

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COMPTON UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011061439

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in Compton, California, on October 3-6, 2011 and October 10, 2011.

Rosa K. Hirji, Attorney at Law, represented Student. Heather S. Zakson, Attorney at Law and Ms. Rosalee Villalobos, Student's educational rights holder, were also present on behalf of Student.

Daniel L. Gonzalez, Attorney at Law, represented Compton Unified School District (District). Ms. Jennifer O'Malley Special Education Administrator for District was present on behalf of the District.

On June 29, 2011, Student filed a request for due process hearing (complaint). The matter was continued on August 17, 2011. Oral and documentary evidence were received at the hearing. At the close of the hearing, the matter was continued to October 24, 2011, for the submission of closing briefs. On that day, the briefs were filed, the record was closed, and the matter was submitted.

## ISSUES<sup>1</sup>

A. Whether District denied Student a free appropriate public education (FAPE) from June 29, 2009, including the extended school year (ESY), and the 2009-2010 school year by:

- 1) Failing to provide services comparable to a June 2009, Individualized Educational Program (IEP) from another school district, during the first 30 days of enrollment in District or within the first 30 days of the 2009-2010 school year;
- 2) Failing to develop, adopt or implement a new IEP within thirty 30 days of Student's transfer into District or within the first 30 days of the 2009-2010 school year;
- 3) Failing to have an IEP in effect at the commencement of the 2009-2010 school year up to the February 25, 2010, IEP;
- 4) Failing to provide Designated Instruction and Services (DIS) counseling services from the date of enrollment in District to February 25, 2010;

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<sup>1</sup> At the Prehearing Conference the ALJ dismissed the following issues on the ALJ's motion on the grounds they were either redundant, not relevant to the claims raised in Students complaint, or outside of OAH:

- 1) Whether District failed to provide a FAPE by failing to provide records prior to a previously scheduled due process hearing; and
- 2) Whether District failed to provide a FAPE by failing to take reasonable steps to promptly obtain student records from the school Student last attended within two business days of his enrollment.

- 5) Failing to provide Resource Specialist Program (RSP) support from the date of enrollment in the District up to January 26, 2010;
- 6) Failing to reassess Student subsequent to January 22, 2010 IEP team meeting in the area of Specific Learning Disability (SLD) despite the evidence of lack of progress in the 2009-2010 school year;
- 7) Failing to conduct a Speech and Language assessment during the triennial evaluations in the 2009-2010 school year?
- 8) Failure to provide the DIS services and RSP services offered in the February 18, 2010, IEP;

B. Whether District denied Student a FAPE from the June 2010 IEP through the end of the 2010-2011 regular school year by:

- 1) Failing to write appropriate goals in reading and mathematics;
- 2) Failing to offer an appropriate placement in a special day class (SDC);
- 3) Failing to consider and provide reading and math intervention, based upon peer-reviewed research to the extent practicable, and specialized services to address Student's Attention Deficit Hyperactivity Disorder (ADHD);
- 4) Failing to offer an appropriate amount of DIS counseling services; and
- 5) Failing to provide an Adult Assistant?

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 17-year-old male who lived with his foster parent within the boundaries of the District at all relevant times. He received special education and related services because he was eligible as a child with other health impairment (OHI) due to his ADHD and a specific learning disability (SLD) with deficits in visual processing.

2. Student is a foster child and is a dependent of the Los Angeles County Juvenile Dependency Court (Juvenile Dependency Court). Student had been removed

from his mother's care and lived with his grandmother until she could no longer care for him. He was then placed in several different foster homes over a short period of time. However, Student's grandmother continued to hold Student's educational rights up until the spring semester of the 2009-2010 school year.

3. Student's school records for the 2008-2009 school year in the Los Angeles Unified School District (LAUSD) shows he attended Inglewood High School in the ninth grade for the first semester in a general education program. There, he failed Algebra I, Earth Science and PE, and received a "D" in English I and Beginning Band. For the second semester, he attended Huntington Park High School (HPHS) where he was enrolled in a general education program with RSP up through June 22, 2009. Student's class schedule included courses in Algebra IB, Developmental Reading B, English 9B, Biology B, Health, and Advanced PE 2B. Student had difficulty in social interaction with his peers, which often resulted in fights at school. He had difficulty attending classes and completing his class work.

4. LAUSD convened Student's annual review IEP team meeting on June 15, 2009. LAUSD was given notice that Student was moving to a new foster home in the Compton Unified District. The IEP team included Student's new foster parent, Ms. Lakeisha Harris, an Educational Consultant, who was contracted with the Los Angeles County Department of Children and Family Services (DCFS) to assist Student and grandmother, Student's social worker, and the LAUSD IEP team. Student's grandmother was not present and had given permission through Ms. Harris for the IEP team to proceed with the development of his IEP for the 2009-2010 school year. The IEP team confirmed that Student remained eligible for special education services under the disability category of OHI. The team discussed Student's unique needs in Behavior, Reading, Writing, and Mathematics, his failing grades in his core subjects, the lack of educational progress in his general education curriculum with RSP, his behavior

problems including difficulty with peer relationships, the continuing need for a behavior support plan (BSP), and his need for ongoing counseling. The IEP team also discussed Student's transition to a new school outside of LAUSD. The IEP team discussed Ms. Harris' request for a psychological assessment for possible emotional disturbance and a functional behavior assessment (FBA) at the next triennial evaluation due in June 2010.

5. The June 15, 2009 IEP contained present levels of performance and goals and objectives in his areas of need and a BSP. The IEP offer for the 2009-2010 school year included continued placement in a comprehensive public high school in a general education classroom and offered services as follows: (1) DIS Counseling and Guidance once per week for 30 minutes; (2) RSP given under a collaboration/consultation model in Reading and Writing three times weekly for 60 minutes each session, and Mathematics three times weekly for 60 minutes each session; (3) Instructional accommodations and supports in the form of graphic organizers, visual aides, frequent comprehension checks, close teacher oversight and availability during class assignments, and seating arrangements to avoid distractions; (4) Progress reports issued every four weeks; and (5) A remediation program to improve test-taking skills to pass the California High School Exit Examination (CAHSEE). The offer included extended school year (ESY) for summer 2009 in a general education classroom for credit recovery to make up Student's missing credits. Student's grandmother consented to the IEP.

6. Student's last day of attendance in the LAUSD was June 22, 2009. As of that date Student had failing grades in Biology, English, Developmental Reading, Health and Advanced PE, and received a passing grade of "C" in Algebra 1B.

7. Student transferred and registered in the District on June 29, 2009. Both Student's foster parent and his grandmother completed a registration information packet provided by District and submitted the forms to District along with a copy of

Student's transcripts and the June 15, 2009, IEP. The foster parent and grandmother notified District that Student was a special education student with an IEP.

8. On June 30, 2009, Student's grandmother submitted a District Permission for Special Education form and requested permission for a special education placement for Student. District staff noted on the form that Student was a tenth grade RSP student with counseling and guidance services. District staff also noted on the form that a 30-day review was due October 5, 2009.

9. Thereafter Student attended ESY at Compton High School in the District where he took a credit recovery class to regain credits for Algebra IA and Earth Science which he failed in the first semester of the 2008-2009 school year. Student provided an additional copy of the June 15, 2009, IEP to District staff when he enrolled at Dominguez Hills High School (DHS) in the tenth grade in August 2009.

#### THE 2009-2010 SCHOOL YEAR

10. The first day of instruction for the 2009-2010 school year was August 31, 2009. Student was placed in a general education class taught by Mr. George Arroyo. Student's class curriculum included Spanish I, English II, College Prep Geometry, College Prep World History, General Biology, and Advanced Band II. Student was also given a credit recovery class to pass Earth Science and Algebra.

11. Mr. Stephon Brown, who was Special Education Director and an RSP teacher at DHS, was responsible for identifying and implementing special education programs for special education students entering DHS. He testified that as part of his routine for implementing special education programs he created a data base identifying special education students within a few weeks of the start of the school year. Once he reviewed the data base he would give a list of special education students to his teachers and created a document called a student passport. The student passport initiated the process of implementing a student's special education services by

providing each teacher with the passport. He did not recall when he first saw the records including Student's June 2009 IEP. However, he assigned himself as Student's Case Manager and focused on Student's classes to collaborate with his teachers to provide RSP services in English and Math. Mr. Brown stated that he provided each of Student's teachers with his IEP and notified each one that Student had RSP and counseling services. He does not know when he acted on Student's program but he believed it was before the end of the first quarter of the fall semester which would have been nine weeks into the semester.

12. During the first half of the first quarter of the fall semester Mr. Brown changed Student's class schedule in Geometry and English without notice to Student, his foster parent or his grandmother. Student's first quarter progress grade report showed Student was failing Geometry, English II, and Advanced Band II. He received a "D" in General Biology and "D minus" in World History and Spanish I. Student also withdrew from the Credit Recovery class because the class required independent study by computer which Student could not do without support.

13. Student started being truant from classes by not returning to class after leaving for one reason or another, or by just walking out of class. He felt the classes were "too hard" and he could not do the work without someone there to help or support him. He often became frustrated when encountering a subject that he could not understand.

14. Mr. Brown testified that he instructed his Instructional Aide, Ms. Hughes, to begin providing RSP services to Student on both a pull out and push-in basis before the end of the fall semester but he did not recall if he documented those services in the RSP log.

15. According to the District school year calendar the first quarter of the fall semester ended on November 2, 2010.

16. On November 23, 2009, Mr. Brown sent a Student Red Flag Report to Mr. Woods, Mr. Qayyum, Ms. Yap, Ms. Carter, Mr. Guimaraes, and Mr. Onwudiwe, Student's first and second quarter teachers informing them that Student was either failing or in danger of failing his classes and he requested they report Student's progress.

17. Mr. Woods, Student's English II teacher, responded and confirmed that Student had been removed from his class at the end of the first quarter because of his absences and failure to complete homework. Student had been placed in Ms. Montielh's English II class where he remained for the school year.

