

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TRAVIS UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016071059

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 13, 2016, naming Travis Unified School District. The matter was continued for good cause on August 22, 2016.¹

Administrative Law Judge Chris Butchko heard this matter in Fairfield, California, on October 25, 26, and 27, 2016, and November 8, 9, and 10, 2016.

F. Richard Ruderman, Attorney at Law, of Ruderman and Knox, represented Student. Student's Parent attended all days of hearing.

Matthew Tamel, Attorney at Law, and Sarah Sutherland, Attorney at Law, of Dannis Woliver Kelley, represented District. Marissa Huitt, Director of Special Education, attended all days of hearing on behalf of District.

¹ By Order issued August 22, 2016, OAH granted consolidation of this action with an action filed by District on August 16, 2016, OAH case Number 2106080598. That order set District's case as the primary matter for purposes of the decision timeline. All claims in District's action were dismissed following settlement between the parties on the second day of the consolidated hearing.

On November 10, 2016, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on December 16, 2016, the record was closed and the matter submitted for decision.

ISSUES

1. Did District deny Student a free appropriate public education for the 2016-2017 school year, including the extended school year, by:
 - a. Failing to make a clear offer of FAPE at individualized education program team meetings in May 2016 because:
 - 1) goals were not developed in the areas of reading accuracy, written expression, and writing fluency; and
 - 2) the IEP did not specify what portion of the 159 daily minutes of specialized academic instruction was to be group, and what portion was to be individual.
 - b. Failing to accurately report Student's present levels of performance in reading and English language arts;
 - c. Failing to offer measurable goals in all areas of need, specifically reading accuracy, written expression, and writing fluency;
 - d. Predetermining placement by offering Student the inappropriate reading intervention program of Scientific Research Associates' ("SRA") Reading Laboratory 2.0 for 20 minutes per day; and
 - e. Failing to offer research-based individualized reading and written expression programs that would meet Student's unique needs?²

². Student's issues have been renumbered from those appearing in the Prehearing Conference Order. At hearing, Student withdrew without prejudice issues then-listed from the October 5, 2016 Prehearing Conference Order as a, g, h, and k. Student also withdrew sub-issues (1), (3), (4), (5) and (7) of former issue b, the parts of sub-issue b(2)

SUMMARY OF DECISION

Student did not establish that any procedural violations alleged deprived Student of a FAPE. Student did not establish that his educational program was predetermined. However, Student did demonstrate that District denied Student a FAPE by failing to offer a program that would meet Student's needs for reading and writing support.

FACTUAL FINDINGS

BACKGROUND

1. Student is a 15-year-old male who has resided in District for his entire educational career. At the time of hearing, Student was attending ninth grade, his first year of high school. Student is eligible for special education services under the categories of other health impairment and specific learning disability. As an infant, Student was diagnosed with Neurofibromatosis Type 1, and underwent a surgical procedure to relieve fluid pressure on his brain at eight months of age. Neurofibromatosis is a genetic disorder characterized by the development of multiple noncancerous tumors of nerves and skin. Student has had tumors on his optic nerve and has also had to have four subcutaneous neuro fibromas removed from his skull and one from his arm. Along with these ailments, Student has sensory neuropathy in his feet and a neuro cognitive disorder secondary to Neurofibromatosis.

dealing with the writing of goals for social initiation with peers, executive functioning, and keyboarding skills, the part of former issue b(6) alleging a failure to set end dates for specialized academic services in the IEP, and the parts of former issue d dealing with establishing measurable goals for social initiation with peers and keyboarding skills. Accordingly, those claims have been dismissed, and the remaining issues have been renumbered for purposes of clarity.

2. Neurofibromatosis is commonly accompanied by cognitive processing problems, including impairments in visual-spatial skills, executive dysfunction, difficulties in sustaining and switching attention, and learning disorders, particularly literacy-based learning disability and attention deficit/hyperactivity disorder.

READING INSTRUCTION BY SUZANNE COUTCHIE

3. Parents and District have had repeated disagreements over Student's educational program. Student has had chronic difficulty with reading and has read well below grade level for a number of years. Prior to this action, Parents filed due process hearing requests in July of 2015, OAH case number 2015080188, and in February of 2016, OAH case number 2016020955. Both of those cases were resolved by settlement agreements.

4. The settlement of each of those actions included District agreeing to reimburse Parents for "private, out-of-pocket educational services" to resolve claims for compensatory education. The second settlement agreement defined those services as "educational tutoring, instruction, and counseling services, attendance of private providers at the IEP meeting on or before May 16, 2016, as well as the costs of transporting student to/from these educational services up to 66 miles roundtrip, at the IRS government rate." No provider or area of tutoring or counselling was specified.

5. Parents used some of those funds to take Student for reading tutoring by Suzanne Coutchie. Ms. Coutchie received a bachelor's of arts degree cum laude in comparative literature from the University of California at Davis in 1973. She obtained a Certificate in Educational Therapy from the Extension school at the University of California at Berkeley in 2005 and a master's degree in education from California State University at Sacramento in 2007. The focus of her master's degree was special education.

6. Ms. Coutchie has been trained in the Orton-Gillingham and Lindamood-Bell teaching methods. Since 1998 she has had a private practice as an educational therapist and student's advocate. She has made numerous presentations to school districts in the Davis area and presented papers at a number of associations and study groups concerning reading instruction.

7. Student received reading tutoring from Ms. Coutchie from the fall of 2014 through December of 2014, and then starting again in late summer of 2015 through the time of the hearing with occasional breaks.

8. Because of Student's health impairment, he was too tired to take tutoring after a full day of school. Instead, tutoring was done before school. Parent had been taking Student out of school for the first two periods of the day, which was a two-period reading bloc in the 2015-2016 school year and his physical education and science classes in the 2016-2017 school year. When Student qualified for the honors section of his science class in the 2016-2017 school year, he pressed both Parent and Ms. Coutchie to start earlier so that he could attend science class. As a result, he began receiving reading instruction from Ms. Coutchie at 6:15 a.m. for one hour and 45 minutes per day, missing his first period physical education class.

