student's assessment was commenced during the spring semester; but because of Student's excessive absences, Torvinen was unable to complete her assessment. NVCS sent a second assessment plan which was signed on September 2, 2009, by Student's mother (Mother).⁸

22. Torvinen, assisted by two other teachers, conducted Student's assessment. Student was administered the Woodcock-Johnson III Tests of Achievement (WJ-III). Student was within the low-average to average range in all areas, with her math skills better developed than her reading and written language skills. Although Student's scores in reading and written language were within the sixth-grade level, her teachers reported that Student functions in class at a higher level than indicated on the WJ-III, and that she demonstrates sufficient skills to be successful with the high school curriculum. In the speech/language area, Student's test results on the WJ-III and observations showed that Student appeared to have adequately developed communication skills. She demonstrated average to above-average fine and gross motor skills based on observations and the Bender Gestalt II standardized test. On the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2), Student was within the average skill level in verbal and visual memory abilities as well as in attention and concentration skills.

⁸ Harris testified that Mother re-obtained Student's educational rights as of May 5, 2009, through Student's 18th birthday on March 12, 2010.

23. Torvinen conducted the social-emotional portion of the assessment. Torvinen has been the special education coordinator and school psychologist at NVCS for three years and a school psychologist for 22 years. Student's social-emotional skills and behavior characteristics were assessed through the Behavior Assessment for Children, Second Edition (BASC-2), Draw A Person, and reports and observations at school. In Draw A Person, Student drew a smiling girl with pom-poms which appeared generally positive with age-appropriate details. The BASC-2 rating scales were completed by Student; Veronica Castillo, a special education teacher and educational liaison from St. Anne's; and Mother.⁹ The results by all three were consistent with each other.¹⁰ The BASC-2 results indicated that Student was functioning within normal behavior characteristics in all areas. At school, Student socialized with her peers, demonstrated leadership capabilities, and was able to resolve disagreements with peers and staff without adult facilitation. She was motivated to do well in class although her attendance and work completion, after the birth of her child, prevented her from passing all her classes. Torvinen concluded that Student's academic achievement and cognitive functioning were within the average range and Student's "coping skills and behavior have improved since previous IEPs and she does not appear to demonstrate

⁹ Torvinen testified that Harris had informed her that Mother was the best person to complete the BASC-2 rating scales to indicate how Student functioned in the home environment.

¹⁰ Student contends that neither Mother nor Castillo were familiar enough with Student to render an accurate ranking. The BASC-2 contains a selection that the rater does not possess enough information to respond. The scoring will pick up if the rater does not possess enough knowledge to rate the individual. This did not occur here.

continued eligibility for special education services as a student with an emotional disorder at this time.”

NOVEMBER 20, 2009 IEP MEETING

24. On November 20, 2009, an IEP team meeting was held at Crenshaw High School, where Student was currently attending. Even though the assessment was done by NVCS, Harris, on behalf of Student, requested that the IEP team be from Student’s new placement. Attendees included Student; her aunt who was in attendance as her foster parent; Ethel Earley, a special education teacher and coordinator who acted as the administrative designee; R.M. Walker, a special education teacher; A. Beck, a general education teacher; Roichelle Hooks, school psychologist for Crenshaw; C. Harley, a counselor; Harris; and M. Korich.¹¹ The team reviewed Student’s present levels of performance in the areas of math, reading, general ability-cognition and processing, social-emotional, and written language. In math and reading, Student scored in the average range on the WJ-III and Student’s classroom teachers reported that she was an excellent student and did not need any supports or accommodations to access the general education curriculum. In written language, Student’s English teacher reported that she was able to write a five-paragraph essay containing a basic thesis statement and that her writings contained few grammar or punctuation errors. In general ability, the team relied on the Torvinen assessment report to demonstrate that Student does not need special education services or accommodations. In social-emotional, the team relied on the Torvinen report to determine that Student no longer appeared to be a student with an emotional disorder. Hooks, a credentialed school psychologist had

¹¹ Korich is listed as a “DPC.” No evidence was produced to explain this designation.

counseled Student prior to the IEP meeting and felt that the NVCS assessment was “accurate.” Hooks opined that the results from the BASC-2 by each of the raters—Mother, counselor and teacher—showed that Student’s scores were consistent in school and out of school environments.