18. On November 24, 2009, Mr. Qayyum, Student's Geometry teacher for most of the 2009-2010 school year except for two weeks before the end of the first quarter and the beginning of the second quarter of the fall semester, and who testified at hearing, reported that Student had difficulty attending, difficulty reasoning logically, failed to finish tasks that he started, performed inconsistently, coped poorly with change, was easily upset by failure, had a confused sense of time/space/direction, moved around inappropriately, and was frequently late and/or absent from class.

19. Student was transferred to Ms. Yap's Geometry class from Mr. Qayyum's class. Mr. Brown brought Student to her class and informed her that he was an RSP student. She did not modify the curriculum for him but some special education teachers came to her class once or twice per week to monitor the RSP students in her class. She was not sure if Student was monitored during that time. Within a two week period Student was returned to Mr. Qayyum's class where he remained for the 2009-2010 school year.

20. Ms. Yap, who testified at hearing, reported to Mr. Brown that during his brief time in her class, Student failed to submit most of his assigned work. She was also concerned about his unverified absences, test performance, study/preparation habits, on-task behaviors, and classroom behaviors. Specifically, Student seemed more



interested in his classmates' conversations than task completion. She gave him an "F" for the first quarter grade. Ms. Yap recommended that Student needed more assistance, would be more successful with one-to-one instruction, and that Student was not sufficiently prepared to be successful in Geometry.

21. Student was also having difficulty in Band II class because he could not read the music and did not have instructional supports to help him. He would become frustrated and leave class or sit and not do the work.

22. Sometime between the first and second quarter of the fall 2009 semester, Student's foster parent and his educational consultant inquired about District's failure to convene the 30-day IEP. Foster parent met with Mr. Brown and expressed his concern that Student's program was not being implemented and Student was not attending classes or doing his class work. District notified foster parent and Ms. Harris that District would convene an IEP in January 2010.

23. On December 14, 2009, Mr. Brown requested that a District resource teacher assess Student using the Wide Range Achievement Test-Fourth Edition to get a current baseline of Student's deficits and areas of need. Test results showed Student had a 4.5 grade level word reading ability, a 4.9 grade level sentence writing ability, and a 5.1 grade level ability in math computation.

24. As of the end of the fall semester in mid January 2010, Student's Spanish, Biology, and World History teachers reported that Student continued to demonstrate a pattern of absenteeism and tardiness, poor class participation, missing class work and/or homework, inattentiveness in class, poor study habits, and low test scores. Mr. Gregory Sayles, Student's World History teacher for the 2009-2010 school year, credibly testified that he did not recall seeing Student's IEP. While he thought Student could do the work in his class Student's effort was sporadic, he lacked continuity in the tasks he was assigned, and he failed to study for tests.

25. Student received the following grades at the end of the fall semester of the 2009-2010 school year: "D" in Spanish I; "C" in English II; "C" in College Prep Geometry; "D minus" College Prep World History; "D plus" in General Biology; and "C minus" in Advanced Band II. The "C" grade in Geometry was a scaled grade based upon an alternative grading system used by Mr. Qayyum.

26. The fall semester of the 2009-2010 school year ended on January 22, 2010. Student credibly testified that he did not start getting RSP support from Ms. Hughes until sometime after the end of the fall semester. Student's testimony was supported by the RSP counseling logs which documented that the first RSP session took place on January 26, 2010. Student also estimated that he did not receive counseling until a few weeks before the end of the fall semester which ended on January 22, 2010. Takeisha Millender-Johnson, School Psychologist was responsible for counseling services. She testified in accordance with her counseling log that she provided counseling to Student starting February 25, 2010. Student neither received the services prescribed in the June 15, 2009, IEP in the fall semester nor did District convene Student's 30-day review IEP or implement his IEP at the beginning of the school year.

#### JANUARY 22, 2010 IEP

27. District convened an IEP team meeting on January 22, 2010. The meeting was convened as the 30-day review IEP. Student, his foster father, Ms. Harris, and his social worker attended the meeting. District staff included Mr. Stephon Brown; Mr. Robert Klass, Student's school counselor; and Ms. Jeanette Ibrahim, the general education RSP teacher in English. As of January 22, 2010, grandmother still held educational rights. District did not know who held Student's educational rights and failed to notify grandmother of the meeting. At the meeting Ms. Harris informed District that grandmother was the educational rights holder. As a result, the meeting could not go forward because grandmother would not authorize the IEP meeting to

proceed. No formal IEP offer was made at this meeting, but those present discussed Student's transition to DHS, and his record of truantcies from class. Ms. Harris and foster parent objected to District's delay in convening the 30-day IEP. Foster parent further expressed his concern that Student had not received RSP services and his concern for Student's lack of progress in the general education classes. Foster parent suggested to the IEP team that Student would do better in a more structured environment such as in a special day class (SDC). Ms. Harris demanded compensatory time for educational services, DIS counseling services, and dance therapy for the delay in implementation of Student's June 2009, IEP. Based upon the discussions, District later prepared a draft IEP dated January 22, 2010, documenting Student's present levels of performance as determined by the December 2009 assessment, prepared goals and objectives, and offered a program and services, including a BSP. District rescheduled the IEP team meeting to February 18, 2010, and provided grandmother notice.

28. District convened the February 18, 2010 IEP team meeting. The purpose of the meeting was to conclude Student's initial 30-day IEP and Annual IEP since transferring to District. This IEP meeting was also a triennial review to address the concerns raised in the January 22, 2010 meeting about Student's difficulties in band class and Student's demands for compensatory DIS counseling services. Student's foster parent was present and Ms. Harris was present on behalf of Student and his grandmother. District IEP team members included Mr. Brown; Ms. Lolita Carter, band teacher; Ms. Jeanette Ibrahim, resource specialist teacher in English; Mr. Bobby Walker, assistant principal; Ms. Lori Johnson, program specialist; and Mr. Klass. The team discussed the RSP being provided to Student in his eighth period band class, and District's plan to enroll Student in an after school credit recovery program. Student was now receiving RSP from Ms. Hughes twice per week both on a push-in and pull-out basis. Mr. Simmons and Ms. Harris expressed their concern that Student continued to

struggle in a number of his classes and Student needed a credentialed teacher and not an instructional aide to provide RSP. In response to Ms. Harris' previous request for compensatory counseling services, District offered 10.5 hours of compensatory counseling services, in addition to the 30 minutes of counseling per week Student was currently receiving, to be provided at the school site 60 percent of the time by the school psychologist and 40 percent of the time by a guidance counselor or another individual qualified to provide DIS counseling services. Ms. Harris rejected the offer as she requested 100 percent of compensatory counseling be provided by the school psychologist because she believed that school guidance counselor was not as qualified to provide the services Student needed.

29. The IEP team discussed Student's present levels of performance as determined by the December 2009 assessment. The team also discussed the goals and objectives established in the areas of need in Reading, Writing, Math, Social/Emotional and Behavior, Training, Education, and Independent Living. The IEP goals remained the same. The IEP placement offer remained the same, with a BSP and related services including (1) RSP three times per week for 60 minutes per session; (2) DIS counseling once per week for 30 minutes; (3) Transitional vocational assessment, career counseling, and career guidance once per month for 30 minutes; (4) Transitional college awareness once per day for 30 minutes; (5) Transitional work experience education once per month for 30 minutes; and other transition services, which were not defined, once per month for 30 minutes. Grandmother consented to the IEP.

30. Student continued to struggle during the second semester of the 2009-2010 school year. As of the fourth quarter grade report Student failed Spanish I, Geometry, and Credit Recovery (for Earth Science). He received a "D" in World History, and Advanced Band II. The only grade designation he received for English II and Biology was "P" for Passing. In addition, the California Standardized Testing and Reporting

(STAR) Program Report for spring 2010, showed Student scored "below basic" in English/Language Arts and Life Science and "far below basic" in Geometry, World History, and Biology.

31. The Juvenile Dependency Court transferred Student's educational rights to foster parent on March 25, 2010. On April 27, 2010, District prepared an Assessment Plan in preparation for Student's triennial IEP. The Assessment Plan proposed a comprehensive psychoeducational evaluation of Student in the areas of Academic Achievement, Social, Adaptive, Behavioral, and Emotional Functioning, Processing, Perceptual/Motor Development, Cognitive Development, and a Health Assessment. Foster parent consented to the assessment on April 30, 2010.

32. Ms. Millender-Johnson, a credentialed school psychologist assigned to DHS, assessed Student on May 11 and May 13, 2011.

33. The test instruments used in the assessment included a record review; Student/Parent/teacher interviews; observations; the Behavior Assessment Scale for Children-Second Edition (BASC-2 PR, TR, SR); the Berry Bucktenica Developmental Test of Visual Motor-Integration (VMI); Attention Deficit Hyperactivity Disorder Test (ADHDT); Test of Auditory Perceptual Skill-3rd Edition (TAPS-3); Test of Visual Perceptual Skills-3rd Edition (TVPS-3); Woodcock Johnson Achievement Test-(WJ-III); The Differential Ability Scales-Second Edition (DAS-2); and the Naglieri Nonverbal Ability Test (NNAT). A vision and hearing screening was also conducted.

34. The report noted that as of the assessment, Student had completed only 57 credits out of 220 needed toward his high school diploma and had earned a failing cumulative grade point average of .84. Student also had not passed the CAHSEE. Student's teachers reported that Student had truant behavior and was not always in class on time or would sometimes make excuses to leave and remain gone for an extended period of time, which ultimately minimized his opportunities to get his class

work done timely. School attendance records indicated that although Student only had three full day absences from school he had 13 period absences or tardies among various classes.

35. The DAS-2, the NNAT and TAPS Cohesion subtest were administered to measure Student's cognitive functioning. The DAS-2 test result showed Student's verbal cognition ability standard score was 109, in the average range. Student's overall performance on the NNAT showed that his non verbal ability was within the average range and was equal to or higher than that of 30 percent of same-aged peers. The results of the TAPS Cohesion subtest, which was used as an alternative measure to assess Student's verbal ability, yielded an average standard score of 108, which was in the 70th percentile.