9. Ms. Coutchie described her reading program as systematic and specialized, meaning that she taught in a way that built upon Student's emerging skills and adapted to his responses to the instruction. She taught him phonics to match alphabetic symbols to sounds, orthographics to learn spelling and word derivations, and the visual patterns of words to recognize letters that do or do not go together. She believed that Student's comprehension skills were higher than his decoding abilities, and that his oral comprehension abilities were average, but his reading comprehension was at the fifth or low sixth grade level.

10. Ms. Coutchie always worked directly with Student, gave him homework every day, and set a 3,000-page reading goal for the year that Student had already completed as of the time of the hearing. Parent and Ms. Coutchie believed that Student was eager to learn to read and enjoyed his sessions with Ms. Coutchie. Ms. Coutchie believed that Student was slightly more than three grade levels behind in total reading skills, but that he eventually would be able to read at grade level. Ms. Coutchie believed that she could have Student reading at grade level in one year's time.

INDEPENDENT PSYCHO EDUCATIONAL EVALUATION

11. Dr. Mary Gwaltney conducted an Independent Psycho educational Evaluation of Student and issued a report dated January 14, 2016. Dr. Gwaltney has a Ph.D. in learning and mind science conferred in 2012 by the University of California at Davis. She has held a certificate in Educational Neuropsychology since 2008. She obtained a master's of science in counseling and school psychology from California State University at Sacramento in 1999 and a bachelor's degree in psychology and Russian language from the University of California at Davis in 1991.

12. Dr. Gwaltney is credentialed as a school psychologist and holds licensure in educational psychology. She worked as a school psychologist for the Rocklin Unified School District from 1999 to 2002, and has had a private practice as a psychological assessor and consultant since 2001. She has had three publications in the field of Autism research. She has never worked as a "hands-on" reading instructor.

13. Dr. Gwaltney's assessment of Student included taking his medical and academic history, interviews of parent and teachers, classroom observation, direct observation, and administration of standardized testing. The witnesses at hearing agreed that Dr. Gwaltney's report was appropriately performed, thorough, and reliable.

14. Dr. Gwaltney found in testing that Student's cognitive abilities and processing speed were at least at average level, but that his working memory and visual

spatial perception were areas of significant weakness. Dr. Gwaltney noted that reading requires one to notice visual detail and identify letters in their spatial orientation to, for example, distinguish between "p", "d", and "b." She found Student's word decoding skills were at a second-grade level. In her opinion, Student generally absorbed instruction better by hearing than seeing or reading. Atypically for someone with reading difficulties, Student had a good vocabulary and no processing speed deficit.

15. Because Student did not present as a difficult or misbehaving child to his teachers, Dr. Gwaltney was surprised when testing showed Student was at the bottom percentile for attention to task, especially given that during testing he was on medication to improve his attention. This was "very concerning" to her because he would appear attentive while in class. Further testing for attention to complex tasks brought a higher score, which Dr. Gwaltney believed was because the more difficult task was more engaging to Student.

16. Student's reading problems, according to Dr. Gwaltney, were rooted in visual-spatial and attentional challenges. His phonological awareness was at least average, but his difficulties arose in the transition from sounds to writing, or orthographics. In her opinion, his reading difficulty had a unique profile. Most reading programs are designed to help students with phonological processing, but Student had no need in that area. Much less is known about remediation of orthographic difficulties in reading. Because of Student's profile, Dr. Gwaltney believed it would be difficult to find a helpful reading program, as most would either reinforce his bad habits or waste his time.

17. During Dr. Gwaltney's observation of Student during his reading tutoring by Ms. Coutchie, she was impressed by the duration of his attention to Ms. Coutchie's instruction. Dr. Gwaltney believed that he was actively engaged in learning and the activities he was doing were appropriate to his areas of need.

THE JANUARY 14, 2016 IEP TEAM MEETING

18. At the time of the January 14, 2016 IEP team meeting, Student's daily class schedule began with two periods of reading intervention through a program called Read 180. After approximately two and one-half weeks in the class, Parent removed him from the class because she believed it was not working and inappropriate for Student because he was not making progress. Instead of attending that class, Student received tutoring from Ms. Coutchie. He returned to school by third period to attend the rest of his day.

19. Dr. Gwaltney attended Student's January 14, 2016 IEP team meeting. She gave the following recommendations from her report: Student required "intensive, systematic specialized instruction that focuses on phonics, the orthographic and visual patterns of reading/spelling, and frequent reminders to focus on visual cues." She stated that he needed "guided repeated oral reading" and independent reading practice administered by a skilled reading instructor.

20. Dr. Gwaltney was surprised that after hearing her report the District IEP team members recommended that Student be provided with the Read 180 reading support program. Her report stated that the Read 180 program was helpful for eighth grade students who were behind in reading, but that it was not proven to be helpful for Students of his age with learning disabilities. In particular, the Read 180 program was not tailored to Student's needs and would not provide him with corrective feedback.

21. There are few, if any, available programs to help a pupil of Student's age learn to decode because decoding skills are usually obtained at a young age. For that reason, it was Dr. Gwaltney's opinion that Student required one-to-one instruction to overcome his deficits. Further, Dr. Gwaltney believed a computer-based program would not allow Student to talk through his learning and be provided with motivation to stay on task. Dr. Gwaltney preferred a program from SRA called "Reading Mastery," which

was then being used at District's high school, because it was administered by a teacher with significant one-to-one interaction with the student.

22. The notes of the IEP Team meeting report that Student had average ability to perceive and comprehend language auditorily, but that "when it turn into print it breaks down for him." Student's visual processing speed was significantly lower than his auditory processing and the major factor in his reading difficulties.