25. The IEP team determined that Student no longer was eligible for special education services as she does not qualify under the eligibility categories of emotional disturbance or specific learning disability.¹² Student’s aunt did not agree to the IEP as she deferred to Mother. On November 24, 2009, Mother signed the IEP consenting to the IEP but also disagreed with services in that she requested “compensatory time” for the counseling that Student had missed in the preceding two years. The District elected to provide nine compensatory counseling sessions for the sessions Student was not given while at OUCHS.

26. Student admits that as of this date she no longer was emotionally disturbed and/or required special education and related services.

2009-2010 SCHOOL YEAR

27. Because of Mother’s concerns expressed when signing the IEP document, Earley testified that Student was placed in a developmental reading class, which is taught by Earley, to assist her in her English class. The class is a learning center class where a student can get help in class work or receive tutoring if needed. It also allows students a place and time to complete homework. The class is a general education class.

¹² The IEP team also examined whether Student was eligible for special education under the category of specific learning disability (SLD) at the request of Harris, who was in attendance at the meeting. The team concluded that Student’s academic achievement and cognitive functioning did not demonstrate characteristics of SLD.

Student's placement was not for purposes of academic support but rather for mentoring of Student.

28. Following the IEP meeting of November 20, 2009, Alicia Garcia became Student's counselor. Garcia has been a school psychologist for 10 years with the District. She received her B.S. in psychology from the University of California, San Diego, and a M.S. in psychology from California State University, Northridge. She possesses credentials in teaching (general studies) and pupil personal services (counseling). Garcia provides the nine compensatory counseling sessions resulting from Mother's November 24, 2009 request. Garcia provides counseling once a month for 30 minutes, although Student may access her at other times if Student feels the need. Garcia has met with Student for six sessions up to the present. Garcia testified that three more sessions are scheduled. During the sessions, Garcia and Student cover personal issues as well as goal-setting and transition issues since Student will graduate at the end of the 2009-2010 school year. Garcia opined that Student does not need counseling to obtain educational benefit, and Student does not meet the eligibility category of emotional disturbance.

29. Student's first semester marks were A in Library, C in Developmental Reading, B in American Literature, and a failure in Composition.¹³ Garcia testified that Student's failing grade was a result of absences and being tardy as this class was first period. Garcia believed that the absences and tardies resulted from Student's parenting duties. Student has a grade point average of 2.659 and is ranked 140 out of a class of 371.

¹³ Garcia testified that Student did not need the Expository Composition course to graduate high school.

EVIDENCE PRESENTED AS TO PROPOSED REMEDIES

30. Student proposes as an appropriate remedy that Student be (1) given an independent transition assessment and plan at Respondents' expense; (2) provided a cosmetologist kit which she will need to attend cosmetology school; and (3) provided three years of dance classes at a dance school, the Debbie Allen Dance Academy.

Transition Assessment and Plan

31. Student contends that the Respondents have never provided her with a transition assessment and an individualized transition plan. The evidence clearly demonstrated that Student did develop a plan for post-secondary education in that she explored her options for her future including college planning, attending cosmetology school to become a cosmetologist, and attending a dance academy with the prospect of becoming an instructor, at both OUCHS and NVCS within the advisory and workforce development classes. Thus, Student received comparable transition services.

Cosmetology Kit

32. Harris testified that the Respondents have failed to refer Student to the State Department of Rehabilitation which would provide her a cosmetologist kit and place her in a school for cosmetology. Student testified that Crenshaw has referred her to the Department of Rehabilitation where her application is pending. Student offered no evidence as to whether she is or had been in the past eligible for such a program. Harris also admitted that special education is not a requirement to obtain services from the Department of Rehabilitation.

Dance Lessons

33. Student testified that she finds dancing to be therapeutic in that it helps her express her emotions as well as relieves the stress of everyday life. Student seeks to

have dance lessons for a three-year period as compensation for the failure of Respondents to provide her counseling for a three-year period. Student, by her own admission, did not need special education services as she was no longer suffering from emotional disturbance in the 2008-2009 and 2009-2010 school years.

LEGAL CONCLUSIONS

1. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof as to all issues.

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) A FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)

3. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special

education. (20 U.S.C. § 1402(26).) In California, "related services" are referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), 458 U.S. 176 [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 substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only 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*, 458 U.S. 176, 201.)

5. An IEP is a written document that is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) It also must be reasonably calculated to enable the student to receive educational benefit. (*J.W. v. Fresno Unified School District* (E.D. Cal. 2009) 611 F.Supp.2d 1107.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

6. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with student's IEP. (20 U.S.C. § 1401(9).)

7. The term "child with a disability" includes a child with emotional disturbance (ED) who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A).) California law defines "individuals with exceptional needs" as those children who are identified as a "child with a disability," and that impairment "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).)

8. A child may be eligible for special education and related services under the category of emotional disturbance (ED) if the following conditions are met:

Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (i).)

9. A child with disabilities attending a charter school shall receive special education and related services in the same manner as a disabled child who attends a public school of the agency granting the charter. The local educational agency that granted the charter shall ensure that all disabled children enrolled in the charter school

receive special education and related services in compliance with federal and state law. (Ed. Code, § 47646, subd. (a).) Education Code section 47641, subdivision (b), provides that where a local educational agency grants a charter, the charter school may be deemed a public school of the granting agency.

VALIDITY OF THE JANUARY 29, 2007 IEP

10. Student contends that the January 27, 2007 IEP is invalid as the IEP team did not include a general education teacher. Student further contends that the September 26, 2006 IEP is the last valid IEP and should have been implemented by the Respondents.

11. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrong-doing occurred. (*Student v. Vacaville Unified Sch. District* (2004) S.E.H.O case SN 04-1026, 43 IDELR 210, 105 LRP 2671, quoting *Alexopoulos v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555; see also *Parent v. Saddleback Valley Unified School District* (2008) OAH case N2007090371, 108 LRP 45940.)

12. California implements the Individuals with Disabilities Education Act (IDEA) through its special education laws. (*Miller v. San Mateo-Foster City Unified Sch. District* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860.) Education Code section 56505, subdivision (l) provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (See also, *Draper v. Atlanta Ind. Sch. System* (11th Cir. 2008) 518 F.3d 1275, 1288; 20 U.S.C. §1415(f)(3)(c).) The two-year limitation period does not apply if the parent was prevented from filing a due process request due to either (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request, or (2) the local

educational agency withheld information from the parent which is required to be provided to the parent. (See also, *J.L. v. Ambridge Area Sch. District* (W.D. Pa. Feb. 22, 2008) 2008 U.S. Dist. LEXIS 13451, *23-24.) Student does not contend that either of the two exceptions apply to this matter.

13. Student is precluded from contesting the validity of the January 27, 2007 IEP because Student filed her due process request outside the two years of the statutory limitation period which expired on January 27, 2008.

ISSUE 1A: WHETHER THE DISTRICT AND CHARTER SCHOOLS FAILED TO PROVIDE STUDENT WITH A FAPE DURING THE 2007-2008, 2008-2009, AND 2009-2010 SCHOOL YEARS BY FAILING TO PROVIDE COUNSELING SERVICES PURSUANT TO STUDENT'S LAST IEP?

14. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child falls "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Van Duyn*, 502 F.3d at 821.)

2007-2008 School Year

15 Student contends that OUCHS failed to provide counseling services because it was unaware of Student's IEP. Student also alleges that OUCHS failed to obtain Student's academic records which would have indicated that Student had an IEP requiring that she receive counseling one time per month for 30 minutes. Student avers that the District failed to provide OUCHS her academic records including her IEP. The District and OUCHS contend that the actions of Student and Grandmother failed to

inform OUCHS that Student was receiving special education services through an IEP and that Student attended Little Citizens Westside Academy even when specifically asked during the application process. They also contend that (1) Student received counseling in excess of that called for in the January 27, 2007 IEP as the OUCHS program requires their students to participate in an advisory class which deals with personal as well as career and future planning, and (2) Student received counseling through an outside agency by Cheryl Woodruff of the California Institute of Health and Social Services.

16. As discussed above in Legal Conclusions 10 through 13, the operative IEP for the 2007-2008 school year was the January 27, 2007 IEP. That IEP provides Student with one 30-minute counseling session per month for the purpose of aiding her transition to full-time placement on a large public school campus, Gardena High School, in general education classes. Student was able to successfully make that transition as evidenced by her second semester grades and her belief that she no longer had an IEP in effect. (Factual Findings 6 and 7.) OUCHS relied on the misstatements from Grandmother and Student that she did not have an IEP, and the transcript from Gardena, which did not reference an IEP that was in effect, in not implementing the operative IEP. (Factual Findings 8 and 9.) Even so, Student was provided with counseling as part of the OUCHS program in its advisory class as well as the twice per month (for a total of 60 to 90 minutes) counseling by Woodruff provided by an outside agency, which was more than the IEP provided. (Factual Findings 6, 8, and 11.) Student has offered no evidence that the counseling received was not appropriate nor has she offered any evidence that Student was emotionally disturbed as defined in Legal Conclusion 8. In fact, Student succeeded at OUCHS as demonstrated by her grade average of B, with no grade below a C, as well as passing the California High School Exit Examination. (Factual Findings 10 and 11.) Thus, Student has not met her burden of proof to demonstrate that the services provided by OUCHS fell significantly below the services called for in the IEP.

17. Alternatively, mootness describes the doctrine under which courts decline to hear a case because it fails to present an existing controversy. (See *Wilson v. Los Angeles County Civil Service Comm.* (1952) 112 Cal.App. 2d 450, 453.) Here, Mother, when partially consenting to the November 20, 2009 IEP, disagreed with the IEP only as to requesting that Student receive compensatory counseling for the sessions which had not been provided under the operative IEP. (Factual Finding 25.) The District elected to provide nine compensatory counseling sessions for the nine sessions Student did not receive at OUCHS pursuant to the January 27, 2007 IEP. (Factual Findings 6, 8 through 12, 25, 27, and 28.) Since the District has and is providing the compensatory counseling sessions for the 2008-2009 school year, the issue is moot.

2008-2009 School Year

18. Pursuant to Factual Findings 6, and 13 through 20, NVCS implemented the operative IEP and provided Student with monthly counseling sessions with the school psychologist. Additionally as part of its program, NVCS and its partner, St. Anne's, provided personal, career and academic counseling to Student. Thus, Student was unable to meet her burden as to the 2008-2009 school year that she did not receive a FAPE because NVCS provided counseling services in excess to those required in the operative IEP.

2009-2010 School Year

19. Pursuant to Factual Findings 6, and 21 through 26, Student failed to demonstrate that she was denied a FAPE during school year 2009-2010. Student was found not eligible for special education under the category of ED. Therefore, Student was not entitled to receive special education or related services. Student offered no evidence to counter the determination of the Crenshaw IEP team; and Student, herself,

admitted that she was no longer emotionally disturbed and needed counseling or to be in special education.

ISSUE 1B: WHETHER THE DISTRICT AND THE CHARTER SCHOOLS FAILED TO PROVIDE STUDENT WITH A FAPE DURING THE 2007-2008, 2008-2009, AND 2009-2010 SCHOOL YEARS BY FAILING TO CONDUCT 30-DAY REVIEWS AND ANNUAL IEPs EACH YEAR?

Procedural Violations

20. A procedural violation constitutes the denial of a FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n. 3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.2d 877, 892.)

Failure to Hold a 30-day Review IEP Meeting after Student Transferred to a New School

21. Student contends that the Respondents committed a procedural violation of the IDEA by failing to hold an IEP team meeting within 30 days of Student transferring to OUCHS, NVCS and Crenshaw High School. Student cites no authority in support of her position.

22. As mentioned in Legal Conclusion 9, both OUCHS and NVCS are considered public schools of the District. California law provides that a charter school is

part of a special education local planning area (SELPA). (Ed. Code, § 47641, subd. (a) and (b).) When a student, with an IEP, transfers to another school district which is part of the former district's special education local planning area in the same academic year, the receiving district shall continue the IEP unless the parent and the local educational agency agree to develop, adopt, and implement a new IEP. (Ed. Code, § 56325, subd. (a)(2).)

23. Pursuant to Factual Findings 8 and 13, OUCHS and NVCS are deemed public schools of the District and are not required to hold an IEP team meeting within 30 days of Student transferring to the charter schools.

FAILURE TO HOLD ANNUAL IEP TEAM MEETINGS

24. A district must hold an IEP team meeting to review the student's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revise the IEP as appropriate, to address other matters such as lack of progress in reaching the annual goals, assessment results, additional information provided by the parents, and the pupil's changing needs. (Ed. Code, §§ 56341.1, subd. (d).)

25. Student contends that the Respondents committed a procedural violation of the IDEA by failing to hold an annual IEP team meeting after the January 27, 2007 IEP meeting.

26. Pursuant to Factual Findings 8 through 11, there is no dispute that OUCHS failed to hold an IEP team meeting during the 2007-2008 school year. OUCHS was unaware of the fact that Student had an operative IEP in place because of the misstatements of Student and Grandmother as well as the failure of the District to provide it with Student's educational records. OUCHS made two or three attempts to obtain Student's records. OUCHS should have made further attempts to obtain Student's educational records from the District. As stated in Legal Conclusion 9, the

SELPA, here the District, is responsible to ensure that charter schools comply with federal and state law. Thus, Student has demonstrated that the District did commit a procedural violation of the IDEA by failing to ensure that an annual IEP meeting was held during school year 2007-2008.

27. Pursuant to Factual Findings 15, 16, 19, and 21 through 25, NVCS failed to hold an annual IEP team meeting after it was discovered that Student did have an IEP which was dated January 27, 2007. Thus, Student has demonstrated that NVCS and the District, in its role as the SELPA, did commit a procedural violation of the IDEA by failing to conduct an annual IEP team meeting.

28. Pursuant to Factual Findings 24 and 25, the District did not commit a procedural violation of the IDEA during school year 2009-2010 in that an annual IEP meeting was held on November 20, 2009.

29. Pursuant to Legal Conclusions 1 and 20, Student has the burden of proof to demonstrate that the procedural violation resulted in the denial of a FAPE. The January 20, 2007 IEP team found that Student no longer was in need of special education or related services as she had met all her goals. The team did make available a single monthly 30-minute counseling session in case to assist Student to being a full-time general education student on a large public high school campus. Student's guardian, Grandmother, consented to the IEP. Student has offered no evidence that she required IEP services or that she would have still been eligible under ED as she had succeeded academically, was able to maintain interpersonal relations, did not engage in inappropriate types of behaviors or feelings, did not exhibit a pervasive depression or unhappiness, nor had a tendency to develop physical symptoms or fears associated with personal or school problems. (Factual Findings 6 through 26.)

ISSUE 1C: WHETHER THE DISTRICT AND THE CHARTER SCHOOLS FAILED TO PROVIDE STUDENT WITH A FAPE DURING THE 2007-2008, 2008-2009, AND 2009-2010 SCHOOL YEARS BY FAILING TO ADOPT AN IEP WITH APPROPRIATE ANNUAL GOALS AND OBJECTIVES?

30. Federal and state law generally require that the IEP contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.320(a)(2)(i)(ii) (2006); 34 C.F.R. part 300, Appendix A, Q.1 (2006); Ed. Code, § 56345.) The appropriateness of placement can only be examined by looking to the implementation of the goals and objectives. In developing an IEP, the IEP team shall consider the strengths of the child, the results of the initial evaluation or the most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area of which a special education student has an identified need, the IEP team must develop measurable goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

31. For school year 2007-2008, there is no dispute that neither OUCHS nor the District held an annual IEP meeting nor developed an IEP. (Factual Finding 26 and Legal Conclusions 8 through 11.) For school year 2008-2009, neither NVCS nor the District conducted an annual IEP meeting. (Factual Finding 27 and Legal Conclusions 15, 16, 19, and 21 through 25.) Thus, Student has demonstrated that the Respondents committed a procedural violation of the IDEA for those school years.

32. For school year 2009-2010, the District held an annual IEP team meeting. The team reviewed the assessment conducted by NVCS personnel and discussed

Student's present levels of performance and whether or not she was still eligible for special education. Because the IEP team found that Student was no longer eligible for special education, the District did not commit a violation of the IDEA. (Legal Conclusions 6, and 21 through 26.)

33. For school years 2008-2009 and 2009-2010, Student did not meet her burden of proof that Respondents deprived her of a FAPE. The evidence demonstrated that Student did not require IEP services nor that she would have continued to be eligible for special education under ED as she had succeeded academically, was able to maintain interpersonal relations, did not engage in inappropriate types of behavior or feelings, did not exhibit a pervasive depression or unhappiness, nor had a tendency to develop physical symptoms or fears associated with personal or school problems. (Factual Findings 6 through 26.) Thus, Student has failed to meet her burden to demonstrate that the Respondents committed a procedural violation of the IDEA by failing to adopt an IEP with appropriate annual goals and objectives.

ISSUE 2: WHETHER THE DISTRICT FAILED TO OFFER STUDENT A FAPE BY FAILING TO PROVIDE A TRANSITION ASSESSMENT AND TRANSITION PLAN FOR THE 2008-2009 AND 2009-2010 SCHOOL YEARS?

33. Beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must contain a transition plan that contains appropriate measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. The plan must also contain the transition services needed to assist the pupil in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); (Ed. Code, § 56345, subdiv. (a)(8).)

34. "Transition services" means "a coordinated set of activities for an individual with exceptional needs" that: (1) is designed within a results-oriented process that is

focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (2) is based upon the needs of the pupil, taking into account the strengths, preferences, and interests of the pupil; and (3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and the provision of vocational education. (20 U.S.C. § 1401 (34); Ed. Code, § 56345.1, subd. (a).)

35. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief upon a showing of a loss of educational opportunity or the denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan be “deferred” was a procedural violation]; *A.S. v. Madison Metro School District* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as a procedural violation]; see also *Virginia S. et al v. Dept. of Education State of Hawaii* (D. Hawaii, January 8, 2007, Civ. No. 06-00128) 2007 U.S. Dist. Lexis 1518 [transition plan violated procedural requirements of the IDEA, but was ultimately found to be a harmless error, when it was not based on an interview with the student or parents, did not reference student’s interests, and which generically described post-secondary goals as graduation from high school and employment following post-secondary education].)

2008-2009 SCHOOL YEAR

36. Pursuant to Factual Findings 9, 27, and 31, and Legal Conclusions 15, 16, 19, and 21 through 25, NVCS and the District failed to hold an annual IEP team meeting

during the 2008-2009 school year and also failed to conduct a transition assessment and create a transition plan. Thus, NVCS and the District have committed a procedural violation of the IDEA.

37. As stated in Legal Conclusion 20, Student must also demonstrate that the procedural violation resulted in Student being denied a FAPE. NVCS incorporates in its program a workforce development class and an advisory class to assist its students in planning for post-secondary school life including academic planning, career planning and independent living skills. Student admitted that she participated, and is still participating, in this program as she received instruction in how to obtain employment and resume-writing; investigated going to a four-year or community college; and received, and is still receiving, assistance in obtaining an internship. Additionally, Student was provided courses in dance and cosmetology at NVCS, which were areas identified by Student where she desired to find employment. (Factual Findings 13 through 20.) Thus, Student has not demonstrated that she was deprived of any services which may have been provided for her had an IEP team meeting been held as she received services comparable or exceeding what she may have gotten with an IEP.¹⁴

2009-2010 SCHOOL YEAR

38. This issue is moot as the IEP team found that Student no longer was eligible for special education on November 20, 2009. (Factual Findings 19 and 32, and Legal Conclusions 6 and 21 through 26.)

¹⁴ Alternatively, as stated in Legal Conclusion 33, the evidence demonstrates that had an IEP team meeting been held during the 2008-2009 school year, Student would not have been found eligible for special education under the category of ED.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: June 3, 2010

_____/s/_____

ROBERT F. HELFAND

Administrative Law Judge

Office of Administrative Hearings