36. The VMI, TAPS-3, and the TVPS-3 were administered to measure Student's psychological processing. On the VMI, Student's overall standard score of 74 (fourth percentile) was below average. The results indicated that Student had difficulty completing non-timed assignments or other eye-hand coordinated activities. The results of the TAPS-3 showed Student's overall auditory processing skills standard score of 91 was in the average range. His phonological awareness ability standard score of 99 was within the average range. Student's ability to recall contextual and non-contextual information standard score was 76, in the below average range. The report noted a relative weakness in recalling numbers in reverse order, words and recalling sentences of increasing length and complexity in linear order. The auditory cohesion subtest showed that Student had auditory cohesion abilities in the average range. The overall results of the TAPS-3 subtests indicated that Student was likely to succeed with instructional information presented aurally. The TVPS-3 was administered to determine how a child processes visual information without written answers, yielded a standard score of 84, in the low average range.

37. The BASC-2 (PR, TR, SR) and the ADHDT were administered to assess Student's social/emotional functioning. The BASC-2 results showed Student's tendency to externalize problems and that his behavior symptoms were in the clinically significant range. These results suggested a high level of maladjustment. The results for internalizing problems and adaptive skills were in the at-risk range. An "at risk" result indicated a problem that may not be severe enough to require formal treatment, or a potential problem, such as depression, that needed careful monitoring. The results of the ADHDT showed that Student fell within the range of high probability of symptoms of ADHD.

38. As to language and speech, the report noted that Student reciprocated communication with the examiner without complication and used appropriate conversational proficiency. Ms. Millender-Johnson concluded that Student did not appear to have difficulty expressing himself to others.

39. The academic test results reported in the WJ-III test scores showed that Student's overall academic achievement standard score was 77, which is in the below average range for his age and equivalent to a 5.6 grade level. His broad reading skills standard score of 81 was in the low average range and was the equivalent to grade level 5.9. His basic reading skills standard score of 81 was equivalent to a 5.0 grade level. Basic reading measures sight vocabulary, phonics, and structural analysis. His reading comprehension standard score of 82 was equivalent to a 5.9 grade level. Reading comprehension measures the ability to read and understand varying information. The report noted that on the WJ-III Student's basic reading and comprehension abilities were relatively equal.

40. Student's broad math skills standard score of 73 was within the below average range and equivalent to the 5.0 grade level. His math calculation standard score was in the low average range and equivalent to the 6.0 grade level but his

calculation skills were reported as a relative strength. Student's math reasoning standard score of 69 was in the well below average range and equivalent to a 3.0 grade level, indicating an area of weakness.

41. Student's broad written language skills standard score of 82 was within the low average range and equivalent to the 6.0 grade level. Student's spelling standard score was in the low average range and was equivalent to the 5.0 grade level. Overall, when not penalized for spelling or grammatical errors, Student's ability to express his thoughts in written form was in the low average range.

42. On May 24, 2010, Ms. Millender-Johnson wrote a Psychoeducational Assessment Report. Ms. Millender-Johnson reported that Student's cognitive ability was in the average range and verbal and nonverbal reasoning skills were equal. Student's auditory processing skills were average. His visual perceptual skills were in the low average range and he had a visual perceptual weakness in basic processing. Student's visual-motor integration skills were low average. He appeared to have difficulty with correctly replicating information represented visually. Ms. Millender-Johnson concluded that the area of weakness that most impacted Student's grades and overall academic performance was attention. Teachers and foster parent reported that Student exhibited difficulty maintaining levels of attention necessary to complete assignments timely. Student's impulsive and hyperactive behaviors were also disruptive to the learning environment. The most significant areas of weakness appeared in the area of math reasoning and attention.

43. Ms. Millender-Johnson concluded that Student remained eligible for special education services under the disability category of OHI due to ADHD. She also concluded that Student was eligible under the disability category of Specific Learning Disability (SLD) due to a severe discrepancy between his cognitive ability and academic



achievement in the area of math reasoning as the result of processing deficits in attention and visual perceptual skills.

44. The report contained the following recommendations: (1) for the IEP team to discuss placement and service options; (2) close monitoring of Student's progress and behavior; (3) continued reinforcement of acceptable behavior and positive feedback; (4) increased communication between home and school about incomplete class and homework assignments and other inappropriate classroom behaviors; (5) teacher reinforcement of the rules and explanation of expectations to motivate Student to complete assignments; (6) encourage Student to keep a chart or graph of the number of incomplete and completed assignments; (7) assign shorter tasks and modify assignments to Student's attention level to better assist with overall class productiveness; (8) follow a less desirable activity with a highly desirable task; (9) reduction of distracting stimuli at home and in school, e.g. providing front row seating; (10) frequent teacher-Student interaction calculated to maintain Student involvement in class activity; (11) positive re-direction of Student by teacher in class to maintain Student's focus on a task.

#### JUNE 8, 2010 IEP

45. District convened the triennial review IEP on June 8, 2010. Student, his foster parent, and Ms. Harris attended the meeting. District IEP team members included Mr. Brown, Mr. Walker, Ms. Monteilh, English II teacher, Ms. Millender-Johnson, and Ms. Hughes. Ms. Millender-Johnson presented the Psychoeducational Assessment Report that concluded Student's primary disability was OHI due to ADHD and his secondary disability was SLD. Ms. Milleinder-Johnson discussed the teachers' comments and concerns in the assessment about Student's academic and social progress. Specifically, Student's World History teacher commented that he was not doing his class work and he was late starting tasks after being prompted. English II teacher Ms. Monteilh

commented that Student got off track when required to work independently because of his tendency to socialize in class. Band teacher Ms. Carter commented that Student did not keep up his music book or ask for help, and he attended class only to socialize with his classmates. Finally, Credit Recovery teacher Ms. Worthy commented that Student sat idle in class for 55 minutes or more and would not complete his work.

46. The team discussed Student's failure to pass the CAHSEE and his below/far below basic standard scores on the spring 2010 STAR. Foster parent discussed his concerns that Student was behind and would not have enough credits to graduate on time. Ms. Harris also expressed the concern that Student needed placement in a smaller more structured setting or a SDC. Mr. Brown suggested that perhaps a general education/SDC program might be feasible for Student. Student rejected the idea of an SDC because he did not want to be identified as a special education student. Ms. Harris requested an additional adult assistant (AAA) or a one-to-one aide for Student in his academic classes and for transitions to classes, which would address his truancy. The District agreed to provide an AAA, named Mr. Tall. Ms. Harris suggested the use of supplemental reading materials and the use of voice recognition software such as "Dragon" to assist Student in accessing the general education curriculum. Although not present, Student's attorney had emailed her concerns, which were discussed by the team. The attorney's concerns were that Student had been failing classes for several years and had not made educational progress and that a general education placement with RSP was not working for Student. Student's attorney requested District team members offer reading, math and writing interventions to bring Student up to grade level such as "Read 180", tutoring, and one-to-one assistance. Student's attorney also requested RSP be provided to Student solely on a pull-out basis more for individual support. Both Ms. Harris and Student's attorney requested that a credentialed school psychologist should provide all of Student's DIS counseling needs at the current level of

services. The District IEP team members did not believe Student needed the current level of services going forward because his behavior had improved. Ms. Harris reiterated the demand for compensatory time in educational services, DIS counseling for the period of September 2009 to February 18, 2010, and dance therapy.

47. The IEP team drafted annual goals and objectives in Reading, Math, Social/Emotional/Behavioral, Independent Living Skills goals and Post-Secondary Training, Education, Employment. The IEP also included a Transition Plan.

48. The Reading goal was for vocabulary and concept development and stated "By (4th quarter 2011), when given grade level literary text [Student] will discern the meaning of analogies encountered, analyzing specific comparisons as well as relationships and inferences with 75 percent accuracy in three of four trials as measured by teacher observation." The baseline for this goal according to the WRAT-4 established Student's word reading ability at a 4.8 grade level and sentence writing ability at 4.9. The WJ-III reading subtest scores were also referenced. The IEP noted the reading levels indicate Student is able to access and comprehend grade level text and Student would benefit from repetitive assignments to reinforce basic reading and promote higher level thinking.

49. The Math goal was for math calculation and reasoning in Algebra II and stated "By (4th quarter 2011), when given a series of multi-step linear problems and word problems independent reading level, involving one variable, [Student] will solve linear equations and inequalities involving absolute value with 75 percent accuracy in three out of four trials as measured by student work samples/criterion assessment." The baseline for this goal referred to the results of the WJ-III math subtests which established Student's abilities at grade level as follows: broad math 5.0, brief math 4.9, calculation skills 6.0, math reasoning 3.9, calculations 6.4, math fluency 5.5, applied problems 3.8, and quantitative concepts 4.0. The IEP noted Student was able to simplify

and solve a polynomial expression, and demonstrate knowledge of basic arithmetic principles. Also when given the quadratic formula Student was able to substitute to the values for a, b, c and in both instances Student came close to answering the problems correctly

50. Except for a reduction of DIS counseling services to once monthly sessions for 30 minutes, the IEP offered continued placement in a general education class with specialized academic instruction and supplemental aids and services at the same levels as the February 18, 2010 IEP. The IEP team agreed that Student would attend summer school to recover credit for the classes he failed. Foster father did not agree with the IEP offer, in particular the reduction in DIS counseling services and District's failure to settle the compensatory service demand, but he consented to the implementation of the IEP. A comment was written in the consent section of the IEP which stated "I agree with the implementation of this IEP but do not agree that it provides FAPE. I do not agree with the offer of compensatory services."

51. According to Ms. Millender-Johnson, Student's behaviors had improved in the second semester, She also believed that the psychoeducational assessment results showed some improvement in Student's behavioral functioning and that he had acclimated to the school, and was enjoying DHS. She opined Student could meet his social/emotional goals with less DIS counseling in the 2010-2011 school year. She had explained to Student and foster parent that specialized academic instruction could be provided in a general education class with RSP support as agreed in the IEP rather than an SDC.

52. Foster father and Ms. Harris disagreed, they testified that reducing counseling services was inappropriate based upon the teachers' complaints about Student's classroom behaviors and other behaviors he exhibited in the home for which he was receiving counseling unrelated to his academic and educational needs. Foster

father was concerned that Student would not meet the credit requirements for timely graduation. They continued to express concern at the IEP team meeting that Student had not received the level and frequency of counseling services required in his June 15, 2009 and February 18, 2010 IEPs. They also told the IEP team about their concerns for his current classroom behaviors and believed his absences from classes, which impeded access to his education, required more DIS counseling by the school psychologist.

53. Ms. Millender-Johnson maintained a DIS counseling log. Her log showed that counseling sessions with Student had started February 25, 2010, and ended on May 8, 2010, for a total of nine sessions in the 2009-2010 school year.

54. Mr. Brown maintained RSP logs, which were not always contemporaneous. His RSP logs showed the first RSP sessions with Student started on January 26, 2010, and ended on June 3, 2010, for a total of 24 sessions for the entire school year.

55. As of the end of the 2009-2010 school year, Student had failed World History. He received a "D" in Advanced Band II, "D plus" in English II, and "D minus" in Spanish. His final grade in General Biology and Geometry was "C". The Geometry grade was a scaled grade based upon an alternative grading system applied by Mr. Qayyum. He also failed Algebra IA in a summer school Credit Recovery class.

#### THE 2010-2011 SCHOOL YEAR

56. Student's class schedule for the 2010-2011 school year consisted of Architect Drafting, Physical Education, Spanish II, English III (P), Algebra II (P), U.S. History, and Medical Terminology.

57. District did not provide an AAA as discussed and agreed to in the June 8, 2010, IEP. District explained at hearing that Mr. Tall, the designated AAA, had been transferred to another school. District did not designate a replacement AAA. District did not provide RSP on a push-in basis as agreed in the June 8, 2010, IEP but provided RSP

on a pull -out basis only. RSP was provided sporadically. DIS Counseling was not provided in accordance with the June 8, 2010 IEP.

58. Mr. Brown testified that as Student's Case Manager and RSP teacher, he focused on providing specialized instruction in Math and Reading. Ms. Hughes would provide RSP on a pull- out basis and Mr. Brown would meet with Student's Math and English teachers to collaborate and co-teach. According to Mr. Brown, co-teaching was a peer- reviewed instructional method that was proven affective in various case studies.

59. As of the first semester of the 2010-2011 school year, Student improved slightly in his Spanish and English courses. He received a grade of "C minus" in Spanish II, and English III, but he failed U.S. History and received a "D- minus" in Algebra II. The Algebra II teacher reported on the Student's Grade Report that he was "in danger of failing". By the third quarter of the second semester Student was passing Spanish II and English III with "Cs" and had pulled up his grade in U.S. History with a "C plus". However, he continued to be in danger of failing Algebra II and received a "D minus".

60. Mr. Lovelace, Student's Algebra II teacher, had reviewed Student's IEP and knew he had RSP. Student needed remediation to learn Algebra II skills and Mr. Lovelace felt Student needed extra help. He explained that Student would need to master the components of Algebra II established by the California Content Standards for math which included: (1) solving linear equations; (2) systems of equations; and (3) quadratic equations. Student did not understand fractions. Mr. Lovelace had concerns about Student's performance because he showed a lack of focus, inability to complete tasks, and lack of consistency in effort. His primary concern was that Student had an 80 percent absentee rate and rarely showed up for class. When he attended class he would request permission to leave to go to the Nurse's office, or for some other reason. Mr. Lovelace did not receive instructional strategies from Mr. Brown to use with Student. Nor was an RSP co-teaching with him in his class. The RSP teacher did work with him to

suggest accommodations to Student such as seating in the front of the classroom, and more time on tests, but Student did not take advantage of it. The RSP teacher may have suggested tutoring, but Mr. Lovelace normally offered this service to struggling students in his class. Student did not have an AAA in his class. Mr. Lovelace did not modify grading as an accommodation. Student had not mastered any of the components of Algebra II during the time he attended in the 2010-2011 school year. He was in danger of failing the spring semester but he received a final grade of "D minus" because he completed a project for extra credit and had received a grade of 100, which pulled his overall grade up from an "F".

61. Ms. Zimmerman was Student's U.S. History teacher. She was familiar with Student's IEP and the accommodations to be provided to Student. Student failed first semester because he would not participate, was off task, and resistant to work. He would come to class and put his head down on the desk. Neither Mr. Brown nor any RSP teacher came into her class to assist Student. She spoke to Mr. Brown about strategies to motivate Student to do the class work and get organized. Student was unhappy with failing the class the first semester. She told him that he could do the work and he could do better. She provided him support by seating him in the front of the classroom and provided tutoring. She held an after school homework class which Student became motivated to attend. He started doing the work and pulled his grade up to a C in the second semester. Student did not have an AAA or one-to-one aide, but Ms. Zimmerman believed he did not need an aide because she provided the support and assistance he needed to succeed in her class.

62. Mr. Raupp was Student's English III teacher. He taught the class according to California Content Standards where the students read 19th and 20th century authors. He explained that a student needed to have at least a 6th to 7th grade reading level to be able to understand the literature taught in his class. While he did not modify his

grading system he used a different grading standard by using an alternative grading scale for Student. He had conferred with Mr. Brown frequently about Student's progress during the year, but Student did not do well in his class. He observed that Student had difficulty focusing, completing tasks, lacked consistency in effort, was inattentive, and was generally not productive. Student did not write or read well, but Mr. Raupp believed Student could do better in his class. No RSP teacher or AAA came to his class to support Student. He did not co-teach with anyone from RSP or special education and Mr. Brown did not teach instructional strategies. According to Raupp, Student did not pass the 2011 CAHSEE, which required a scaled score of 350 to pass the Math and English/Language Arts examinations, having obtained scores of 328 in Math and 339 in English/Language Arts. Student's CAHSEE scores lead Mr. Raupp to conclude that Student had not improved by the end of the 2010-2011 school year.

63. Student transferred from DHS to Pomona High School on May 11, 2011, because he was involuntarily removed from his foster placement and placed at a group home within the jurisdictional boundaries of the Pomona Unified School District. Student received no credit for the spring semester of the 2010-2011 school year because he withdrew before the end of the semester. His final grade report showed that Student left District with a cumulative total GPA of 0.8843 and a total of 118 credits out of 222 needed to graduate.

#### MAY 13, 2011 INDEPENDENT PSYCHOLOGICAL ASSESSMENT

64. Robert J. Rome, Ph.D assessed Student on May 13, 2011, and wrote a Psychological Assessment Report (Report) at the request of the Los Angeles County DCFS. The reason for the referral was to assess Student's current functioning and learning needs.

65. Dr. Rome provided expert testimony at hearing. He is a licensed psychologist in private clinical practice specializing in developmentally disabled children



in special education. He has more than 30 years of experience as a psychologist. He is a certified evaluator conducting more than 10,000 evaluations for the various regional centers in southern California; he has participated on panels for Department of Mental Health psychological evaluations; he has conducted educational evaluations for more than 20 school districts; and has testified more than 500 times in matters concerning disabled children. He conducted the assessment by reviewing Student's school records, test records, District's assessments, and the June 2009, February 18, 2010 and June 8, 2010 IEPs. He observed Student in his foster home. He also interviewed Student and his foster parent and administered standardized tests to Student in the home. The Student interview lasted 35-40 minutes interspersed with testing; the testing lasted approximately one hour. The foster parent interview lasted 15 minutes. He did not observe Student in school because Student had withdrawn from school before his prescheduled observation appointment. He conducted the assessment based upon information that Student was in the 10<sup>th</sup> grade but discovered at hearing that Student was in the 11<sup>th</sup> grade at the time of the assessment.

66. Dr. Rome's assessment used: (1) interviews with Student and his foster parent; (2) review of previous reports; (3) clinical observations; (4) the Wechsler Adult Intelligence Scale-Fourth Edition; (5) the Woodcock-Johnson-Third Edition Tests of Achievement (letter-Word Identification, Reading Fluency, Calculation, Spelling, Writing Fluency, Passage Comprehension, Applied Problems, Writing Samples, And Word Attack subtests)(WJ-III); (6) the Test of Adolescent and Adult Language-Fourth Edition; (7) the Vineland Adaptive Behavior Scales-Second Edition; and (8) the Beck Youth Inventories-Second Edition.

67. Based upon the assessment, Dr. Rome reported the following clinical diagnostic impressions: (1) ADHD Combined Type – The report noted that Student has difficulties with staying on tasks to completion, among other attention issues; (2)

Adjustment Disorder, Not Otherwise Specified – The report noted the various changes in Student's life have brought about difficulties in his behavior and emotional reactions and that with counseling and other supports, he has performed better; (3) Reading Disorder – The report noted the severe discrepancies between his higher intellectual functioning and his reading skills in some areas especially with difficulties in phonetic reading and speed of reading; (4) Mathematics Disorder – The report noted severe discrepancies between Student's higher intellectual functioning and his lower math skills, especially in the area of math calculation; (5) Phonological Disorder – involving both his speech and sounds in his written language skills; and (6) Stressors that included reported difficulties he had experienced in school, reported identity issues, and the changes in residence and school he has experienced, along with the effects of frequent changes over past years in foster home placement and school.

68. Dr. Rome noted that Student demonstrated the improvement he could make when given direct assistance and training in areas of previous need. Specifically, in prior testing Student showed major difficulties in math word problems, but after getting focused attention and instruction in this area he went from below average to average skills with near grade level performance when shown how to solve math word problems. Dr. Rome also concluded that Student benefitted from counseling and had improved in the areas of attending to tasks, behavior, and compliance with school authority. Student still needed assistance in academics including reading fluency, phonetic reading skills, math calculation, and memory, and basic visual processing. The report also noted that Student had a lisp coupled with auditory difficulties in sound symbol association and other phonological areas. Dr. Rome was critical of District's failure to screen Student's language skills and recommended a speech and language evaluation by a speech and language specialist.

69. In several areas, Dr. Rome concurred with the results of the District's May 24, 2010 Psychoeducational Assessment. Specifically, he agreed that Student had deficits in auditory and visual memory, math reasoning, math word problems, math calculation and memory processing. Student lacked memory skills and guessed at words. Student's attention problems interfered with his academics.

70. Dr. Rome opined that Student failed to make educational progress in the 2009-2010 school year. He reviewed the December 14, 2009 WRAT-4 assessment which showed Student had below grade level ability in reading, writing, and math calculation yet the subject matter of the RSP sessions focused on grade level math with which was several grade levels higher than Student's abilities i.e. the 10th grade. He opined that Student's truancy record, tardies from classes, and his failing grades in the 2009-2010 school year were a red flag that District should have acted upon by providing more accommodations, providing the RSP and DIS services offered in his IEP with consistency, and making appropriate adjustments to his IEP.

71. He criticized District for failing to refer Student for further screening for speech and language deficits and opined that District's assessment revealed auditory deficits that should have triggered a referral for speech and language evaluation. He was not a speech and language pathologist. However, the results of the Test of Adolescent and Adult Language he administered, showed Student was border line for speech and language deficits, which supported Dr. Rome's opinion that Student needed a more comprehensive screening or assessment. Dr. Rome's testimony on this issue was speculative and no weight can be given to his opinion in this regard because he had no working knowledge of Student prior to the assessment, his interview with Student took 35-40 minutes interspersed with one hour of assessments, all of which took place at Student's home, and supplemented by his review of Student's records.

72. Greater weight is given to Ms. Millender-Johnson's testimony on this issue. Ms. Millender-Johnson administered the TAPS-3. The results of the TAPS-3 showed that Student's phonological awareness was within the average range. Student demonstrated adequate ability to discern between similar sounding words, perform a number of types of phoneme manipulations within words which include compound words, beginning, middle, and ending syllable, phoneme deletion, and synthesizing a word given the individual phonemic sounds. She noted in the Psychoeducational Assessment report that Student had no apparent inability to communicate and there was no indication of a speech impairment that would prevent Student from accessing his education. In addition Ms. Millender-Johnson credibly testified that her practice was to refer a child for speech and language screening if there were any indication of a deficit requiring assessment. Ms. Millender-Johnson was familiar with Student and had worked with Student providing counseling services prior to the psychoeducational evaluation and had numerous opportunities to determine if Student showed signs of a possible speech and language deficit which required further assessment. She concluded that no such referral was warranted.

73. Dr. Rome was also critical of the June 2010 IEP because of the Math, Writing and Reading goals. He had reviewed District assessments and Student's test records for the CAHSEE and STAR and concluded that the goals in these areas of need were inappropriate and not calculated to provide Student educational benefit in the 2010-2011 school year. The Math goals were for Algebra II and called for him to solve multi-step problems when his assessments showed he was below grade level in math reasoning and calculation, and still working on solving single-step math problems. He opined that the reading goals were inappropriate because of Student's weakness in phonetics and reading comprehension.

74. Dr. Rome also offered an opinion on the quality of the RSP services Student received. He reviewed the RSP logs for the 2009-2010 and 2010-2011 school years. He believed the RSP, when provided to Student, focused on areas that required work above his ability level in Math and English. He also reviewed the DIS counseling logs and concluded that Student needed counseling for his behaviors in and out of the classroom but did not get the counseling services as offered in the February 18, 2010 IEP. Dr. Rome also concluded that DIS counseling should not have been reduced in the June 8, 2010 IEP. Dr. Rome opined that both the school psychologist and school counselor with the requisite credentials were qualified to provide Student's DIS counseling needs.

75. District had a Read 180 program which foster parent and Ms. Harris requested District use with Student to improve his reading. Ms. Harris testified that the Read 180 program was a peer-reviewed computer program designed to improve reading comprehension with a teaching component managed by a teacher that had proven successful in improving a student's reading skills. Ms. Harris also testified that "Dragon Speak" voice recognition software would also be helpful in Student's program as well. Dr. Rome also supported use of interventions to improve Student's Math and Reading skills. Dr. Rome testified that Read 180 required a minimum third grade reading level and was appropriate for Student. He also testified that he was not familiar with "Dragon Speak" voice recognition software and could not give an opinion of its appropriateness for Student.

76. Dr. Rome's administration of the WJ-III in May of 2011, when compared with the District's May 2010 WJ-III, showed that Student made some progress while enrolled in the District as follows:

Composite	May 2010 Standard Score	May 2011 Standard Score
Broad Reading	81	84
Broad Math	73	82

77. Dr. Rome acknowledged in his written report and his testimony that Student made progress in the 2010-2011 school year. His grades improved overall. He improved in solving math word problems after getting focused attention and instruction in this area. This was demonstrated by Student moving from below average to average skills when shown how to solve math word problems. He also made progress in reading comprehension. However, Student still had deficits in phonetics and reading fluency and did not make substantial progress in his social/emotional behavior.

78. Dr. Rome opined that District should provide Student with compensatory services for failing to provide the required RSP and DIS counseling services in the 2009-2010 and 2010-2011 school years, which resulted in a lack of educational progress. He estimated Student should receive 50 sessions of DIS counseling once per week, for 60 minutes per session, and RSP in the form of intensive instruction for 46 weeks once per week for 60 minutes per session.

79. Dr. Rome also believed that Student should receive a speech and language assessment, if one had not already been performed in his current school district, because of District's failure to interpret the assessment results showing the need for a referral for further evaluation of Student's possible need of speech and language services.

80. Finally, Dr. Rome testified that Student's transfer from District before the end of spring 2011 resulted in a loss of credits toward graduation. He estimated that District owed Student up to 100 hours of academic instruction to facilitate his receipt of credits for the period. However, he acknowledged that District did not remove Student from DHS and that Student withdrew for reasons beyond District's control.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

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

*Issues A(1)to (5) - Comparable services to June 2009 IEP for the first 30 days, New IEP within 30 days of transfer or start of school year, No IEP in place at beginning of school year, RSP and DIS counseling services not provided until January and February of 2010*

2. Student contends that District failed to provide him with a FAPE from June 29, 2009, including the ESY and the 2009-2010 school year by failing to provide services comparable to his June 15, 2009 IEP during the first 30 days of enrollment. In related claims, Student contends District further failed to develop, adopt or implement a new IEP within 30 days of his transfer to District or within 30 days of the 2009-2010 school year and failed to have an IEP in effect at the beginning of the 2009-2010 school year up to the February 25, 2010 IEP. Finally Student contends that District failed to provide DIS counseling services from the date of enrollment in District to February 25, 2010, and RSP support from the date of enrollment to January 26, 2010.

3. District contends Student was not denied a FAPE because Education Code sections 56325, subdivision (a) and 56043, subdivision (i), the statutes upon which Student relies for relief, are inapplicable to this case. District asserts that Student did not transfer into District within the same academic school year and Student did not request an IEP meeting upon Student's transfer or at anytime prior to the first IEP team meeting convened by District on January 22, 2010.

4. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), 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 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 designed 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).)<sup>2</sup>

5. 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. § 1401(26); Ed. Code, § 56363, subd. (a).) In California "related services" are referred to as designated instruction and services (DIS). (Ed. Code, § 56031, subd. (b)(1).)

6. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 106 [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

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<sup>2</sup> All citations to the Code of Federal Regulations are to the 2006 edition.



services that maximize a student's abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F3d 786, 793.) 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*, at p. 201.)

7. There are two parts to the legal analysis in suits brought pursuant to the IDEA- Procedural and Substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Rowley*, *supra*, 458 U.S. at p. 200.) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.*, at pp. 206-207.)

8. 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; *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; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.)

9. A district must have an IEP in effect for each child with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a)(2006); Ed. Code, § 56344, subd. (b).)

10. Education Code section 56325, subdivision (a)(1) sets forth procedures for the transfer of a special education student with an IEP from one California district to another in a different SELPA during an academic year. During the first 30 days that the transferring student is in the transferee district, that district must provide the student a FAPE, including special education and related services "comparable" to those described in his previously approved IEP. Within those 30 days, the transferee district must adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law. (See also 20 U.S.C. § 1414(d)(2)(C)(i)(I).) However, that obligation only applies in the case of a special education student with an IEP who "transfers into a district . . . within the same academic year" that he was in the previous district. (Ed. Code, § 56325, subd. (a)(1); see 20 U.S.C. § 1414(d)(2)(C)(i)(I).)

11. A school district must review an eligible child's IEP at least once a year to determine whether or not the annual educational goals are being achieved, the appropriateness of placement and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, §§ 56341.1, subd. (d) and 56343, subd. (d).) A local education agency shall initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (34 C.F.R. § 300.323(c).) Each local educational agency convening an IEP meeting shall take steps to insure a parent or parents are afforded the opportunity to participate. The IEP meeting shall be scheduled at a mutually agreed-upon time and place. The notice shall indicate the purpose, date and time, and location of the meeting and who shall be in attendance. (Ed. Code, §§ 56341.5, subd. (a) and subd. (c).) When a parent requests an IEP team meeting to review an IEP, the meeting must be held within 30 days, "not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the written request." (Ed. Code, § 56343.5.)

12. A pupil's individualized education program shall be implemented as soon as possible following the individualized education program team meeting, pursuant to Section 300.323(c)(2) of Title 34 of the Code of Federal Regulations and in accordance with Section 56344. (Ed. Code, § 56043, subd. (i).)

13. The decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(1).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

#### ANALYSIS OF ISSUES A(1)-(5)

14. The 30-day transfer provisions apply to the facts in this case. Student was offered ESY in the June 15, 2009 IEP. ESY extended the 2008-2009 school year to allow Student to take the credit recovery classes for Health Science and Algebra 1A that were identified in the IEP, and that he failed to pass in the 2008-2009 academic year. Had he remained in the LAUSD and attended the same ESY session it would have been considered within the same academic year. Passing the class would have given Student credit for the same academic year.

15. District's obligation to provide comparable services was triggered by the 30-day transfer provisions. The evidence establishes that following his transfer and enrollment in the District on June 29, 2009, Student attended ESY at Compton High School where he attended a credit recovery class within the same academic year that he

was in the LAUSD for classes he failed to pass in the 2008-2009 school year. Based upon the evidence, as to Issue A(1), District met its obligation under Education Code section 56325, subdivision (a)(1), by providing an ESY class comparable to that offered in the June 15, 2009 IEP from Student's prior district. District also placed Student in a general education class which was comparable to the June 2009 IEP. Student failed to meet his burden of proving a denial of a FAPE in Issue A(1). (Factual Findings 1-55; Legal Conclusions 1 and 4-15.)

16. As to Issue A(2), regarding the failure to hold an IEP team meeting in place within 30 days of transfer, and issue A(3), regarding the failure to have an IEP in place by the beginning of the school year, Student met his burden of demonstrating a procedural violation of the IDEA. When Student was transferred to District, District notified foster parent and grandmother that a 30-day review IEP was due on October 5, 2010, at which time District was obligated to adopt the previously approved IEP or develop, adopt, and implement a new IEP. Mr. Brown testified that District failed to conduct a 30-day review. The evidence establishes that only after foster parent and Student's educational consultant questioned the delay in holding the 30-day review did Mr. Brown schedule an IEP meeting, which was not convened until the last day of the first semester on January 22, 2010. The IEP could not be reviewed and/or developed even then because District failed to notify grandmother of the meeting.

17. Whether or not Student's transfer into District in June of 2009 triggered District's obligation to have an IEP in place under the 30-day rule, District was required to have an IEP in place for Student at the beginning of the 2009-2010 school year. The June 2009 IEP identified areas of need in Math, Reading and Writing and provided RSP to address those areas of need. Student also had needs in the area of behavior that were addressed in the IEP. The IEP established behavior goals and provided for a BSP with counseling services. The failure to have an IEP in place resulted in District's failure

to provide RSP and DIS counseling services. It also resulted in schedule changes to Student's class schedule without notice, which confused Student and his teachers. District's failure to have an IEP in place also contributed to Student's failure to participate in his curriculum, in some instances, due to the lack of supports and services that were provided in his transition IEP. Additionally, Student's frustration over the lack of supports in the classes where he had the most need fueled his reluctance to attend the classes, do his class work, do homework and study for and pass tests. As a consequence, he received low or failing grades in his classes in the first semester of the 2009-2010 school year. District did not have an IEP in place until February 18, 2010. District's failure to have an IEP in place at the beginning of the school year, whether as a result of failure to hold an IEP team meeting within 30 days of transfer, or under the general rule that an IEP must be in place by the start of the school year, constituted a procedural violation which impeded Student's right to a FAPE and caused Student a deprivation of educational benefit.

18. District's failure to have Student's IEP in place at the beginning of the 2009-2010 school year was a procedural violation resulting in a denial of FAPE because he did not get the specialized academic instruction he needed which contributed the high failure rate in his classes and he did not get the counseling services needed to address his behavior, truancy and inability to participate in his classes. The procedural violations of Issues A(2) and A(3) impeded Student's right to a FAPE and caused a deprivation of educational benefits. (Factual Findings 1-55; Legal Conclusions 1 and 4-18.)

19. Further, Student met his burden of showing that he was deprived of a FAPE on the grounds stated in Issues A(5) and A(6). The evidence was clear that Student was not provided with either DIS counseling or RSP services until February and January of 2010, respectively. District did not present evidence at hearing showing that Student

would not have required these services to receive a FAPE, and to the contrary, District offered these services in the February of 2010 IEP that was intended to operate until the end of the school year. Student's performance in the fall of 2009 demonstrated that he needed both services to access his education. Accordingly, Student met his burden of proof on Issues A(5) and A(6) as well. (Factual Findings 1-55; Legal Conclusions 1 and 4-19.)

#### ISSUES A(6) AND (7) – ASSESSMENTS IN SPRING OF 2010

20. In Issue A(6), Student contends that District should have assessed Student for SLD in the fall semester of the 2009-2010 school year and failure to do so denied Student a FAPE. District contends an assessment was timely conducted when the triennial review was due and District assessed in all areas of suspected disability and determined Student has a secondary disability of SLD and provided Student a FAPE.

21. In Issue A(7), Student contends District denied him a FAPE when it failed to conduct a speech and language assessment as part of the triennial psychoeducational evaluation in the spring of 2010. District contends the psychoeducational evaluation ruled out speech and language as an area of suspected disability, therefore Student was not denied a FAPE by District's failure to assess.

22. An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements as for an initial assessment apply to re-assessments such as the three-year (triennial) assessment. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (e).) The student must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414(b)(2) & (3); Ed. Code, §

56320, subds. (e) & (f).) The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306 (2006).) As part of a reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including teacher and related service-providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305 (2006); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

23. A procedural violation of IDEA only constitutes a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see also Legal Conclusion 13, incorporated by reference.) The failure to perform an assessment when it is warranted may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

24. First, as to Issue A(6), Student failed to meet his burden of proving that he was denied a FAPE by failure to assess him for learning disabilities in the fall of 2009. Student transferred to District in June of 2009, immediately following an IEP team meeting in his prior school district. District reasonably could believe that the June of 2009 IEP from Student's prior district accurately stated his needs. Moreover, the evidence at hearing did not show that District would have been aware of any further

need to assess Student following his brief attendance in ESY 2009 credit recovery classes and the few months of attendance at DHS in the fall of 2009. The evidence showed that the only concern regarding additional assessments was that of Ms. Harris at the June 15, 2009 IEP regarding assessments for emotional disturbance eligibility, not SLD. Notably, Student's grades would not have put District on notice of any additional need to assess for SLD because they were consistent with his poor performance in LAUSD the prior year. In sum, Student failed to prove by a preponderance of the evidence that the District's duty to conduct additional assessments in the fall of 2009 for SLD was triggered. Accordingly, Student was not denied a FAPE on this ground. (Factual Findings 1-72; Legal Conclusions 1, and 4-24.)

25. As to Issue A(7), regarding the failure to provide a speech and language assessment, Student also failed to demonstrate by a preponderance of the evidence that he was denied a FAPE. The main evidence offered by Student on this point was the expert testimony of Dr. Rome. Dr. Rome was clear in his testimony that he was not a speech and language pathologist. His psychological assessment of Student revealed Student had a lisp coupled with auditory difficulties in sound symbol association and other phonological areas. The report was critical of District's failure to screen Student's language skills and recommended a speech and language evaluation by a speech and language specialist. Little weight can be given to Dr. Rome's conclusion because he had not worked with Student prior to the May 13, 2011 evaluation, one year after the 2009-2010 school year that is the focus of Student's claim. Also, Dr. Rome only conducted a 40-45 minute observation of Student followed by a one-hour administration of test instruments, such that he had no other basis for concluding Student required a speech and language evaluation. Dr. Rome did not opine that Student's lisp was severe enough to interfere with Student being understood, nor did Dr. Rome's opinion explain any



connection between how his findings of receptive language deficits would have indicated a need to assess for speech and language therapy.

26. District's psychoeducational assessment report in the spring of 2010, noted that Student had no apparent inability to communicate and there was no indication of a speech impairment that would prevent Student from accessing his education. In addition Ms. Millender-Johnson credibly testified that her practice was to refer a child for speech and language screening if there were any indication of a deficit requiring assessment. Ms. Millender-Johnson administered the TAPS-3. The results of the TAPS-3 showed that Student's phonological awareness was within the average range. During the 2009-2010 school year, Student demonstrated adequate ability to discern between similar sounding words, perform a number of types of phoneme manipulations within words, which included compound words, beginning, middle, and ending syllable, phoneme deletion, and synthesizing a word given the individual phonemic sounds. Ms. Millender-Johnson was familiar with Student and had worked with Student, providing counseling services prior to the spring of 2010 psychoeducational evaluation and had numerous opportunities to determine if Student showed signs of a possible speech and language deficit requiring further assessment.

27. Student has failed to prove by a preponderance of the evidence that District denied Student a FAPE because the District failed to assess him for an SLD prior to the spring of 2010 (Issue A(6)), or to conduct a speech and language assessment (Issue A(7)). (Factual Findings 1-79; Legal Conclusions 1, and 4-27.)

*Issue (B)(1) – Denial of FAPE in June 8, 2010 IEP because reading and mathematics goals were inappropriate*

28. Student contends that the Reading and Math goals in the June 2010 IEP were inappropriate and denied Student a FAPE in the 2010-2011 school year. District

contends that the goals were appropriate and Student made substantial educational progress in the 2010-2011 school year.

29. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA and the IEP must include an assortment of information including a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum; when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance; a description of how the child's progress toward meeting the annual goals will be measured; when periodic reports of the child's progress will be issued to the parent; and a statement of the special education and related services to be provided to the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.)

30. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).) In the case of a child whose behavior impedes the child's own learning or other children's learning, the IEP team shall consider positive behavioral interventions and supports, and other strategies, to address the behavior. In the case of a child whose behavior impedes the child's own learning or other children's learning, the IEP team shall consider positive behavioral interventions and supports, and other strategies, to address the behavior. (20 U.S.C. 1414(d)(3)(B)(i); Ed. Code, §56341.1, subd.(b)(I).)

31. An IEP is evaluated in light of information available to the IEP team 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* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

32. To determine whether a school district's program offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by *Rowley* and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.) Furthermore, educational benefit in a particular program is measured by the degree to which Student is making progress on the goals set forth in the IEP. (*County of San Diego v. Cal. Sp. Ed. Hrg. Off.* (9th Cir. 1996) 93 F.3d 1458, 1467.))

33. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing J.R. Rep. No. 410,1983 U.S.C.C.A.N. 2088, 2106.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J., supra*, 267 F.3d at p. 877, citing *Hall v. Vance County Bd. Of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A child's progress must be evaluated in light of the child's

disabilities. (*Rowley, supra*, 458 U.S. at p. 202; *Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1996) 103 F.3d 1114, 1121.)

34. As stated above in Legal Conclusions 13 and 23, incorporated by reference, to prove the denial of a FAPE based on a procedural violation, Student must demonstrate that the violation impeded the right of the child to a FAPE, significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents, or caused a deprivation of educational benefits.

35. Student's IEP goals in Math and Reading were appropriate for the following reasons. The Reading goal was for vocabulary and concept development and stated "By (4th quarter 2011), when given grade level literary text [Student] will discern the meaning of analogies encountered, analyzing specific comparisons as well as relationships and inferences with 75 percent accuracy in three of four trials as measured by teacher observation." The baseline for this goal according to the WRAT-4 established Student's word reading ability at a 4.8 grade level and sentence writing ability at 4.9. The WJ-III reading subtest scores were also referenced. The IEP noted the reading levels indicated Student was able to access and comprehend grade level text and Student would benefit from repetitive assignments to reinforce basic reading and promote higher level thinking. The goal was measurable and based upon assessment results that identified Student's area of need.

36. The Math goal was for math calculation and reasoning in Algebra II and stated "By (4th quarter 2011), when given a series of multi-step linear problems and word problems independent reading level, involving one variable, [Student] will solve linear equations and inequalities involving absolute value with 75 percent accuracy in three out of four trials as measured by student work samples/criterion assessment." The baseline for this goal referred to the results of the WJ-III math subtests which

established Student's abilities as follows: broad math 5.0, brief math 4.9, calculation skills 6.0, math reasoning 3.9, calculations 6.4, math fluency 5.5, applied problems 3.8, and quantitative concepts 4.0. The IEP noted Student was able to simplify and solve a polynomial expression, and demonstrate knowledge of basic arithmetic principles. Also, when given the quadratic formula Student was able to substitute to the values for a, b, c and in both instances Student came close to answering the problems correctly. The Math goal was measurable and based upon an assessment that identified Student's area of need.

37. Here, Student's contention relies on the testimony of Dr. Rome that Student was at a fourth to fifth grade level in reading and writing and a fourth to sixth grade level in mathematics. Student had not passed the CAHSEE and tested far below basic on the STAR in Math and English Language Arts. Dr. Rome opined that the reading, writing and math goals, as written, were not appropriate because they required Student to perform at a tenth grade level (actually eleventh grade) which Student was not capable of. Dr. Rome's opinion testimony in this regard fails for the following reasons.

38. First, the goals were appropriate at the time they were drafted, such that there was no procedural violation of the IDEA. As of June 2010, the IEP team was well aware that Student was struggling in reading and math. The goals in both areas reflected that Student was not at grade level and aspired for Student to make progress toward grade level. Even though it may not have been realistic for Student to make gains that would bring him to grade level, the goals cannot be said to have denied Student a FAPE for having too high of an aspiration where they were nonetheless targeted at the correct areas of need and measurable.

39. Alternatively, if Student did demonstrate that the goals were incorrect at the time they were written, Student failed to meet his burden of showing the second

element of a procedural violation: that the goals as written either interfered with parental participation in the IEP process or resulted in a deprivation of educational benefit or the receipt of a FAPE. There was no evidence that improper goals interfered with parental participation in the IEP process. As to whether Student was denied a FAPE, 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. (See Legal Conclusion 8, incorporated by reference.) Here, the evidence established that Student made some overall progress in the 2010-2011 school year. Dr. Rome's assessments showed Student improved in the area of math word problems after getting RSP support, he went from below average to average skills with "somewhat" grade level performance when shown how to solve math word problems.

40. Dr. Rome's administration of the WJ-III in May of 2011, when compared with the District's May 2010 WJ-III, showed that Student made some progress while enrolled in the District as follows:

Composite	May 2010 Standard Score	May 2011 Standard Score
Broad Reading	81	84
Broad Math	73	82
Broad Written Language	82	84

These scores demonstrate that Student improved and in some instances scored higher in the areas tested. Thus, even if Student had shown the goals were inappropriate as of the time they were drafted, Student failed to show that he was ultimately denied a FAPE as a result.

41. As to Issue B(1), Student has failed to prove that the Math and Reading Goals in the June 8, 2010 IEP were not appropriate and denied Student a FAPE. (Factual Findings 1-77; Legal Conclusions 1, and 4-41.)

*Issue B(2) – Failing to offer an SDC for Mathematics and English in the June 8, 2010 IEP*

42. Student contends that he was deprived of a FAPE because the June 2010 IEP should have offered him an SDC for Mathematics and English in order to address his ADHD and SLD. District contends that a general education class with RSP and supports, and accommodations was an appropriate placement in the least restrictive environment.

43. As set forth in Legal Conclusions 6-8, incorporated by reference, under *Rowley* a student's IEP must be reasonably calculated to provide student with some educational benefit. There is no one test for measuring the adequacy of educational benefit conferred under an IEP. 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.

44. As set forth in Legal Conclusion 32, incorporated by reference, to determine whether a school district's program offered a student a FAPE the focus must be on the adequacy of the district's proposed program. If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

45. As set forth in Legal Conclusion 31, incorporated by reference, an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight.

46. School districts are required under the IDEA to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116. (2006).)

47. Here, based upon District's psychoeducational assessment as of the June 8, 2010 IEP, Student had average cognitive ability. He had deficits in math and reading and attention deficits for which RSP support was still required at the same levels as in the February 18, 2010 IEP. The IEP goals and objectives were in the same areas of need as in the February 18, 2010 IEP. The IEP noted some improvement however, in Student's behavior and that he had met some of his behavior goals, but the IEP provided new



behavior goals for which counseling services were also provided. Based upon the assessment information and Student's progress reports, the District IEP team members concluded that placement in a general education setting with RSP supports and counseling was still appropriate, and met the LRE requirement. Here District's offer of a general education program with RSP and counseling was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and was the LRE, such that District provided a FAPE. Student presented no evidence to support the conclusion that his inattention, inability to focus, failure to do class work required his placement in a more restrictive environment such as a SDC, given Student's cognitive abilities.

48. The evidence supports the conclusion that the IEP offer of placement in the general education class with RSP and supports and services was placement in the least restrictive environment and was appropriate. Student did not meet his burden of proof on Issue B(2). (Factual Findings 1-77; Legal Conclusions 1, and 4-48.)

*Issue B(3) – Failing to offer reading and math interventions and other specialized services in June 8, 2010 IEP*

49. Student contends District denied him a FAPE because the June 8, 2010 IEP did not offer him peer-reviewed interventions in reading and math. Specifically, Student contends he should have been offered programs like Read 180, and supplemental materials and software and other specialized services to address Student's ADHD. District contends it offered Student a FAPE because the RSP services were based on peer-reviewed research.

50. As set forth in Legal Conclusions 5, 31, and 32, 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.) To determine whether a school

district's program offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. An IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed.

51. Title 34 Code of Federal Regulations, part 300.320(a)(4) provides that IEPs shall include a statement of the special education and related services and supplementary aids and services to be provided to the student, based on peer-reviewed research to the extent practicable. The United States Department of Education (ED) clarified that the service based upon the greatest body of research is not the service necessarily required for a child to receive a FAPE, or that a school district's failure to provide services based on peer-reviewed research necessarily results in a denial of a FAPE. Further, the ED has explained that services need only be based upon peer-reviewed research to the extent possible, given the availability of peer-reviewed research. The ED also specifically declined to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refused to provide documentation of research-based methods, believing such requirements were unnecessary and would be overly burdensome. (*Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46665 (August 14, 2006).)

52. *Rowley* established that, as long as a school district provides an appropriate education, the choice regarding the methodology to be used to implement

the IEP is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Subsequent case law has applied this holding to disputes regarding choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm., supra*, 361 F.3d at p. 84.)

53. Here, the evidence established that the June 8, 2010 IEP offered an appropriate placement with specialized academic instruction and supports. District had a Read 180 program, which foster parent and Ms. Harris requested District use with Student to improve his reading. Ms. Harris testified that the Read 180 program was a peer-reviewed computer program designed to improve reading comprehension with a teaching component managed by a teacher that had proven successful in improving student's reading skills. Ms. Harris also testified that "Dragon Speak" voice recognition software would also be helpful in Student's program as well. Dr. Rome also supported use of interventions to improve Student's Math and Reading skills. Dr. Rome testified that Read 180 required a minimum third grade reading level and was appropriate for Student. He also testified that he was not familiar with "Dragon Speak" voice recognition software and could not give an opinion of its appropriateness for Student. Student presented no other evidence of other materials and or software or specialized services to address Student's ADHD. "Dragon Speak" is a program designed to address the remediation of writing skills. Here the concern was interventions designed to address reading and math skills.

54. The law only requires research-based interventions “to the extent practicable;” it is not required. Student was offered RSP in Math and Reading, which was calculated to provide Student a FAPE. In addition, Student’s IEP goals in Reading and Math provided a FAPE because Student made some progress in the 2010-2011 school year. Finally, based upon what the IEP team knew at the time of the June 8, 2010 IEP it was objectively reasonable for District to believe that continued intervention with specialized academic instruction (RSP) in Math and Reading would be appropriate and provide Student a FAPE.

55. The evidence establishes that based upon what District knew of Student at the time of the June 8, 2010 IEP District provided Student appropriate interventions in the form of RSP to the extent practicable to meet Student’s unique educational needs in Reading and Math. Student has failed to prove by the preponderance of the evidence that District’s offer of RSP did not provide him a FAPE. (Factual Findings 1-77; Legal Conclusions 1 and 4-55.)

*Issue B(4) – Reducing the DIS counseling services in the June 2010  
Triennial IEP*

56. Student contends District’s failure to offer the same level of DIS counseling services in the June 2010 IEP resulted in a lack of educational progress to Student in the 2010-2011 school year. District contends that reduction of counseling services did not deny Student a FAPE.

57. As set forth in Legal Conclusion 50, 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.) To determine whether a school district’s program offered a student a FAPE the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811

F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. An IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed.

58. The evidence establishes that as of the June 8, 2010 IEP, Student continued to be off-task in his class work. His teachers continued to express concerns about his truancy, tardiness, and failure to complete class work. At most, Student participated in a few of his classes that he liked. The rest he would ignore. District proposed to reduce Student's DIS counseling from 30 minutes once per week to 30 minutes once per month based upon the triennial assessment results which purported to show Student's behaviors had improved in the areas of impulse control and ability to accept authority. Foster father and Ms. Harris argued against reducing counseling based upon the concerns raised by Student's teachers and the need to address his ongoing attention issues. They believed counseling should be offered at the same level as in the February 18, 2010 IEP. They testified that without appropriate counseling and supervision, anything less would deprive Student of educational benefit.

59. In contrast, the District IEP team members believed at that time that Student's behaviors had improved by the end of the 2009-2010 school year, such that a reduction in services was warranted. Specifically, Ms. Millender-Johnson took the position at hearing that based upon the triennial assessment results Student needed need no more than 30 minutes per month counseling. This position was not supported by the evidence at hearing. Student's Spring Semester Grade Report showed that as of the end of the 2009-2010 school year, Student had failed World History. He received a

"D" in Advanced Band II, "D plus" in English II, and "D minus" in Spanish. His final grade in General Biology and Geometry was "C". The evidence also showed Student's classroom behaviors continued to escalate throughout the 2009-2010 school year based upon teacher reports and foster father's report given in the assessment. Student's grades and classroom behaviors during the year were inconsistent with a reduction in counseling services for the next year.

60. In sum as to Issue B(4), Student has proven by preponderance of the evidence that Student required the same level of counseling services given in the February 18, 2010 IEP and District's failure to provide the same level of counseling services denied Student a FAPE. (Factual Findings 1-78; Legal Conclusions 1 and 4-60.)

*Issues A(8) and B(5) – Failure to provide RSP and DIS counseling services offered in the February 18, 2010 IEP and Failure to provide the AAA offered in the June 8, 2010 IEP*

61. In Issue A(8) Student contends that District deprived him of a FAPE because the RSP and DIS counseling services offered in the February 18, 2010 IEP were not provided. Similarly, in Issue B(5) Student contends that although his June 8, 2010 IEP offered the services of an AAA, he was deprived of a FAPE in the 2010-2011 school year because District did not implement the aide services. District contends that Student received RSP and DIS counseling services offered in the February 18, 2010 IEP. District further contends that Student was not deprived of a FAPE by its failure to provide the AAA. District further contends that failure to provide the AAA is a compliance issue and outside of OAH's jurisdiction to decide.

62. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP

occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial and significant provisions of the IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822 [hereafter *Van Duyn*].)

63. However, the materiality test is not a requirement that prejudice be shown: "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn, supra*, 502 F.3d at p. 822.) The child's educational progress, or lack of it, may be probative of whether there was more than a minor shortfall in services. A shortfall in services and a shortfall in the child's achievement in that area tend to show that the failure to implement the IEP was material. Similarly, if the child performed at or above the anticipated level of achievement, this would tend to show that the shortfall in services was not material.

64. Here, as to Issue A(8), discussed below, District implementation the provisions of the IEP requiring DIS counseling provided him a FAPE but District failed to implement RSP services in accordance with the February 18, 2010 IEP and did not provide Student a FAPE.

65. As part of the implementation of the behavior goals and the BSP, the IEP provided for individual counseling services at the frequency of once per week for 30 minutes. The evidence established that counseling services were to be provided by the school psychologist or a counselor. Ms. Millender-Johnson, District school psychologist at DHS testified that she started providing counseling services to Student on February 25, 2010.

66. The evidence established that Ms. Millender-Johnson maintained a DIS counseling log. Her log showed that she provided counseling to Student starting

February 25, 2010, and ending June 8, 2010. The logs showed that Student received all but approximately two hours of DIS counseling. Student did not demonstrate how the failure to receive approximately two hours of counseling services over a period of months was a substantial failure to implement the IEP. Accordingly, the failure to implement all of the DIS counseling hours was de minimis under *Van Duyn*.

67. The IEP also provided RSP in Math and Reading three times per week for 60 minutes per session for each subject.

68. The evidence also established that Mr. Brown maintained RSP logs, which were not always contemporaneous. His RSP logs showed the first RSP sessions with Student started on January 26, 2010, and ended on June 3, 2010, for a total of 24 sessions for the entire school year. Here, however, based upon the school calendar and the RSP logs there were some weeks where only one RSP session was held and some where none were held. Student missed as many as 25 sessions of specialized academic instruction during the period from the February 18, 2010 IEP to the end of the 2009-2010 school year. Based upon teacher reports, Student's failing grades, and his low test scores in the spring 2010 semester District's failure to provide RSP as required in the February 18, 2010 IEP was a material failure to implement the IEP and cannot be considered de minimis. Student has proven by a preponderance of the evidence that District's failure to provide RSP in accordance with his IEP denied Student a FAPE.

69. As to Issue B(5), the evidence establishes that District did not provide the AAA as agreed in the June 8, 2010 IEP at all. The evidence shows District agreed to provide the AAA to support Student academically and with transitions on campus to address Student's truancy and other issues. The AAA was a substantial and significant provision of the IEP. Student's continued academic and behavioral difficulties, including attendance problems, after the June 8, 2010 IEP can be attributed to the failure to provide the AAA. Accordingly, as to Issue B(5), Student has proven by a preponderance



of the evidence that District's failure to provide an AAA in accordance with his IEP was substantial and denied him a FAPE. (Factual Findings 1-8078; Legal Conclusions 1 and 4-69.)

## REMEDIES

70. As discussed above, Student met his burden of proving that he was denied a FAPE on the following issues:

1. A(2) and A(3), Failing to have an IEP in effect within 30 days of transfer into District and/or the beginning of the 2009-2010 school year through the February 18, 2010, IEP;
2. A(4), Failing to provide DIS counseling services from the date of enrollment in District to February 25, 2010;
3. A(5), Failing to provide RSP support from the date of enrollment in District to January 26, 2010;
4. A(8), Failing to implement the RSP services offered in the February 18, 2010, IEP;
5. B(4), Failing to offer an appropriate amount of DIS counseling services in the June 8, 2010 IEP; and
6. B(5), Failing to implement the AAA in the June 8, 2010 IEP.

71. An Administrative Law Judge may order a school district to provide compensatory education to a pupil who has been denied a FAPE. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1486.) Compensatory education is an equitable remedy that courts may employ to craft appropriate relief for an aggrieved party. The law does not require that day-for-day compensation be awarded for lost or missed time. Equitable relief requires review of the conduct of both parties to determine whether relief is appropriate. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23, supra*, 960 F.2d at p. 1484.)

72. Robert Rome provided testimony that Student suffered the loss of educational benefit over more than one year because of District's delay in providing services and because Student also suffered from the lack of appropriate services when they were provided by District. Dr. Rome also suggested that District should compensate Student for 100 hours to complete the coursework he lost when he withdrew from District because he was placed in another foster home outside the District. There is no basis for an award based on Student's failure to successfully complete the 2010-2011 school year because District was not responsible for his withdrawal from DHS. However, as discussed below, Student is entitled to compensatory services for the District's various failures to properly implement his IEPs.

73. For purposes of calculating the loss to Student of a FAPE under Issues A(2)-(5) and (8), District failed to provide Student more than 24 weeks of 30 minute sessions per week of DIS counseling from September 1, 2009 to February 25, 2010, for a loss of 12 hours of counseling. District failed to provide more than 20 weeks of 180 minute sessions each for per week of RSP Math and Reading from September 1, 2009 to January 26, 2010, for a loss of 120 hours. District also failed to implement 25 hours of RSP services in accordance with the February 18, 2010 IEP, for which Student lost 25 sessions of RSP in Math and Reading. As to issue B(4), failing to offer an appropriate amount of DIS counseling services in the June 8, 2010 IEP; District's failure to provide Student 30 minutes per week of DIS counseling resulted in a loss of approximately 26 weeks of counseling services in the 2010-2011 school year, for a total of 13 hours.

74. Student is also entitled to an award of compensatory education because of District's failure to provide him an AAA agreed upon in the June 8, 2010 IEP. The evidence establishes that Student attended approximately 34 weeks of school without AAA support before he was transferred out of the District. District incorrectly asserts that Student's claim for an AAA is a compliance matter not within OAH jurisdiction.

Student is not seeking enforcement of the June 8, 2010 IEP but relief for District's failure to provide a FAPE.

75. The failure to provide the level and quantity of related services required in the 2009-2010 and 2010-2011 school years and the failure to provide the AAA contributed to Student's ongoing difficulties in attending to task and completing assignments. Several of Student's teachers in both school years testified to Student's ongoing difficulties. Student did however, make some progress, as his grades improved in the spring semester of the 2010-2011 school year. Dr. Rome also testified that Student's math calculation skills improved and his behaviors began to improve. This improvement was seen in the areas where Student received some RSP and counseling support.

76. However, notwithstanding the fact that Student was beginning to make some progress in the 2010-2011 school year, District's overall complete failure to provide him with the services he clearly needed in the two years he was in the District is inexcusable. As can be seen in this case, the purpose of providing RSP and DIS counseling and the AAA was to improve his overall academic performance.

77. Based on the above calculations, and the lack of any evidence excusing District's failure to appropriately serve Student, Student is awarded compensatory services in the form of academic tutoring for 205 hours in the form of tutoring services with an agency or non public agency (NPA) like Sylvan Learning Center, for a period of two years from the date of this Decision, as long as Student is enrolled in, and attending school. Transportation shall be provided by Student's parent or foster parent, as District was not responsible for Student's move away from the District.

## ORDER

1. District is ordered to pay for compensatory services in the form of academic tutoring for 205 hours from a non public agency (NPA) like Sylvan Learning

Center, for a period of two years from the date of this Order, as long as Student is enrolled in and attending school. Any services not accessed by Student within the two year period will be forfeited. District is not responsible for Student's transportation to or from tutoring services.

2. All of Student's other requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues A(2)-(5) and (8); and B(4)-(5). District prevailed on issues A(1), A(6), A(7); and B(1)-(3).

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: November 15, 2011

\_\_\_\_\_/s/\_\_\_\_\_  
STELLA L. OWENS-MURRELL  
Administrative Law Judge  
Office of Administrative Hearings