23. The IEP team decided at this meeting to add Student's eligibility under the category of specific learning disability and to add psychological services for Student, although a goal for those services was not drafted at that time. The IEP team meeting did not result in an executed IEP, and the meeting was adjourned until a new meeting was called for May 17, 2016. Following the meeting, Parent submitted a statement regarding goals for Student for attachment to the IEP report.

DISTRICT'S PREPARATION FOR THE MAY IEP

24. In anticipation of the resumption of the IEP team meeting, Julie Duffy, a program specialist with District, conducted an academic assessment of Student. Ms. Duffy holds two masters degrees, one in in education and one in educational leadership and administration, both of which she received from Chapman University (now Brandman University) in 2010 and 2015 respectively. She received her bachelor's degree in child development in 2000 from California State University at Sacramento.

25. Ms. Duffy holds a teaching credential for special education students with mild to moderate disabilities. She has worked as a teacher, support provider, or resource specialist for school districts since 2004. She began working for District as program specialist in August of 2015. Ms. Duffy was Student's case manager³ at District. Ms. Duffy attended the January 14, 2016 IEP team meeting.

³. The IEP meeting report states that Mr. Hunley was Student's case manager.

26. The purpose of Ms. Duffy's assessment was to obtain a "clear report" of Student's ability and to see if he was making progress. This assessment was the only one she performed in the 2015-2016 school year, although she has done approximately 28 assessments in the last four years. To assess Student, she administered the Woodcock-Johnson standardized test and the San Diego Quick Reading Assessment. Ms. Duffy recognized that Student had been assessed often: he knew the directions to the Woodcock-Johnson. That test's results showed that Student was generally in the average range, but he showed significant weaknesses in math fluency and delayed story recall. The reading assessment found that his independent reading ability was at a fourth-grade equivalent and his instructional reading level was at a fifth-grade level. She found him overall to be in the low average range compared to his age level.

27. District also conducted an observation by District's Education Specialist Anne Miller of a tutoring session given to Student by Ms. Coutchie. Ms. Miller did not testify at hearing. Ms. Miller observed Student in a review of syllable division rules, and noted that he was prompted 22 times for 15 questions. Similarly, Student required prompting on six of nine questions in a later unit. Student worked on syllable rules, new vocabulary, metaphor, prepositional phrases, cold reading, reading comprehension, and vowel combinations during 60 minutes of observation. Ms. Miller noted that Student was engaged and enjoyed the session.

THE MAY 17, 2016 IEP TEAM MEETING

28. At the May 17, 2016 IEP team meeting, the previous IEP's goals were "closed out," and new goals drafted based upon previously-prepared drafts worked on by Student's special day class teacher Andrew Hunley, his Occupational therapist Stephanie Westphahl, and Ms. Duffy. Dr. Gwaltney was not invited by District to the May 17, 2016 IEP team meeting. Although Parent expected that she would be at the meeting, Parent did not pursue her attendance. The IEP team meeting was audio-recorded.

29. The draft goals were revised based upon discussion among the IEP team at the meeting. At hearing, Ms. Duffy and Parent disagreed upon whether there was agreement to the goals at the IEP meeting. Performance baselines for Student were worked out by the team with input from Parent and Ms. Coutchie.

30. The draft IEP contained eight goals, each with a statement of Student's present level of performance. At issues are goals 1 (reading fluency), 2 (decoding), and 3 (writing revision). In addition, Dr. Gwaltney gave her opinion that a writing fluency goal would be worthwhile, as Student's typing speed was low and he had difficulty completing in-class written assignments in the allotted time.

31. The baseline for Student's reading fluency goal contained conflicting assessment results. Ms. Coutchie reported that Student could read a seventh-grade text at 40-45 words per minute at 95 percent accuracy. Dr. Gwaltney found that Student could do a cold read of fifth-grade text at 48 and 96 correct words per minute. District testing found that he could read fifth-grade text at 84 words per minute and sixth-grade text at 63 words per minute. Grade-level speed is 150 words per minute.

32. Goal 1 was set as Student being able to read sixth-grade level text at 100 words per minute charted at 90 percent accuracy in three consecutive trials. Dr. Gwaltney thought Goal #1 was adequate as drafted.

33. For Goal 2, Student's present level of ability at decoding was reported from Dr. Gwaltney's assessment as the equivalent of second grade, seven months into the school year. The IEP report's baseline set out her findings that Student had difficulty with short vowels the 'schwa' vowel sound, non-word decoding and sequencing of vowel sounds.

34. The measurable annual goal for decoding as drafted for Student set that he would be able to decode a list of ten fourth-grade multisyllabic words with prefixes and suffixes charted at 80 percent accuracy on three of five consecutive trials.

35. The present level of performance for Goal 3, writing revision, was again largely taken from Dr. Gwaltney's assessment. She found that Student was at a third-grade level for essay writing. The baseline noted that Student struggled to write grammatically correct and complete sentences and had difficulty with grammar and punctuation.

36. Student's writing revision goal was that he would use a supportive word processing program to produce an essay that would score a three on the District's writing rubric for sixth-grade work.

37. The IEP team reviewed an observation by District staff of a tutoring session by Ms. Coutchie conducted by Anne Miller, a special education teacher. She noted that Student was introduced to a significant number of new words and worked on rules concerning syllable and word formation. She expressed concern about the amount of time Ms. Coutchie spent helping Student to give a correct response and with the fact that Student was exposed to the "high level thinking" of his tutor rather than to peer role models whose reasoning would be more accessible to Student.

38. Parent was told at the May 2016 IEP team meeting that Student would receive individual instruction in reading during his curriculum support class. Ms. Duffy told Parent that Student would receive "an SRA" reading program for reading remediation. At that time, SRA's Reading Mastery was being used at the high school by one student. Reading Mastery was an intervention for decoding and reading fluency problems, but District members of the IEP team knew that Reading Mastery would be replaced the next year by SRA's Reading Lab 2.0. No one at the meeting was knowledgeable about Reading Lab 2.0. Parent was told that Reading Lab 2.0 was an update to Reading Mastery.

39. Both Parent and Ms. Coutchie demanded reassurance that Student would not be given a computer program as his reading intervention when he transitioned to

high school. District members of the IEP team assured them that Student would be provided with the "SRA reading lab" as part of his curriculum support class. Parent asked what that was and was told by Francine Caires, the Special Education Department Chair, that it was a "more focused reading program" that was "pretty scripted."⁴

40. When Parent asked if it was computer-based, more than one District staff member immediately answered "No." Parent was told by Ms. Caires that the program was highly respected, had been around for years, and was the "gold standard." When Parent asked what she would see if she observed a session, she was told that "it would be one-to-one with a teacher" working on decoding, reading timed passages, or just practicing reading. Primarily, staff informed Parent, the program was based off a student workbook. These statements were accurate descriptions of the Reading Mastery program, which staff knew would not be offered to Student. Parent requested more information about the program from District staff, but it was not provided.

41. The IEP Report's section setting out the proposed placement and services noted that the high school into which Student would be transitioning was "currently using Science Research Associates (SRA) program which is a reading intervention designed to teach explicit direct instruction to struggling readers." District's offer of FAPE for 2016-2017 included "reading instruction with the SRA reading intervention program in [Student's] curriculum support class for 20 minutes a day."

42. Student did not have the option of a two-class reading skills block once he transitioned to high school. Parent requested that Student be given a first period English

⁴The person speaking to Parent is identified on the recording as "Fran," and appears from context and from the list of attendees to the IEP team meeting to be Francine Caires.

class so he could continue with his reading tutoring before school. The IEP team meeting again did not result in an executed IEP, largely because Parent was dissatisfied with the proposed reading program which she felt was not sufficiently explained.⁵

43. Shortly after the IEP Team meeting, Parent met with Ms. Duffy and Mr. Hunley for further discussions of District's FAPE offer. Parent was told by Ms. Duffy that Student would be using Reading Lab 2.0 once he began high school, but there was no information available about the program. Parent contacted McGraw Hill Education, the publishers of the program, to obtain information about it, but ended the call confused because she and the representative appeared to be talking about two entirely different products.

TESTIMONY OF DR. COLLEEN ESTES

44. Dr. Coleen Estes is a school psychologist employed by District. She received her doctorate in educational psychology from Texas Tech University in 1982. She earned a master's of education in special education and rehabilitation counselling from the University of Texas at Austin in 1974 and a bachelor's degree in psychology degree from Lamar University in 1972. Since obtaining her doctorate, she has had a private practice, been a clinical consultant, and a college instructor. She worked for five years as a psychotherapist for Solano County Mental Health Services on a contract basis. Since approximately 2002 she has worked for District.

45. Dr. Estes did not attend the May 17, 2016 IEP team meeting and did not assess Student. Dr. Estes has provided Student some counselling services. She reviewed

⁵. Parent signed to consent to the implementation of the IEP on the first day of hearing.

Dr. Gwaltney's assessment of Student and a psycho educational assessment performed in November of 2014 by District psychologist Heidi Mize as part of a triennial review. Dr. Estes concluded that Student was a sight reader because his reading comprehension was so much higher than his oral reading ability and that he could not decode words because of his visual processing deficits. She felt that his reading comprehension ability was at least average. In her opinion, teaching him phonics would be counterproductive because he was not good at it and it would raise his anxiety levels.

46. Dr. Gwaltney strongly disagreed that Student would not benefit from phonics instruction or that there was no need to work on his decoding skills because his reading comprehension appeared relatively high. In her view, failure to address an area of need was counter to the Individuals with Disabilities Education Act and to Response to Intervention,⁶ as it was not appropriate to lower expectations or to give up on basic decoding even for older students. Further, Dr. Gwaltney found that Student had progressed in decoding from 2014-2015 and was still responding to intervention. She believed he had the potential to reach average ability in reading.

READING LAB 2.0

47. Parent found out within a week of the start of school in August of 2016 that Student's reading intervention was going to be computer-based instruction and that he would not be receiving one-to-one reading instruction from a teacher. She again tried to find out more about the Reading Lab 2.0 program, but was unsuccessful. Parent was disappointed that Student was given physical education first period rather than the English class she had requested.

⁶ Response to Intervention is a three-step, or tiered, model of school supports that uses research-based academic interventions of escalating intensity.

48. Dr. Gwaltney researched Reading Lab 2.0 and found out that it was not an update to Reading Mastery. Instead, it had no relation to the other program. Further, Reading Lab 2.0 was not designed to be an intensive intervention. Instead, it was considered a Tier One intervention, the lowest intensity, while Reading Mastery was on the cusp between Tiers Two and Three. Dr. Gwaltney was told in an email from McGraw Hill Education in October of 2016 that Reading Lab 2.0 was intended to be used as a supplement to a Tier One program, although it could be used with a Tier Two program. McGraw Hill told Parent the program was “good for any student just wanting extra practice to the student who might be slightly behind within their core program.” Further, she was informed that “[t]here is really no instruction to this program as the teacher can just monitor student progress, assign certain readings, and provide additional material.”

49. Reading Lab 2.0 was not a reading intervention tool. The program began with an assessment that assigned students a lexile (reading) level. The program then allowed students to read stories that were within their areas of declared interest and then posed a series of reading comprehension questions or word puzzles. The program kept track of the stories read, the scores on the closing problems, and the total amount of time spent by the student on the various parts of the program.

50. Dr. Gwaltney observed Student using Reading Lab 2.0 in November of 2016. Instead of being guided through a lesson by an instructor, he was entirely self-directed. Student would skip through the section of the program that required him to read a passage and jump to the end section. Because the program allowed users to change answers until they got them correct, Student would just randomly match answers to questions. In Dr. Gwaltney’s observation, Student had 17 incorrect answers to six correct ones. The program reported that he had a 100 percent word study score despite the errors, and Student completed the section in just over a minute.

51. Dr. Gwaltney found the Reading Lab 2.0 program “very inappropriate” to Student’s needs. She believed Student needed intensive reading intervention on a one-to-one basis with a teacher for 50 minutes a day, five days a week. Dr. Gwaltney believed that Ms. Coutchie was very knowledgeable, had a good rapport with Student, and had made “growth” in Student’s abilities, but did not know that her approach was sufficiently systematic. Dr. Gwaltney did not know whether she would recommend that a school pay for Ms. Coutchie’s services going forward rather than create a more appropriate program in-house. Dr. Gwaltney believed that more than 50 minutes a day of intensive intervention might overload Student’s ability to attend to task and may interfere with his ability to meet the demands of high school academics.

52. Mary King, who teaches Student’s English Essentials and Curriculum Support classes, supervised Student’s use of the Reading Lab 2.0 program. There had been some technical problems with the program, but Student worked on the program, when available, several times per week. Ms. King believed that Student could decode quite well, and that he could read at grade level by working from contextual clues.

53. Ms. King presented a Student Progress Report for Student’s use of the Reading Lab 2.0. Student began recorded work in the program on August 25, 2016. On that date he spent nine minutes and twelve seconds working on the program to complete a reading unit, evenly divided between reading comprehension and word study tasks. He maintained a similar level of participation for the first week. It then began to decline through the second week of September, when his time in the program dropped precipitously.

54. From September 16, 2016, through the end of the reporting period on October 7, 2016, Student spent less than two minutes in the program on six days, between two and five minutes on three days, and between five and seven minutes on the remaining five days. On those days where he spent more than two minutes in the

program, he finished as many as three units. The majority of his time was spent on the reading comprehension section, as in 11 units he spent less than 30 seconds on word study skills. At no point did Student work in the program for the 20 minutes envisioned in the May 17, 2016 IEP.

55. Dr. Gwaltney was an extremely credible witness. She spoke from personal knowledge, having assessed Student herself as an independent assessor. She was candid, forthright, and direct when questioned and a disinterested witness, especially as she expressed doubts about using Ms. Coutchie's services going forward. Her credentials justified her selection as an independent expert.

56. District's witnesses were somewhat less persuasive. Ms. Duffy lacked Dr. Gwaltney's experience and credentials. Dr. Estes necessarily based her testimony on the work of Dr. Gwaltney and of Heidi Mize, having not assessed Student herself, which lessened the weight that could be given to her opinion. Ms. Coutchie was earnest and qualified to opine about special education theory, but had a clear interest in obtaining payment for her services. Student's teachers, particularly Ms. King, were dedicated and genuinely cared about Student's education, but were not involved in the formation of Student's educational plan. The exception is Mr. Hunley, who did not testify at hearing.

STUDENT'S TUTORING EXPENSES

57. Ms. Coutchie charged \$90 per hour for tutoring. For the period from August 1 to October 17, 2016, Parent presented an invoice for 37.5 hours of tutoring. The invoice stated that for "future dates" it was expected that Student would receive tutoring for two hours per day, and all but one charged item is for two hours of service. According to Ms. Coutchie's testimony, Student's tutoring ordinarily ran from 6:15 a.m. to 8:00 a.m., for 1.75 hours per day. The distance from Student's residence to Ms. Coutchie's workplace was 30 miles.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁷

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁸ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit.5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

⁷Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁸All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these

phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUE 1A): FAILURE TO MAKE A CLEAR OFFER OF FAPE AT THE IEP TEAM MEETING IN MAY 2016

5. Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student'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); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

6. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, *cert. denied*, 513 U.S. 965 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear written IEP offer that parents can understand. "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and

what additional educational assistance was offered to supplement a placement, if any.” (*Union*, 15 F.3d at p. 1526, quoting 20 U.S.C. § 1415(b)(1)(E).)

7. Numerous judicial decisions have invalidated IEPs that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (*See, e.g., A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769.) One district court described the requirement of a clear offer succinctly: *Union* requires “a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal.” (*Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108.)

8. Student asserts that District violated this requirement in two ways. First, he contends that goals were not developed for him in the areas of reading accuracy, written expression, and writing fluency. Secondly, he contends that the IEP did not specify what portion of the 159 daily minutes of specialized academic instruction was to be in a group setting and what portion was to be individual.

9. Although this claim was listed in the prehearing conference order and discussed at hearing, it has not been addressed in Student’s final briefing. Student instead contends in his briefing that District violated the requirement of making a clear offer by offering one-to-one reading intervention at the time of the IEP meeting but delivering computer-based instruction during the school year. That is not the violation

asserted in the due process hearing request or set out in the prehearing conference order, which controls the issues for hearing.⁹

10. The failure to make a clear offer is a procedural violation. To obtain relief, Student must have shown that the failure to craft goals in the cited area or the failure to specify whether services were group or individual prevented Parent from deciding whether or not to accept the offer, thereby materially impeding Parent's ability to participate in the decision making process; impeded Student's right to a FAPE; or caused Student a deprivation of educational benefits.

11. Assuming arguendo that District both failed to craft the goals and to specify whether Student would receive special education services on a group or individual basis, Student's claim must be denied because there has been no proof of any consequence of those failures. There has been no testimony from Parent that these alleged defects inhibited her ability to decide whether to accept the District's offer of FAPE. It is manifestly clear in the record that Parent's concern over whether District was proposing a sufficiently intensive reading remediation program that would properly address Student's reading deficits prevented her from accepting the IEP offer. No proof was presented that these technical violations were of consequence. Student's right to a FAPE was not impeded and he lost no educational benefit because of these failures as Student did not introduce sufficient evidence to prove that violation. No proof has been put forth that these violations constituted a violation of Student's right to a FAPE. Accordingly, claim 1a must be denied.

⁹ Student cannot expand the issues for hearing without amending the due process complaint. Requests to amend due process hearing complaints must be made not later than five days before the hearing. (20 U.S.C. § 1415(c)(2)(E)(i)(II); Ed. Code, § 56502, subd. (e).)

ISSUE 1B): FAILURE TO ACCURATELY REPORT STUDENT'S PRESENT LEVELS OF PERFORMANCE

12. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. §1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345.) An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The statement of present levels creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

13. Student contends that District failed to accurately report his present levels of performance in reading and English language arts in making its offer of FAPE for the 2016-2017 school year. Again, Student did not present evidence at hearing connecting this failure to any loss of parental ability to participate in the IEP process or any loss of educational benefits. Student did not address this issue in his closing brief. Accordingly, this claim suffers the same defect as the previous issue.

14. It is clear that Student and District have a different view of his potential, and there are differences of opinion about Student's abilities in reading comprehension and decoding due to testing variances between the assessments conducted by Dr. Gwaltney and Ms. Duffy. For Student's reading fluency baseline, Ms. Gwaltney expressed his abilities in terms of seventh-grade text, the District in terms of sixth- and fifth-grade material, and Dr. Gwaltney for fifth-grade text on a cold read. Each of these baselines reported that Student had a need for reading intervention, and provides a standard from which Student's progress may be measured. It is not necessary that all assessments be in the same units as long as the student's present levels are appropriately tested and

duly reported. Student accepted the present levels baseline for his decoding and writing revision skills, goals two and three.

15. Student contended at hearing that the District's framing of his baseline skills in the IEP report were confusing or that they mixed grade level standards, but has not set out how such violations affected his education. Student has not presented evidence or argument setting out how such procedural violations constituted a denial of FAPE by impeding his right to a FAPE, materially impeding Parent's ability to participate in the decision making process, or causing a deprivation of educational benefits. Claim 1b is denied.

ISSUE 1C): FAILURE TO OFFER MEASURABLE GOALS IN ALL AREAS OF NEED

16. A child's IEP must contain a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(a)(ii); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) For each area of identified need, the IEP team must develop measurable goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) The failure to offer goals is a procedural violation.

17. Student contended that his IEP goals were flawed because they were developed from baseline present levels of performance that were inconsistent and confusing. Student asserts that the IEP was deficient because it contained no writing fluency goal despite the fact that Dr. Gwaltney recommended such a goal. Student argues that his speed of written language was not adequate for him to access the core curriculum. Dr. Gwaltney stated that a writing fluency goal would be worthwhile, but

Student has not shown that it was necessary or that its absence prevented him from making meaningful education progress.¹⁰

18. Student's reading fluency levels were reported in terms of the grade level of the reading material. Student contends that this led to a flawed goal, as his reading fluency goal for the year was to read a sixth-grade text at 100 words per minute at 90 percent accuracy in three consecutive trials. This goal was flawed, Student argues, because a sixth grader would be expected to read grade level text at 150 words per minute.

19. That argument is unpersuasive. Student's goal was not to read at the same speed as an average sixth grader, but to read sixth-grade level text at 100 words per minute. Student's goal was to read sixth-grade level text at a speed somewhat below that expected of an average sixth grader. An IEP team may set a target below grade-average ability, even for a student in a higher grade than the target level. The choice not to set a higher standard is not a procedural violation, as the goal must be appropriate to the student's ability and current baseline skill. Student's argument that the IEP is deficient because it does not set out what the expected reading fluency level would be for an eighth-grade student is unsupported by citation to law or case. An IEP is not required to forecast a student's acquisition of grade-level skills.

20. Similarly, Student's decoding goal is characterized as "confusing and flawed" because it finds his baseline skill to be at a second-grade level, but sets a goal of fourth-grade level decoding, to be evaluated for progress based upon third-grade

¹⁰ Student has withdrawn the claims reported in the prehearing conference order concerning keyboarding skills and goals. The assertion that his IEP should have had a writing fluency goal is not denied on that basis but because Student has not argued that its absence has met the *Target Range* standards for a denial of FAPE.

standards. Likewise, Student objects that his writing revision goal had a third-grade baseline and a sixth-grade goal for an eighth-grade student. Parent found these formulations confusing, and urges that District be ordered to modify the goals to be clear, realistic, and use a single set of standards.

21. Clear, realistic, and simplified is a noble goal, but not a legal requirement. Progression through grade levels may be effectively monitored by mixing grade standards. Reasonably appropriate goals were offered and progress towards their completion is measurable. The goals suffice to meet the statutory standard of being based upon Student's present levels of academic achievement and functional performance, and setting a target which Student has a reasonable chance of attaining within a year. Parent has not contended that any area of need was omitted or that any flaw in the goals as written constituted a denial of FAPE. Relief must be denied on issue 1c because Student failed to meet his burden of persuasion as to this issue.

ISSUE 1D): PREDETERMINATION OF PLACEMENT

22. Predetermination of a student's placement is a procedural violation that can deprive a student of a FAPE. (*Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*Target Range, supra*, 960 F.2d at p 1084; *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10 (*Douglas County*)). A school district is required to consider those placements in the continuum that may be appropriate for a particular child, and failure to do so is a procedural violation.

23. Student has not addressed this claim in his final briefing. Student's allegation, as set out in the prehearing conference order, is that District predetermined Student's placement by offering Student the inappropriate reading intervention program of SRA's Reading Laboratory 2.0 for 20 minutes per day.

24. District correctly points out in its brief that the Reading Lab 2.0 program is a service, not a placement. Even if it were considered a placement, the claim fails for lack of proof. No evidence was introduced demonstrating or even suggesting that the offer was predetermined. District members of the IEP team were enthusiastic about the program, but the record has no evidence that there was unwillingness to consider alternatives or that District had a "take it or leave it" approach to its offer of services. Given the lack of supporting evidence and the fact that a service is not a placement, relief on issue 1d must be denied as Student has failed to meet his burden of proof as to this issue.

ISSUE 1E): FAILING TO OFFER SERVICES TO MEET STUDENT'S UNIQUE NEEDS

25. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

26. The Supreme Court has noted that, "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools." (*Schaffer, supra*, 546 U.S. 56, 53.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider

is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No.C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885.) Nor must an IEP conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parents' desires."], citing *Rowley*, *supra*, 458 U.S. at p. 207.)

27. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, *supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology.

28. Student has both physical and neuro cognitive challenges. The greatest impediments to his success in his education are his reading difficulties. Both Parent and District have provided him with assistance or services to aid him in overcoming his challenges.

29. The parties do not dispute that Student's overall reading ability is below grade level and greatly inhibits his ability to receive an education. Parent responded to Student's need by taking him to Ms. Coutchie for tutoring in reading and writing. District has offered accommodations, supports, and special classes. Parent now contends that District's offer of services for Student's reading needs is so ineffectual as to deny him FAPE.

30. Student's reading problems stem from impairment of his working memory and his visual spatial perception. Dr. Gwaltney, the independent assessor, found that Student had strong oral comprehension, good mental processing speed, and a suitable vocabulary. His deficit was his inability to match sounds to letters. His inability to decode words into sounds was an unusual weakness, particularly in a pupil of his age, and made most reading remediation tools unhelpful to him. Further, although Student had attentional difficulties, he did not show outwards signs of inattention. Dr. Gwaltney believed that he was likely to passively fail to learn unless actively engaged.

31. Student required intensive, systematic intervention that was focused on bridging the divide that existed for student between symbols and sounds. Dr. Gwaltney recommended instruction in phonics and orthographics that was guided by a skilled reading teacher. She believed that the commonly available reading programs such as Read 180 would not be helpful because they were designed to help children with poor reading skills or habits, not with learning disabilities. In her opinion, such a program would reinforce Student's bad habits and errors.

32. Dr. Gwaltney attended Student's January 16, 2016 IEP team meeting and pressed these points. She was dismayed that District members of the IEP team were recommending that Student be given the Read 180 program because it was not consistent with her recommendations and because she did not believe it would be effective.

33. District staff believed that Student would be better served by improving his strengths. Ms. Duffy conducted an academic assessment to be presented at the continued IEP which found weaknesses and scattered strengths, but placed him overall in the low average range in his peer group. Her impression of Student's needs and deficits was that they were much less unique than they were in the view the independent assessor.

34. The May 17, 2016 IEP team meeting did not result in a completed IEP because Parent was not convinced that the plan was designed to meet Student's need for intensive reading intervention. Parent and District staff differed as to whether there was agreement on Student's goals for the new IEP. The observer sent by District to witness Ms. Coutchie's reading tutoring felt that Student was being excessively coached. Both Parent and Ms. Coutchie felt that the major finding of Dr. Gwaltney's report was that Student's needs could not be met by a packaged reading program because his problems arose from a unique disability and not from lagging skills or lack of practice, and that District staff were ignoring or discounting that conclusion.

35. However, the differences between the conclusions of Student's independent assessor and District's assessor are less consequential than District's ultimate handling of Student's reading intervention. Although District knew that SRA's Reading Mastery program would not be used at the high school when Student began there in the 2016-2017 school year, District staff described Student's reading program as though it would be. Staff at this meeting knew that Reading Mastery was being discontinued and that Reading Lab 2.0 was being purchased. No evidence was introduced at hearing that District staff knew at this time that Reading Lab 2.0 was a wholly computer-based program that required no teacher participation. Rather, the record supports a finding that District staff at the meeting knew nothing whatsoever about Reading Lab 2.0 and nevertheless urged it upon Parent.

36. Both Parent and Ms. Coutchie were determined that Student not be given a computer-based reading intervention. They were told that his high school program was a focused program that was well-tested with a long history of use and was the gold standard in reading intervention. When Parent asked how the program was administered, she was told that it was one-on-one with a teacher. Those statements may, as District asserts in its brief, be true for Reading Mastery as it was used right then

at the high school, but they were not proper responses to Parent's questions about the services her son would receive. Parent was told that Student would use something called Reading Lab at the high school, but the nature of the transition from SRA's Reading Mastery to SRA's Reading Lab 2.0 was not disclosed.

37. Whether Ms. Caires herself knew that Student would not use Reading Mastery in high school, other staff certainly did know and said nothing. The draft IEP meeting report stated that the high school was using an SRA product that gave direct instruction to struggling readers. The offer of FAPE promised "the SRA reading intervention program" to Student in his curriculum support class for 20 minutes per day. District staff knew they would not be offering Student the reading intervention program that they had described to Parent and did not disclose that they were transitioning to an unknown product.

38. Both Parent and Dr. Gwaltney attempted to get information about Reading Lab 2.0. What Parent was told was so different from what she had been led to believe that she became frustrated with the publisher's representative. Dr. Gwaltney did learn months later that Reading Lab 2.0 was a reading practice program intended to supplement other programs for mildly delayed readers. It met none of her recommendations and had all flaws she feared.

39. Dr. Gwaltney observed Student using Reading Lab and found that it was reinforcing bad habits such as guessing and skipping ahead. She found that he was just pushing through, getting correct answers through brute force and learning nothing. Her observation is supported by the Student Progress Report, which shows that Student rapidly learned to game the system and spent less and less time on the program each day.

40. Dr. Estes believed that Student should not learn phonics, and that instead he should build upon his sight-reading skills. Although she did not assess him, she

concluded from assessments that were done that he was a sight reader and not a decoder, and that he would be frustrated and unhappy if he were forced to learn phonics because he was not good at it. Her opinion was strongly countered by Dr. Gwaltney, who had seen Student progress in decoding and who believed that it was improper to abandon a fundamental skill like decoding words even though the student was in eighth grade. Dr. Gwaltney's opinion, based upon her expertise and the fact that she assessed Student, carries more weight.

41. Whether or not staff were actively deceiving Parent about the nature of Reading Lab 2.0 is immaterial. Student has not raised such an issue. Similarly, it does not matter that the program did turn out to be as poorly matched to Student's needs as Parent, Dr. Gwaltney, and Ms. Coutchie feared. An IEP for a disabled child is measured at the time that it was created. (*Adams, supra*, 195 F.3d at p. 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *Douglas County, supra*, 552 F.3d at p. 801.)

42. District denied Student FAPE by its decision to pick a product about which it knew nothing and pass it off as an intensive intervention for Student's atypical reading difficulties. Under the standard set in *Rowley*, a District need not optimize a student's potential, but need only design an educational program that will provide a basic floor of opportunity. District did not meet this standard.

43. The choice of Reading Lab 2.0 was not designed to meet Student's unique needs, as the IEP team had no idea what needs Reading Lab 2.0 was designed to meet. The use of Reading Lab 2.0 was not reasonably calculated to provide Student with some educational benefit. No calculation was involved, as the nature, focus, and method of

Reading Lab 2.0 was unknown to the team at the time they proposed its use. If there would be any educational benefit conferred, it would occur by happenstance and not by design.

44. District charges in its brief that Parent is attempting to dictate methodology of instruction, which she may not do. That choice is wholly reserved to District, subject to the condition that its selection is designed to meet the student's needs. However, the same *Rowley* standard applies, which District did not meet. Reading is a fundamental academic skill which is the gateway to all other instruction. It is not adequate for District to pick a product at random and hope that it will remediate Student's reading difficulties. It is particularly inappropriate for the IEP team to do so after being told by an independent expert that Student's needs cannot be met by packaged interventions that are not designed to help with reading problems caused by disability. Student has not attempted to set a particular methodology for his intervention, but has asked that the intervention provided be appropriate to his needs. In fact, Student's needs would probably have been met if District had continued to use the Reading Mastery program for its high school students, as it was not computer-based and was administered by a teacher who could adjust its interventions to match his particular deficits. Instead, District did not propose a reading program that would meet his unique needs.

45. Student has met his burden of persuasion that District failed to offer him a reading intervention program that was designed to allow him to make meaningful educational progress.

REMEDY

1. Parent seeks reimbursement for the costs incurred to provide Student with reading and writing intervention services.

2. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*)). A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party.

3. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at 52 pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

4. Because she was concerned that Student was not learning to read, Parent utilized the services of Ms. Coutchie as a tutor. According to testimony, Ms. Coutchie charged \$90 per hour, and was owed \$3,375 for services rendered from August 1 to October 17, 2016. Those services are reimbursable to Parent as services provided to her child as a consequence of District’s failure to provide FAPE. Parent shall not be

reimbursed for any therapy expense which has not been charged to her or which has already been covered by some other party.

5. Similarly, further services from Ms. Coutchie provided to the date of this order are reimbursable at \$90 per hour to a maximum of an average of 1.75 hours per weekday, excluding holidays, in accordance with her testimony that she would provide services to Student from 6:15 a.m. to 8:00 a.m. each weekday. Parent shall not be reimbursed for any therapy expense which has not been charged to her or which has already been covered by some other party.

6. From the date of this order forward, Parent is entitled to reimbursement for one therapeutic hour per school day, up to a maximum rate of \$90 per hour. This level of service is as suggested by the testimony of the independent assessor, Dr. Gwaltney. Parent may utilize any provider, suitably credentialed in reading instruction and unrelated to her, she chooses, including Ms. Coutchie, as long as the services are for reading and writing skills. This reimbursement shall continue until District completes anew independent psycho educational assessment of Student by Dr. Gwaltney, or, if she is unavailable, another mutually agreed-upon assessor who has certification or specialization in reading issues, convenes an IEP team meeting with that assessor in attendance, and makes Student an offer of FAPE.

7. Parent shall be reimbursed for necessary car travel to bring Student to tutoring covered by this order at the currently prevailing Internal Revenue Service Rate for reimbursement for travel by privately owned vehicle. Parent is entitled to reimbursement for 60 miles of roundtrip travel for each tutoring session conducted by Ms. Coutchie. Student shall be reimbursed up to 60 roundtrip miles of car travel for any tutoring session covered by this order.

ORDER

1. Within 30 calendar days of this order, District shall reimburse Parent \$3,375 for tutoring expenses incurred with Ms. Coutchie from August 1 through October 17, 2016. It shall also reimburse Parent \$90 per hour to a maximum of an average of 1.75 hours per weekday for tutoring services from Ms. Coutchie from October 17, 2016 to the date of this order. Parent shall be reimbursed for necessary mileage to take Student to tutoring, up to 60 miles per session by car, at the prevailing IRS rate. Parent shall submit an invoice for such services within 30 calendar days of this order, and District shall pay that invoice within 45 calendar days of the submission of the invoice.

2. From the date of this order until District makes a new offer of FAPE under the conditions listed above, Parent shall be reimbursed for one therapeutic hour per school day, up to a maximum rate of \$90 per hour, for tutoring services in reading and writing skills. Parent shall be reimbursed for necessary mileage to take Student to tutoring, up to 60 miles per session by car, at the prevailing IRS rate. Parent shall submit an invoice for such services monthly, and District shall pay that invoice within 45 calendar days of the submission of the invoice.

3. District shall contract with, retain and fund Dr. Gwaltney to conduct a new independent educational psycho educational assessment, with emphasis upon Student's reading abilities and deficits. The assessment shall focus on providing information necessary for District to determine the type, intensity and duration of the specialized instruction and related services which can be individually designed to provide educational benefit to Student and ameliorate his reading deficit. If Dr. Gwaltney is unavailable, the parties shall meet and agree upon an independent assessor who has certification or specialization in reading issues who shall be retained by District to conduct the assessment in Dr. Gwaltney's place. Dr. Gwaltney or the retained expert shall attend all IEP meetings and be compensated by District for attendance and

reasonable travel time to the meetings until such time as a new IEP is agreed to by all parties or District files a due process action for authorization to implement the IEP.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on Issues 1a – d and Student prevailed on Issue 1e.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd.(k).)

DATED: January 19, 2017

_____/s/_____

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings