BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT, ON BEHALF OF STUDENT, v. CAMPTONVILLE ACADEMY, CAMPTONVILLE UNION ELEMENTARY SCHOOL DISTRICT, AND YUBA COUNTY SPECIAL EDUCATION LOCAL PLAN AREA.	OAH CASE NO. 2008090659

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in Marysville, California, on February 5, 6, 9, and 10, 2009.

Student was represented by Taymour Ravandi, Attorney at Law, who was assisted by Kathleen Rossow. Parent was present throughout the hearing.

The Camptonville Academy (Academy), the Camptonville Union Elementary School District (CAUSD), and the Yuba County Special Education Local Plan Area (SELPA) (collectively the District) were represented by Linda Rhoads Parks, Attorney at Law. Present throughout the hearing were Janis Jablecki, Executive Director of the Academy, who also represented CAUSD; Christopher Mahurin, the Area Coordinator/Educator of the Academy; and Terri Burroughs, Administrator and Program Specialist for the SELPA.

Student filed a second amended due process hearing request on November 7, 2008. On December 26, 2008, OAH granted a continuance of the dates for hearing. At the conclusion of the hearing, the parties were given leave to file closing briefs by February 26,

2009. On that date, the parties submitted briefs and the record was closed.

ISSUES

STUDENT'S ISSUES

1. Did the District deny Student a free and appropriate public education (FAPE) during the 2007-2008 and 2008-2009 school years (SYs) by:

(a) Failing to conduct an individualized education program (IEP) team meeting?

(b) Failing to provide prior written notice of its refusal to enroll Student in, or of its disenrollment of, Student from the Academy?

2. Did the District deny Student a FAPE during SYs 2007-2008 and 2008-2009 by offering Student an educational program that did not meet her unique needs in the core academic areas because of a significant discrepancy between her academic level and the academic level of the program that was offered?[1]

DISTRICT'S AFFIRMATIVE DEFENSES

1. Should Student be barred from equitable relief because Parent violated the compulsory education law?

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[1] In her Closing Brief, Student raises several issues new issues, including allegations that the District failed to have an IEP in effect by the beginning of the school year, confused FAPE requirements with those relating to the least restrictive alternative, failed to establish an appropriate baseline in the February 2007 IEP offer, and failed to address Student's progress in the general education curriculum. None of these issues was set forth in her complaint, her prehearing conference statement, or the Order Following Prehearing Conference. Therefore, they are not considered here. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

2. Should Student be barred from equitable relief during the time Parent neither filed a request for due process hearing, nor enrolled Student in any school?

3. Should Student be barred from equitable relief during the time period after her motion for stay put was denied and she was not enrolled in school?

RELIEF REQUESTED

Student seeks an order requiring the District: (1) to convene an immediate IEP meeting for Student, after re-enrolling her in the Academy; (2) to reimburse Parent for educational expenses; and (3) to provide compensatory education, such as additional one-to-one instruction and new assessments, to remedy its alleged denial of a FAPE to Student.[2]

FACTUAL FINDINGS

BACKGROUND

1. Student, a female, will be 17 years of age on March 28, 2009. She lives with Parent in Yuba City, California.[3] In the school years (SYs) 2003-2004, 2004-2005, 2005-2006, and 2006-2007, she was enrolled in the Camptonville Academy (Academy), a public charter school in the Camptonville Union Elementary School District (CAUSD) and the Yuba County SELPA. She is eligible for, and has been receiving, special education and related services due to a specific learning disability. She has difficulty with verbal comprehension, perceptual planning, and working memory, and consistently scores well below average for

[2] The parties agree that the Academy, CAUSD, and the SELPA acted in concert in all matters pertinent to this Decision, and are jointly and severally liable to provide any ordered relief.

[3] Yuba City, although adjacent to Yuba County, is in Sutter County.

her age in those and related areas on standardized tests.

2. CAUSD chartered the Academy as a public charter school in 1997, and renewed its charter in 2002 and 2007. The Academy admits students from Yuba County and from counties contiguous to Yuba County, including Sutter County. Every semester, as a condition of enrollment, each student (and if the student is a minor, his or her parent) must sign a Master Agreement with the Academy governing basic aspects of their relationship.

3. The parties last agreed on an IEP for Student on September 30, 2004, and since then have been unable to agree on another one. For SY 2006-2007, Student's eighth grade year, the District proposed an IEP (the triennial IEP) at its triennial meeting on October 20, 2006, and in continuations of that meeting on November 17 and December 13, 2006, and February 9 and 23, 2007. With a minor exception, Parent did not agree to the triennial IEP.[4] Disagreements over appropriate courses and instructional materials for Student were among the unresolved disputes at the triennial meeting.

4. In July and August 2007, the Academy presented to Parent a list of courses and instructional materials for Student for her ninth grade year. It then incorporated that list in the Master Agreement that Parent was required to sign in order to enroll Student in the Academy for the first semester of SY 2007-2008. When Parent refused to sign the Master Agreement because it incorporated the disputed list of courses and materials, the Academy refused Parent's request for an IEP meeting to discuss the list, and unilaterally disenrolled Student from the Academy. Parent has been teaching Student at home ever since.

[4] Parent agreed that Student could receive three hours a week of assistance from the Academy's Resource Specialist Program.

THE ACADEMY'S LEARNING MODEL

5. The Academy does not teach students in traditional classrooms. Its learning model is "personalized learning/independent study," in which a student is usually placed at home for instruction primarily by parents, with support and direction from the Academy. This learning model, like the Academy itself, has roots in the home school movement. The Academy provides a structure and legitimacy for instruction by parents who would not otherwise qualify to home-school their children, and furnishes professional assistance with teaching and curriculum. To students, it provides guidance and flexibility in the selection of curriculum and materials, the discipline of periodic review, supplemental small classes and activities, and one-to-one tutoring when necessary. A credentialed teacher visits the home once or twice a month to mentor teaching parents, monitor and report on student progress, and sometimes to tutor the student. A student's independent learning is supplemented by a variety of on-campus small group electives, seminars, science labs, group projects, a media center, core subject instruction, and teacher office hours.

6. The Academy specializes in instructing students who are struggling in traditional classes and need to work at their own paces. Some of its students receive special education and related services, though most do not. All aim for a high school diploma. There is no standard curriculum; each student has an individually tailored curriculum implemented by instructional materials agreed upon by parent and teacher. The materials must comply with state content standards, and are usually selected from catalogues maintained by the Academy. If a parent wants to use other materials, the teacher must approve the choice. The Academy then funds all or part of the purchase of the materials. Parental participation in the choice of courses and instructional materials is an important part of the Academy's learning model.

7. Student's four years of enrollment at the Academy proceeded normally under the Academy's model. At the beginning of each semester, a regular education

teacher was assigned to her. That teacher and Parent worked out a curriculum and a selection of materials to teach it. It was Parent's practice to propose materials to the teacher, who would examine the table of contents of the materials, give or withhold approval, and then make assignments from the approved materials. The teacher visited Student's home twice a month or sometimes weekly, examined and recorded the completion of her written assignments, assisted Parent in teaching methods, and sometimes tutored Student. The parties agree that Student made significant progress during her four years at the Academy.

THE MASTER AGREEMENT PROCESS

8. By state law a public charter school like the Academy must have in place for each independent study student, every semester, a written agreement signed by the school and the student, and if the student is a minor, by the parent, guardian, or caregiver of the student. The agreement must specify, among other things, the specific resources, including materials and personnel, to be made available to the student.

9. The Academy complies with the above requirement by using a Master Agreement that sets forth the student's schedule of courses and the credits for completing them, the course objectives, the method of study, the method of evaluation, and the timing and frequency of required reports. The Master Agreement incorporates by reference an Assignment and Work Record form specifying "appropriate instructional materials," a reference to the materials agreed upon by teacher and parent. It imposes specific responsibilities on the student and the parent. Above the signature line is the statement that by signing the Agreement, the student and the parent "agree to all provisions set forth." As the parties understood, the consequence of Parent's refusal to agree to all of the terms of the Master Agreement was that Student could not be enrolled in the Academy for the upcoming semester.

COURSES AND MATERIALS IN THE IEP PROCESS

10. At least since 2004, the parties have treated the choice of courses and instructional materials as an integral part of the IEP process. The notes of the IEP meeting on September 30, 2004, report a discussion of modifications to Student's curriculum and work assignments, and a discussion of the use of a grammar program. It was agreed at the time that Parent would review a particular grammar text with Student's teacher, and sometimes substitute a different text when necessary. At a November 22, 2005 meeting that Parent could not attend, the District members of the IEP team discussed the modification of academic assignments for Student's academic level.

11. When the IEP team convened its triennial meeting in September 2006, Student's September 2004 IEP had been in effect for two years. The parties' attempt in November 2005 to reach agreement on a newer IEP had failed. The District had completed extensive assessments of Student. At the first of several meetings, the District proposed to continue Student's placement in independent study, with research specialist and speech and language support. The offered IEP provided that recorded texts would be made available when appropriate, and noted Student's need for multisensory presentation of materials with concrete linkage to prior knowledge. The notes of the meeting show that a reading program from A Beka, a publisher of Christian materials, was being used by Parent. Parent requested that the team review and discuss the specific classes proposed for Student in the second semester of SY 2006-2007. The team discussed "ways to accommodate curriculum and materials used in [Student's] classes." Attached to the proposed IEP is a letter from Parent questioning the reasoning behind the assignment of particular classes. At one of the triennial meetings, Parent requested that a special education teacher review and clarify assignments and curriculum, and the team again discussed ways to accommodate the materials Student used. The District members of Student's IEP team who testified confirmed that they discussed courses and materials at

Student's IEP meetings.

12. During the several sessions of the triennial IEP meeting, Student's difficulty with math was discussed. Parent repeatedly expressed concerns about certain math assignments, and the District proposed a meeting with teachers to address those concerns. The notes of the meeting on February 9, 2007, reflect that Student was using the program Math U See at the intermediate level, and that her math goal was altered to reflect her progress with that program. One page of the IEP is a document titled "Scope and Sequence -- Intermediate Math," which lists each of 36 specific math lessons in the order the District wanted Student to take them. Parent opposed the use of the math lesson plan. That lesson plan and the intermediate Math U See program were both incorporated by reference in the math goal the District proposed for Student.

13. Even after five sessions of the triennial IEP meeting, the parties could not agree on anything but resource specialist support. Many issues remained between them, including the appropriateness of proposed courses and instructional materials, the sufficiency of the accommodations and modifications proposed for Student, and the extent of her need for multisensory instructional materials.

COURSES AND MATERIALS IN THE MASTER AGREEMENT

14. Throughout the spring of 2007, Christopher Mahurin, Student's teacher, developed a list of proposed courses and instructional materials for Student's use in SY 2007-2008. He testified that he was guided in those selections by the disputed triennial IEP and by consultations with other members of the IEP team. He also discussed the list with Parent as he developed it, but could not reach agreement with her.

15. On June 21, 2007, Mr. Mahurin wrote a letter to Parent setting forth all the courses and instructional materials Student would use in SY 2007-2008. The letter was not a proposal; instead, it announced that Mr. Mahurin had already made the necessary decisions. In a preface to the list of courses and materials, Mr. Mahurin wrote: "At this

point, I am enrolling [Student] in the following high school courses. I am also ordering and assigning the following curriculum for these courses." The courses were English 9 (Basic), World Geography (Basic), Math Skills, Nutrition (Health), Physical Education, and Beginning Drawing. Under each course title, specific instructional materials were listed.

16. Mr. Mahurin sent his June 21, 2007 letter to Parent by certified mail that day. Parent testified she never received the letter. It is unnecessary to resolve this question, as it has no bearing on the analysis or result of this Decision.

17. On August 24, 2007, Mr. Mahurin and Parent met to discuss courses and instructional materials for Student for the upcoming academic year. Mr. Mahurin produced the June 21, 2007 list, which Parent testified she saw for the first time. A lengthy discussion ensued, but Parent declined to agree to the listed courses and materials, and proposed courses and materials she preferred, including some from A Beka. At the end of the meeting Parent orally requested that an IEP meeting be convened to discuss courses and materials, and that evening Mr. Mahurin, in an email describing the unsuccessful meeting, advised Terri Burroughs, the SELPA director, of Parent's request for an IEP meeting. A meeting was subsequently set for September 4, 2007.

THE UNILATERAL DISENROLLMENT

18. Mr. Mahurin advised Parent that his list of courses and instructional materials would be incorporated into the Master Agreement she and Student would have to sign in order for Student to be enrolled in the fall semester of SY 2007-2008. Parent asked how she could appeal Mr. Mahurin's decisions about courses and instructional materials, and understood him to say that she should appeal to the Academy's Board of Directors. On August 24, 2007, Parent wrote to Jan Jablecki, the Academy's Executive Director, stating her disagreement with Mr. Mahurin's list of courses and materials, invoking "the resolution process," and requesting that the matter be placed on the agenda of the Board of Directors at its next meeting on September 13. At first Parent refused to sign the Master

Agreement because it incorporated Mr. Muharin's list of courses and materials. A few days later she signed the Master Agreement, but wrote on the document that she did not agree with the courses and materials. The District treated this as a refusal to sign.

19. Shortly before the IEP meeting scheduled for September 4, 2007, Ms. Burroughs telephoned Parent to tell her that she had cancelled the IEP meeting because Student was not enrolled in the Academy. On September 4, Ms. Jablecki wrote to Parent, informing her that "[u]ntil we have a valid signed Master Agreement [Student] is not enrolled" in the Academy.

20. In response to Parent's written complaint, Ms. Jablecki convened a Curriculum Review Committee. She testified that, in order to ensure that the Committee was independent, she chose members for the Committee who, except for Mr. Muharin, "did not necessarily know" Student or Parent. The Committee met on September 7, 2007, and upheld Mr. Mahurin's choices of courses and instructional materials. Parent did not appear at that meeting. She testified she was not invited to the meeting, and was unaware of it until some later time. There was no evidence to the contrary.

21. On September 12, 2007, Ms. Burroughs notified the Yuba City Unified School District, Student's district of residence, that Student was not currently enrolled in the Academy for SY 2007-2008.

22. Ms. Jablecki placed Parent's complaint on the agenda of the Academy's Board of Directors for its September 13, 2007 meeting, and obtained a written statement from Parent. Mr. Mahurin prepared notes for his presentation to the Board, which, he testified, accurately represented what he told them. His notes show that he defended his choices of courses and instructional materials, and also aired a number of grievances usually handled by IEP teams. He told the Board, for example, that Parent had requested three different writing classes for Student; that she did not permit certain assessments; that she did not follow through on some assignments; that she requested a computer for

Student and then refused to take it home; and that she refused to allow Student to participate in either the state's STAR (Standardized Testing and Reporting) testing or the California High School Exit Examination (CAHSEE). Parent appeared at the Board meeting and gave several reasons for her opposition to Mr. Muharin's choices.

23. On September 13, 2007, the Academy's Board of Directors voted to deny Parent's complaint. On September 17, Ms. Jablecki notified Parent in writing of the Board's decision, adding that Student was "not enrolled" in the Academy "and your local district of residence has been notified." Since that time, the District has disclaimed any responsibility for Student's education.

24. Since Student was disenrolled from the Academy, Parent has continued to teach her at home, without any support from the Academy, using materials Parent prefers. Every month Parent has sent to the Academy the same kinds of learning logs of Student's studies that had to be sent when Student was enrolled there. Every month the Academy has sent the logs back, with a letter stating that Student is not enrolled in the Academy.

INVALIDITY OF THE DISENROLLMENT

25. The District's sole justification for disenrolling Student is the claim that Student was lawfully disenrolled when Parent refused to sign the Master Agreement. As a result, the District argues, it was no longer responsible for Student's special education, and responsibility for Student reverted to the Yuba County Unified School District, Student's district of residence.

26. The District is correct in asserting that state law governing charter schools provides that a student may not be enrolled in an independent study placement without a written agreement with the student (and, if the student is a minor, with the parent, guardian, or caregiver of the student). However, this law does not exist in a vacuum; because Student is an individual with exceptional needs who is eligible for special education, provisions of the Education Code governing the rights of special education

students and their parents, and the Individuals with Disabilities in Education Act (IDEA), are also applicable. State statutes are to be harmonized and all of them followed if possible. In any event, the IDEA and its implementing regulations are federal laws, and to the extent they conflict with state laws, those federal laws prevail under the Constitution's Supremacy Clause.

27. The District's disenrollment of Student violated state and federal special education law. Disenrollment was a change of Student's placement, which is lawful only after the change has been considered and decided upon by the student's IEP team, with exceptions not applicable here. A proposed change of placement may not be implemented unless the district gives the parent prior written notice of it, with the explanations required by law. And a district may not impose on a student all or part of a disputed IEP without parental consent, or the order of an ALJ or a court of competent jurisdiction.

Failure to hold an IEP meeting

28. Once a student is receiving special education and services, a district must conduct an IEP meeting at least annually (unless a parent agrees otherwise) to review the student's progress and the appropriateness of her placement, and to make any necessary revisions to her IEP. A district must also convene an IEP meeting when a parent requests a meeting to develop, review, or revise an IEP. In California, a 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. Student contends that the District failed to call an IEP meeting at any time after Parent's request for it on August 24, 2007, which request was relayed to Ms. Burroughs by Mr. Mahurin's email that day.

29. The District does not dispute that it first responded to Parent's August 24, 2007 request for an IEP meeting by scheduling a meeting for September 4, 2007, or that it

later cancelled the meeting on the ground that Student was no longer enrolled in the Academy, and never scheduled another meeting.

30. District witnesses recognized that decisions about courses and instructional materials were properly the province of Student's IEP team. For example, Shevaun Matthews, the assistant principal of Marysville High School, was particularly well qualified to make that judgment. She had worked for the Yuba County Office of Education for ten years, variously as a resource specialist, special day class teacher, and special education coordinator. She has extensive experience in developing curriculum, and has attended approximately 500 IEP meetings. She testified that, in her experience, courses for a ninth grade special education student would typically be determined by the IEP team. Asked whether instructional materials would also be discussed, she answered, "absolutely." No witness disagreed.

31. The District's action in transferring its dispute with Parent from the IEP process to the Master Agreement process, where it could impose its will on Parent, intruded into and usurped the proper functions of the IEP team. The District was obliged by law to call an IEP team meeting at Parent's request. The District's decision to disenroll Student from the Academy also constituted a change in Student's educational placement, which cannot lawfully be accomplished without an IEP team meeting. In refusing to convene an IEP meeting at Parent's request to discuss courses and instructional materials and to consider a change of placement, the District procedurally violated the IDEA and corresponding state special education law.

Failure to provide prior written notice

32. The IDEA requires a school district to provide written notice to parents before it initiates or refuses a change in a student's identification, evaluation, or educational placement. The written notice must describe the action proposed or refused, explain why the district proposes or refuses to take the action, describe the documents

underlying the decision, describe the factors relevant to the decision, explain why other options were rejected, and inform parents of their procedural rights with respect to the decision. The District did not give Mother such a prior written notice of its intention to change Student's placement, either before or after that decision was made. In failing to give prior written notice of its change of Student's placement, the District violated the IDEA and state special education law.

PREJUDICE

33. A procedural violation of IDEA results in a denial of FAPE if it impedes the Student's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or causes a deprivation of educational benefits.

34. The District's unlawful disenrollment of Student deprived her of her right to a FAPE and of educational benefits, because it denied her the public school education to which she was entitled.

35. The District's unlawful disenrollment of Student also deprived Parent of a number of important procedural protections in the IDEA and related laws. A parent has the right to be part of the body that makes educational decisions for her disabled child. However, Parent was not a part of the Board of Directors, and apparently was not even aware of the proceedings before the Curriculum Review Committee.

36. A parent has the right to attempt to persuade the other members of the IEP team of the merits of her position. She also has the right to receive and consider the viewpoints of all the educators who are selected and required by statute to attend IEP meetings. One of the reasons why the viewpoints of the District members of the IEP team are valuable to a parent is because those team members are generally familiar with the student's abilities, challenges, and needs. The procedure chosen by the District deprived Parent of those rights. Except for Mr. Mahurin, the members of the Curriculum Review

Committee were chosen specifically because they were not familiar with Student, Parent, or the dispute. There was no evidence that the Board of Directors was any better informed than the Committee. A parent has the right to consideration of her child's program with an open mind, but Mr. Mahurin's list of courses and instructional materials was predetermined.

37. A parent has the right to prohibit the implementation of a proposed IEP by declining to consent to it. The District's insistence on Mr. Mahurin's list of courses and instructional materials constituted the partial implementation of an IEP that Parent had refused to sign. All of Mr. Mahurin's choices of courses and instructional materials were directly traceable to provisions of the disputed triennial IEP. The math goal in that IEP explicitly incorporated the schedule of 36 intermediate math lessons the District wanted Student to take, but all the other instructional materials were also selected by Mr. Mahurin in consultation with some IEP team members and with reference to the disputed IEP. In order to justify its choice of instructional materials, the District introduced a columnar list of the materials required by Mr. Mahurin, with a reference to the disputed IEP supporting each selection. For example, the selection of materials called Write Source was linked to "Written Language goal #3." Streaming audiovisual materials and a program called Brain POP were justified by reference to the District's desire for "multisensory presentation with concrete linkage" expressed on page 14 of the disputed IEP. The program Math U See (intermediate) was "based on math goal Page 4" of that IEP.

38. When a parent refuses to consent to the receipt of special education and services, after having consented in the past, California law allows a school district seek resolution of the impasse by filing a request for a due process hearing. If the district believes that implementation of all or part of an IEP to which the parent will not consent is necessary to provide the student a FAPE, it has a mandatory duty to seek an order from an ALJ allowing it to use that IEP. It has no authority to impose any or all of the disputed IEP

unilaterally.

39. The evidence showed that the District members of the IEP team believed in good faith that the courses and instructional materials Mr. Mahurin selected were essential to providing Student a FAPE. However, the District's decision to avoid a due process hearing and impose its will through the Master Agreement deprived Parent of all the procedural protections she would have enjoyed if the District had complied with the Education Code and sought the approval of an ALJ for the implementation of its proposed IEP. It thus denied Parent a neutral forum in which her dispute with the District could be promptly resolved, and in which the District would have borne the burden of initiating the hearing, and the burdens of going forward and of proof. Instead, the District imposed on Parent the burdens of initiating the hearing and proving her case if she wished to resist the District's decision to implement parts of an IEP to which she did not consent.

40. The evidence did not show that the District's failure to provide prior written notice of its decisions to impose courses and instructional materials on Student, and to disenroll her, had any consequences not already caused by the District's failure to convene an IEP meeting and return the dispute over courses and materials to the IEP process. Between August 24, 2007, and the board meeting on September 13, 2007, Parent received repeated oral and written notice from Mr. Mahurin and other District staff that Student would be disenrolled if Parent did not sign the Master Agreement.

41. For the reasons stated above, the evidence showed that the District's failure to convene an IEP meeting to address the dispute over courses and instructional materials, deprived Student of a FAPE and of educational benefits, and significantly impeded Parent's opportunity to participate in the decision-making process, thereby also denying Student a FAPE. Since the District's disenrollment of Student was unlawful, the District's liability for its denial of FAPE to Student is continuing. It, therefore, procedurally denied Student a FAPE throughout SY 2007-2008 and from the beginning of SY 2008-2009 to the present.

THE SUBSTANCE OF THE DISPUTE

42. In order to provide a student a FAPE, a district must provide an IEP that is reasonably calculated to allow the student to derive some educational benefit from it. Student contends that the District denied her a FAPE during SYs 2007-2008 and 2008-2009 by offering her an educational program that was not reasonably calculated to meet her unique needs and allow her to derive educational benefit, since the courses and instructional materials chosen for her were too difficult in light of her abilities and levels of accomplishment.

43. Resolving Student's substantive contention would involve a review of each of the books and instructional materials placed in the Master Agreement by Mr. Mahurin. For several reasons, that resolution is neither necessary nor warranted here.

44. First, resolution of the substantive dispute would not affect the outcome of this case. This Decision has already found that the District denied Student a FAPE during SYs 2007-2008 and 2008-2009. The same relief is appropriate, and would be granted, with or without resolution of the substantive dispute.

45. Second, the dispute over the list of courses and instructional materials assembled by Mr. Mahurin in the spring and summer of 2007 is obsolete, and its resolution would be of little use to the parties. Student is almost two years older, and has not received any formal education since the spring of 2007. Her curricular needs are different than they were when this dispute arose. Experts for Student and the District testified that Student has probably regressed in some educational areas since she was disenrolled from school. The triennial evaluations underlying the SY 2007-2008 selections of courses and materials will soon be three years old. It would therefore serve no current purpose to approve or disapprove a selection of courses and materials that is unlikely to be useful in developing Student's educational program.

46. Third, the factual record is insufficiently developed to permit informed

resolution of the dispute. It contains a great deal of information about Student's scores on various tests, but almost nothing on translating those test results into sound curriculum decisions. Three detailed analyses of tests administered to Student were introduced, and were similar in result. Student's scores on those tests indicate that she has significant delays in reading, writing, and math, and that in most areas she is at a grade equivalency of second to fourth grade. Those results cast some doubt on whether she would have been able, in SY 2007-2008, to benefit from the curriculum proposed for her.

47. However, nothing in Student's assessments directly determines appropriate curriculum and materials. Parent, who is very familiar with Student's work but has no relevant training in educational matters, testified that she determined the appropriateness of the materials simply by looking at them and consulting the publishers. But no witness for Student addressed whether, in light of her test results, she could benefit from the specific materials Mr. Mahurin selected. For example, Student's expert Dr. Gordon Ulrey, a distinguished psychologist, assessed Student thoroughly in December 2008 and January 2009 and persuasively presented the results of his assessments. However, when asked to evaluate whether the 36 math lessons incorporated into the disputed IEP were appropriate for Student, he declined to do so, saying the he did not know enough. His assessment results were not correlated to specific choices of courses and materials.

48. The District took the opposite tack, directly address the appropriateness of the courses and materials without explaining how Student could benefit from them in light of her significant deficits, and the gap between her current abilities and those of her chronological peers. The District presented opinion testimony from Mr. Mahurin and Carolyn Coffey, Student's last two Academy teachers, and from other knowledgeable teachers who had varying degrees of exposure to Student. Some of these witnesses testified that specific materials were appropriate for Student; some merely testified that the entire package was appropriate. These witnesses believed that as long as ninth grade

material was delivered at a fourth grade reading level, Student could benefit from it. None explained how the downward adjustment of Student's reading level addressed her other serious deficits, such as working memory, auditory processing, math reasoning, and writing.

49. The instructional materials themselves were not introduced in evidence and could not be independently examined. Parent, Mr. Mahurin, and others testified that their judgments were influenced partly by the statements of the publishers of the materials about the use of their materials for students of various ages and skills. However, with one exception, none of the statements of the publishers was introduced. That publisher measured its publications in lexiles, not grade levels.

50. Part of the dispute turns on whether the chosen instructional materials had sufficient support in audio and visual supplements. That question, as one District witness testified, is inseparable from the parties' unresolved dispute over the accommodations and modifications Student requires.

51. The dispute stems from a more fundamental controversy between the parties. Parent believes that Student is not capable of benefiting from studying ninth grade materials, and needs to return to fifth grade content and work her way up toward graduation, one year at a time, until she loses eligibility for special education on her twenty-second birthday. The District believes that Student can finish high school in four years and get a diploma. The choice of courses and materials depends on the resolution of that controversy.

52. Finally, the determination of courses and instructional materials should be made in the first instance by Student's IEP team. The IEP team did discuss Mr. Mahurin's schedule of 36 math lessons and the program Math U See, but it did not specifically discuss any of the other materials that were incorporated into the Master Agreement. It is difficult to envision a well-informed decision on such matters without the benefit of the IEP

team's consideration and recommendations, and the record such consideration would produce.

53. For all the above reasons, this Decision does not resolve Student's substantive contention that the courses and instructional materials selected by Mr. Mahurin did not address her unique needs and were not reasonably calculated to allow her to derive some benefit from her education.

RELIEF

Reimbursement

54. Parents may be entitled to reimbursement for the costs of placement or services they have provided their child when a school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. The parents' unilateral placement is not required to meet all requirements of the IDEA or of state statutes governing public schools, or offer every service needed to maximize a student's potential. It does, however, have to provide specialized instruction designed to meet the student's needs, as well as any support services the student needs to benefit from that instruction. A claim for reimbursement may fail if the student makes limited to marginal academic progress in the private placement. Parent argues that she is entitled to reimbursement for $5,459 in educational expenses she incurred while teaching Student on her own.

55. The parties agree that Student made substantial progress in independent study while supervised and tutored by the Academy. After Student was disenrolled from the Academy, Parent chose to educate her at home in the same fashion as before, but without Academy help. However, the absence of Academy support made a critical difference. Parent is a high school graduate with some college credits, but has no training in education that would assist her in teaching Student, except for the tutoring in teaching

skills previously provided by Mr. Mahurin and his predecessors. The Academy teachers visited once or twice a month to provide structure and ensure progress, tutored Student from time to time, and selected courses and instructional materials for her. The Academy also provided Student a wide range of enrichment activities that greatly enhanced her educational experience. The evidence showed that when enrolled at the Academy, Student benefited significantly from a variety of on-campus small group electives, seminars, science labs, group projects, a media center, core subject instruction, and teacher office hours. Student lost the benefit of all those Academy services and supports when she was disenrolled.

56. Left on her own, Parent chose courses and instructional materials by herself. There was no evidence of the nature of these materials, or that these materials were appropriate for Student. Ms. Jablecki testified without contradiction that the learning logs Parent kept sending the Academy did not indicate substantial teaching of any core subjects. The evidence showed that Student made little or no progress under Parent's unassisted tutelage. Student's own expert, Dr. Ulrey, testified that he was surprised to find how little Student had progressed in skills and achievement since she was disenrolled. Parent attributed this lack of progress to lack of support from the Academy, and candidly testified that she could not accomplish Student's education by herself.

57. The evidence showed that Student did not need less structure and discipline; she likely needed far more. Psychologist Moore testified that she believed that Student could benefit from a more structured environment such as a special day class. Dr. Ulrey stated in his report:

> An educational program that provides the structure of individualized or small group instruction with materials that include multi modalities of visual, auditory as well as tactile kinesthetic is needed. It is highly unlikely that [Student]

would succeed in an independent study program without substantial additional supports ...

The uncontradicted evidence from both parties suggests that Student may no longer be appropriately placed in independent study, even with Academy support.

58. The evidence does not support a finding that the alternative placement selected for Student by Parent was appropriate or met any of her needs for special education and related services. Accordingly, Parent's educational expenditures will not be reimbursed.

Equitable defenses

59. The District raises three equitable defenses that are all variations on a single theme: that no relief should be ordered because Parent defied the compulsory attendance law by teaching Student at home. Since no reimbursement is ordered, and since the District furnishes no authority applying such equitable defenses beyond the context of reimbursement, there is no need to consider those defenses here.

Compensatory education

60. The only witness who testified at hearing about compensatory remedies was Dr. Ulrey. He persuasively opined that Student could be made whole only by the provision of at least four hours of tutoring by a credentialed special education teacher, five days a week. He also testified that this remedy should be furnished until Student finishes the 12th grade.

61. Dr. Ulrey's opinion about the method of remedying Student's shortcomings in education, tutoring by a credentialed special education teacher five days a week for four hours a day, was persuasive and uncontradicted. However, his suggestion for the length of time this remedy should be ordered was based on hypothetical circumstances that were more drastic than the actual circumstances here. Dr. Ulrey testified in response to

hypothetical questions about a student who, last year, was studying only fourth grade content, and was suddenly required to study ninth grade content, skipping the content in between those grades. However, the facts of this case are more complicated.

62. Parent testified that, in SY 2006-2007, Student's materials were all at a fourth grade content level. She determined this primarily by just looking at them. However, Mr. Mahurin, who has substantially more experience and training in the selection of instructional materials, testified that some of Student's materials in that year contained eighth grade content presented at a fourth grade reading level. For example, while the English materials selected by Parent contained fourth grade content, Student was also taking Composition at the Academy's Resource Center, working with materials having content levels between sixth and eighth grade. In addition, she was taking Life Science at the Resource Center, studying a seventh grade text supplemented by seventh grade videos supplied by Mr. Mahurin. These aspects of Mr. Mahurin's testimony were not disputed. The content level of other materials Student used that year was not clear from the testimony.

63. Thus, the gap between the content levels of Student's materials in the previous school year and the materials Mr. Mahurin required for SY 2007-2008 appeared substantial, but considerably less than the hypothetical questions to Dr. Ulrey assumed. On this record the gap can only be approximately determined, but in light of all the evidence it is equitable to award Student compensatory education of the kind proposed by Dr. Ulrey for approximately two years.

Other relief

64. The District will be ordered to reinroll Student in the Academy. Because there has not been an IEP meeting for Student for approximately two years, the District will be ordered to conduct all necessary assessments in areas of suspected disability so that the IEP team can determine all of Student's current unique needs, and address all matters relevant to Student's special education, including, but not limited to, her placement in

independent study, courses and instructional materials, accommodations and modifications, and assessments.

65. Ms. Jablecki was asked whether Student could receive credits toward graduation for any of the work she has done while disenrolled. Ms. Jablecki responded that a school may convene a team to review the work to determine whether it is credit-worthy. Accordingly, the Academy will be ordered to convene such a team, which shall include Parent, and determine in its sole judgment whether any of the work Student has done since her disenrollment is deserving of credits toward graduation.

66. If the parties cannot agree on a new IEP for Student, the District should resolve the disagreement in compliance with Education Code section 56346, subdivisions (d), (e), and (f). In no event should the District use the Master Agreement process to resolve disputes about the IEP. The evidence showed that there is a method by which the District can comply with both the requirements of special education law and the requirements for a Master Agreement. When a student is placed by a district in a certified non-public school (NPS), there is a master contract between the district and the NPS that governs their relationship. When a special education student is placed in the NPS by the district, that student's IEP meeting is held and agreement reached. Then the substance of the IEP is placed in the Individual Services Agreement that governs the NPS's treatment of the student, thereby avoiding any inconsistency between the IEP and the Individual Services Agreement. The District can follow the same procedure for its Master Agreement with Student and Parent. If anything that must be put in the Master Agreement is in dispute in the IEP process, the District should place in the Master Agreement the relevant contents of the last agreed-upon, implemented IEP until the dispute is resolved in compliance with Education Code section 56346.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S., 49 [163 L.Ed.2d 387].)

CHARTER SCHOOL RESPONSIBILITY

2. Children with disabilities who attend public charter schools and their parents retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a)(2006).) A charter school that is a public school of an LEA must serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools. (*Id.*, subd. (b)(1)(i).)

3. A public charter school that authorizes independent study by a student must have in place every semester a written independent study agreement. (Ed. Code, § 51747, subd. (c).) The agreement must be signed by the student, and, if the student is under 18 years of age, by the parent, guardian or caregiver. (*Id.*, subd. (c)(8).) The agreement must contain, among other things, the "specific resources, including materials and personnel, that will be made available to the pupil." (*Id.*, subd. (c)(3).) However, the Legislature did not intend that these statutes override or conflict with special education law. Education Code section 47646, subdivision (a), provides in pertinent part that a child with disabilities attending a charter school shall receive special education instruction "in the same manner as a child with disabilities who attends another public school of that local educational agency." It also imposes on the chartering LEA the duty to ensure that "all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program" and is in compliance with the IDEA and its regulations. (*Ibid.*)

RESIDENCY AND CHARTER SCHOOLS

4. Normally a minor student attends the public school of her parents' residence. (Ed. Code, § 48200.) A public charter school, however, does not admit students by residency. It admits only volunteers, and can admit students who reside in the county of the charter school or in any county immediately adjacent to the county of the charter school. (See. Ed. Code, § 47605, subd. (d)(2); 51747.3, subd. (b).)

CONFLICT OF LAWS

5. It is basic to statutory construction that statutes are to be harmonized if possible. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) An implied repeal of one statute by another may be found "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*Garcia v. McCutcheon, supra*, 16 Cal.4th at p. 477, quoting *In re White* (1969) 1 Cal.3d 207, 212.)

6. Since the power of an ALJ to order relief in an IDEA matter is grounded in federal law, it prevails over conflicting state law. (U.S. Const., art. 6, § 2.)

ELEMENTS OF A FAPE

7. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

8. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690], the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that

maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

9. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley*, *supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

PARENTS' RIGHT TO PARTICIPATE IN THE DECISIONAL PROCESS

10. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

CONVENING OF IEP MEETINGS

11. A school district must conduct an IEP meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); see, 20 U.S.C. §

1414(d)(4)(A)(i).)

12. A district must also convene an IEP meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).) In California the meeting must be held within 30 days from the date of receipt of the written request, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56343.5.)

PLACEMENT

13. An educational placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) Making placement recommendations is the central function of an IEP team meeting. (Ed. Code, §§ 56342, subd. (a), (b); 56343, subd. (d).) An LEA must ensure that the student's parent "is a member of any group that makes decisions on the educational placement" of the child. (Ed. Code, § 56342.5.)

PROCEDURES FOR RESOLVING IMPASSE

14. When a parent refuses to consent to the receipt of special education and services, after having consented in the past, California law requires that the school district seek resolution of the impasse by filing a request for a due process hearing:

> If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the individualized education program after having consented to those services in the past, the local educational agency shall file a request

> for due process pursuant to Chapter 5 (commencing with Section 56500).

(Ed. Code, § 56346, subd. (d)(emphasis supplied).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed:

> If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.

(Ed. Code, § 56346, subd. (e).) The clear implication of subdivision (e) is that the district may not implement the portions of the IEP to which the parent has not consented. Finally, if the district believes that the components of the IEP to which the parent will not consent are necessary to provide the student a FAPE, it must seek an order from an ALJ to that effect:

> … if the local educational agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code.

(Ed. Code, § 56346, subd. (f)(emphasis supplied).) And the statute makes it clear that, while the district seeks resolution of the impasse in due process, it may not implement the disputed IEP. Instead:

> While a resolution session, mediation conference, or due process hearing is pending, the child shall remain in his or her current placement, unless the parent and the local educational agency agree otherwise.
>
> (Ed. Code, § 56346, subd. (f).)

15. The mandatory duty of a district to seek a due process hearing was confirmed by *Porter v. Manhattan Beach Unified School Dist.* (C.D.Cal., Dec. 21 2004 (Case No. CV 00-8402 GAF)) 105 LRP 40577. In *Porter*, a school district's impasse with a parent prevented it from providing a FAPE to a student for seven years. The district blamed the parents, but the District Court held that the fault lay with the school district because it did not seek resolution in due process:

> Under California law, if the parent does not agree to the IEP, the school district is required to take affirmative steps to ensure that the child receives a FAPE. Cal. Educ. Code § 56346(b)-(c); Doe v. Maher, 793 F.2d 1470, 1490 (9th Cir. 1986) (holding that if there is no agreement on the terms, "the agency has a duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meeting, but must afford the parents a due process hearing in regard to that plan").
>
> ....
>
> If the local educational agency determines that the portions of the program to which the parent did not consent, or all of the program if the parent did not consent to any part of the

> IEP, is necessary to provide the child with a FAPE, it is required to initiate due process hearing procedures to override the parent's refusal of consent. (Id.; see also Doe [v. Maher], 793 F.2d at 1490.)

The District Court emphasized that the parents, however intransigent, were not to blame for the consequences of their impasse with the school district:

> Regardless of the conduct of the parents of a disabled child, when a child goes without special education services for years on end, there can be no one to blame but the entity in control of providing the services -- the school district. If the District did not get the consent it needed, it clearly had both a right and an obligation, as a matter of law, to get approval for the IEPs from the state agency to implement them ... Cal. Educ. Code § 56346(b)-7(c).

CONSEQUENCE OF PROCEDURAL ERROR

16. A procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).)

ISSUE 1.A.: DID THE DISTRICT DENY STUDENT A FAPE DURING SYS 2007-2008 AND 2008-2009 BY FAILING TO CONDUCT AN INDIVIDUALIZED EDUCATION PROGRAM (IEP) TEAM MEETING?

17. Based on Findings of Fact 1-30, and Legal Conclusions 1-6 and 10-15, the District failed to convene an IEP meeting when requested by Parent to do so on August 24, 2007, or at any time during the SYs 2007-2008 and 2008-2009. Based on Findings of Fact 31, 33-39 and 41, and Legal Conclusion 16, that failure impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and caused a deprivation of educational benefits. Accordingly, that failure denied Student a FAPE for the SYs 2007-2008 and 2008-2009.

PRIOR WRITTEN NOTICE

18. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b)(2006); Ed. Code, § 56500.4, subd. (b).)

ISSUE 1.B. DID THE DISTRICT DENY STUDENT A FAPE DURING SYS 2007-2008 AND 2008-2009 BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE OF ITS REFUSAL TO ENROLL STUDENT IN, OR OF ITS DISENROLLMENT OF STUDENT FROM, THE ACADEMY?

19. Based on Findings of Fact 1-4 and 32, and Legal Conclusions 13 and 18, the District failed to provide Parent any prior written notice of its decision to impose courses and instructional materials on Student and to disenroll her from the Academy. Based on Finding of Fact 40 and Legal Conclusion 16, however, that failure caused no prejudice independent of that caused by the District's failure to convene an IEP meeting and return the dispute over curriculum and materials to the IEP process. Parent had repeated notice of the District's intent to disenroll Student if Parent did not sign the Master Agreement.

ISSUE 2. DID THE DISTRICT DENY STUDENT A FAPE DURING SYS 2007-2008 AND 2008-2009 BY OFFERING STUDENT AN EDUCATIONAL PROGRAM THAT DID NOT MEET HER UNIQUE NEEDS IN THE CORE ACADEMIC AREAS BECAUSE OF A SIGNIFICANT DISCREPANCY BETWEEN HER ACADEMIC LEVEL AND THE ACADEMIC LEVEL OF THE PROGRAM THAT WAS OFFERED?

20. Based on Findings of Fact 42-53, Issue 2 is not decided. Because the procedural violations found in this Decision denied Student a FAPE, it is not necessary to resolve the substantive FAPE issue.

LIMITATION OF ISSUES

21. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

REIMBURSEMENT

22. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].)

23. Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c)(2006); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [126 L.Ed.2d 284].) The appropriateness of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

24. A unilateral placement does not have to offer every service needed to maximize a student's potential. It does, however, have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. (*Gagliardo v. Arlington Cent. Sch. Dist.* (2d Cir. 2007) 489 F.3d 105, 112.) In *Gagliardo*, the private school offered the intensive reading and writing instruction that the student required, but it was unable to meet the student's need for treatment of his anxiety disorder. The Second Circuit held that the alternative chosen by parents was inadequate and that reimbursement was not appropriate. (*Id.* at pp. 113-114; see also, *Teague Indep. Sch. Dist. v. Todd L.* (5th Cir. 1993) 999 F.2d 127, 132-133.) A claim for reimbursement may fail if the student makes limited to marginal academic progress in the private placement. (*Corpus Christi Indep. School Dist. v. Christopher N.* (S.D.Tex. 2006) 45 IDELR 221, 106 LRP 27898.)

25. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private

placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)(2006).) These rules may be equitable in nature but they are based in statute. The District argues that its equitable defenses extend beyond the subject of reimbursement, and may defeat a claim for compensatory education as well. But the District cites no statute, regulation, or decision supporting its position. In *Burlington, supra,* the Supreme Court invoked equitable principles in authorizing reimbursement. In *W.G. v. Bd. of Trustees of Target Range Sch. Dist., supra,* 960 F.2d at p. 1486, the Ninth Circuit rejected equitable defenses in a reimbursement case. *Parents of Student W. v. Puyallup Sch. Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, did involve compensatory education, but it addressed the discretion of a district court in fashioning relief, not that of a hearing officer. Reduction of reimbursement for educational expenses is directly related to parental conduct because the money to be reimbursed comes from parents. However, the District cites no authority that would empower a hearing officer to disallow compensatory education for a child based on the conduct of her parent. Nor does the District explain how such an action could be equitable in light of the IDEA's central purpose of protecting disabled children.

26. Based on Factual Findings 1-4 and 54-58, and Legal Conclusions 22-25, Parent's unilateral placement of Student at home for her education was not an appropriate alternative placement for her and did not meet her unique needs. Reimbursement is therefore denied.

ORDER

1. Within 30 days from the date of this Order, the District shall re-enroll Student in the Academy and conduct all necessary assessments in all areas of suspected disability. The District shall educate Student pursuant to her last agreed-upon and implemented IEP until a new IEP is agreed to or ordered implemented by an ALJ or a court.

2. If the parties cannot agree on a new IEP for Student, the District shall resolve the disagreement in compliance with Education Code section 56346, subdivisions (d), (e),

and (f). The District shall not use the Master Agreement process to resolve any disagreements over any IEP for Student, and shall not insert anything in the Master Agreement that conflicts with any agreed-to and implemented IEP for Student. If anything that must be put in the Master Agreement is in dispute in the IEP process, the District shall place in the Master Agreement the relevant contents of the last agreed-upon, implemented IEP until the pending IEP dispute is resolved.

3. When an IEP for Student is agreed upon, or ordered implemented by an ALJ or a court, the District shall conform its Master Agreement with Student and Parent to the IEP in all matters addressed in both documents.

4. Within 45 days of the date of this Order, the Academy shall convene a team, including Parent, to review the work Student has done since her disenrollment to determine, in its sole judgment, whether any of that work is deserving of credits toward graduation with a diploma, and shall grant her such credits if deserved.

5. Beginning 30 days from the date of this Order, the District shall provide individual tutoring to Student, by a credentialed special education teacher, in core academic subjects, for four hours per school day for a period of two calendar years, including summers.

6. The terms of this Order may be altered by an agreement in writing, including but not limited to an IEP, between the District and the holder of Student's educational rights.

7. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issue 1.A and 1.B. Because Issues 1.A and 1.B resolved the most significant issues in the matter, Issue 2 was not decided.

RIGHT TO APPEAL THIS DECISION

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

DATED: March 18, 2009

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings