

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

HUNTINGTON BEACH UNION HIGH
SCHOOL DISTRICT,

OAH Case No. 2014090268

HUNTINGTON BEACH UNION HIGH
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014090535

DECISION

Student filed his Due Process Complaint on September 3, 2014. District filed its Due Process Complaint on September 11, 2014. The parties stipulated to consolidating the cases, and on September 22, 2014, the Office of Administrative Hearings consolidated the cases, with Student's case designated as the primary case and the case upon which the decision deadline would be calculated. On January 9, 2015, OAH granted the amendment of Student's complaint and deemed the Amended Complaint filed. OAH continued the hearing at the parties' request on March 3, 2015.

Administrative Law Judge Kara Hatfield heard this matter in Huntington Beach, California, on May 26, 27, and 28, 2015, and June 2, 3, 4, 16, and 18, 2015. The ALJ heard the matter in Van Nuys, California, on June 15, 2015.

Attorneys Rosa Hirji and Jenny Chau represented Student. Father attended the hearing on all days and Mother attended hearing on June 15, 2015. Student did not attend the hearing.

Attorney Karen Van Dijk represented Huntington Beach Union High School District. Doug Siembieda, District's Director of Special Education, attended all days of the hearing. Nancy Finch-Heuerman, Director of the West Orange County Consortium for Special Education, attended the hearing on May 26, 27, and 28, 2015 and June 2, 3, 4, 15, and 16, 2015. Anne Delfosse, Executive Director of the West Orange County Consortium for Special Education, attended the hearing on June 18, 2015.

On the last day of hearing, the matter was continued at the parties' request until July 20, 2015, so the parties could file and serve written closing arguments and response briefs. Closing arguments and response briefs were filed, the record was closed, and the matter was submitted on July 20, 2015.

ISSUES¹

- 1) Did District deny Student a free appropriate public education between August 2013 and May 13, 2014, by failing to identify, locate and evaluate Student as a child with a disability?
- 2) Did District conduct Student's initial evaluation² in spring of 2014 in accordance with the legal requirements so that Student is not entitled to an independent educational evaluation?
- 3) Did District's May 13, 2014 individualized education program offer deny Student a FAPE because it failed to offer services to address Student's mental health needs, goals designed to address Student's academic and mental health needs, and supports and services to enable Student to make meaningful educational progress?

¹ The issues are those presented in Student's complaint and framed in the Order Following Prehearing Conference. The ALJ has reordered the issues without changing their substance, for purposes of organizing this decision. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² On June 2, 2015, the parties filed a Joint Stipulation re Modification of District's Issue in which Student confirmed he was not challenging the appropriateness of the motor development portion of District's initial evaluation and was not seeking an independent educational evaluation in the area of occupational therapy. Additionally, although both parties presented evidence regarding the transition assessment District conducted, Student's August 12, 2014 written request for an independent evaluation only requested an evaluation "encompass[ing] cognitive, behavioral, socio-emotional, and mental health components." Therefore, no issue exists regarding the appropriateness of District's transition assessment.

4) Did District's September 22, 2014 IEP offer deny Student a FAPE because it failed to offer services to address Student's mental health needs, goals designed to address Student's academic and mental health needs, and supports and services to enable Student to make meaningful educational progress?

5) Did District's December 8, 2014 IEP offer deny Student a FAPE because it failed to offer intensive individual instruction, services to address Student's emotional disturbance,³ goals designed to address Student's mental health needs, and supports and services to enable Student to make meaningful educational progress?

SUMMARY OF DECISION

Student contends he was denied a FAPE in the 2013-2014 school year because although District knew Student had one or more disabilities upon his enrollment in District, District failed to identify Student as a student with a disability who might need special education and related services and to refer him for assessment for eligibility. Student contends he was denied a FAPE since May 13, 2014, because District's offers of special education and related services in May 2014, September 2014, and December 2014 were not adequate to address his academic and mental health needs, most significantly in that District did not offer Student adequate educationally related mental health counseling.

District contends it did not deny Student a FAPE in the 2013-2014 school year because although Student entered District already identified as a student with one or more disabilities, his needs were being addressed through a "504 Plan" and it was not until the time that Parents requested an assessment for eligibility for special education and related services that District should have suspected that because of Student's disability or disabilities, he needed special education and related services. District also contends that the assessment it conducted in response to Parents' referral was conducted in accordance with the legal requirements, and that Student therefore is not entitled to an independent educational evaluation at public expense. District further contends that District's offers of special education and related services in May 2014, September 2014, and December 2014 were adequate to address his academic and mental health needs, and that District appropriately timed increases in the amount of specialized academic instruction and mental health counseling as Student's needs for increased services unfolded.

³ Student did not allege, as a procedural violation, the failure to designate Student as eligible for special education under the category of Emotional Disturbance. "[T]he party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under this section, unless the other party agrees otherwise." (Ed. Code, § 56502, subd. (i).) The real issue is whether District adequately addressed Student's needs related to his considerable emotional challenges.

Student met his burden of demonstrating that District denied him a FAPE due to District's failure to suspect that Student needed special education and related services and refer him for an assessment for eligibility. Student also met his burden of demonstrating he was denied a FAPE due to District's inadequate offers of mental health counseling services in each of the three IEP offers at issue.

District met its burden of demonstrating that its assessment of Student was conducted in accordance with the legal requirements, such that Student is not entitled to an independent educational evaluation at public expense.

FACTUAL FINDINGS

Background

1. Student was 17 years and three months old at the time of hearing. At all relevant times, he lived in a joint custody arrangement with Father and Mother, both of whom separately resided within the boundaries of another district within the same special education local plan area (SELPA) as District. Student attended high school within his district of residence for a small part of the 2012-2013 school year, which was Student's ninth grade year, and then attended a private boarding school (military academy) in another county for the remainder of ninth grade.

2. Student had a history of difficulties in school going back to elementary school. In Kindergarten it was noted that Student had issues regarding impulsivity, constant physical movement, and creating power struggles. Over the next many years, he was continually described as bright and likeable, even charming, and he achieved proficient scores on state standardized testing. However, Student struggled with disorganization and lack of focus, and produced little classwork or homework. His eighth grade public school grade point average was 0.75 in the fall term and 0.25 in the spring term. He performed better at the military academy and earned a 2.83 in the fall term and a 2.33 in the spring term, with an average academic grade point average of 2.58 for the year.

3. Student enrolled in District via an inter-district transfer agreement for the 2013-2014 school year, tenth grade. On his application, Student indicated that he received special services through Section 504 of the Rehabilitation Act of 1973. Upon enrollment, Student provided District a copy of the 504 Plan created by his district of residence in June 2012, which stated that Student "ha[d] a disability pursuant to § 504 that substantially limits learning or another major life activity" because he had "ADHD," and that the "disability" affected Student due to "difficulty w[ith] focus & follow through." District created another 504 Plan in August 2013 that was similar to, but not exactly the same as, the prior district's 504 Plan. The basis of District's 504 Plan was that Student's Attention Deficit Hyperactivity Disorder was a "handicap impact[ing] the student's ability to receive equal access and benefit from school programs and services."

4. District assumed that the military academy, as a private enterprise, had not implemented Student's 504 Plan from the prior district. District believed Student had earned a 2.58 GPA for the 2012-2013 school year without accommodations.

5. No later than November 2013, District was aware that Student took medication (Concerta) to address his ADHD and mood stabilizers (Lexapro and Abilify). If District had not known that sooner, it was so informed when Student submitted to a physical evaluation to participate in wrestling and golf at school.

2013-2014 School Year

6. In the fall 2013 semester, Student was enrolled in Yearbook, Algebra 2A, Spanish 1A, World History A, College Prep English 2A, Biology A, and Wrestling. At the first reporting period, 4 ½ weeks into the term, Student had two absences from second and fifth periods and had three absences from fourth period; school attendance records indicated these absences were health related. He was receiving two D's and an F. Other teachers did not report absences or grades. Teacher comments included that Student had "low performance/test scores affecting grade," his assignments were not complete, and he was in danger of receiving an F. At the mid-semester reporting period, 9 weeks into the term, he had a total of four absences in his zero period, five absences in first and second periods, six absences in third and fifth periods, seven absences in sixth period, and eight absences in fourth period; school attendance records indicated some of these additional absences were health related. Although he was earning an A in Wrestling and a C- in Yearbook, he had one C, two D's and two F's in his academic classes. Although one teacher reported that Student was a pleasure to have in class, other teacher comments again indicated incomplete assignments, low performance, and the danger of failing. At the third progress report of the semester, 12 weeks in, Student had not accrued any more absences in the four reported academic classes, but he had two D's and two F's, as well as the same teacher comments as before, and a new one, "Student not achieving to apparent ability." Things had definitely changed for Student, who had a 2.58 GPA the year before.

7. The school psychologist in charge of 504 Plans met with all students with 504 Plans who were receiving D's and F's at the 4 ½ week (September 27, 2013), 9 week (October 25, 2013), and 12 week progress report (November 15, 2013) periods, and, due to Student's poor grades, she met with Student after each report regarding his poor progress. The school psychologist had information from Student's teachers that Student understood the curriculum and materials, performed decently on tests and quizzes, participated in class, and did class and group work. However, teachers were concerned that he was missing a lot of school and did not come to them or ask for the work when he missed class. They also indicated his regular failure to turn in homework or to get the homework when he was absent and to make it up. Student was not receiving any points for homework and only a few points for classwork, and despite his decent test scores, he was therefore earning very low to failing grades.

8. In mid-December 2013, the Assistant Principal of Supervision and Attendance met with Student and one or both Parents to discuss Student's grades and his lack of motivation. They discussed Student's poor attendance and reasons for it. Conflict between Student and his English teacher was well known and documented. Student indicated he just did not want to go to class. Explanations or excuses for Student's absences focusing on his health, a medical condition, or his mood were not provided by Student or Parents. Father told Student he had to be in school, that he had to go to class, and, in the Assistant Principal's presence, he was almost pleading with Student to do so. After the December 2013 meeting with the Assistant Principal, Student was provided with blank progress report sheets weekly to take to each of his teachers and then to provide to the Assistant Principal and Parents.⁴ District and Parents were trying to get Student to go to class and to remain in class.

9. Between the start of the fall 2013 semester and roughly the 12 week progress report, Student went to the school nurse's office seven times on six different days, complaining of a headache or both a headache and a stomach ache. He was usually provided with ibuprofen or Tums and an opportunity to rest. The one time the nurse called Father, he authorized Student to go home. The two times Mother was called, she instructed the nurse to have him remain at school.

10. Student finished the fall 2013 semester having withdrawn from Yearbook, and with two D's and three F's in his academic classes; an A in Wrestling contributed to his overall semester GPA of 1.00. Although he enrolled in seven classes, for which he might have earned 35 credits towards graduation, his passing grades in only three classes earned him only 15 credits.

11. At the first progress report 4 ½ weeks into the spring 2014 semester, Student already had six absences in his first and second period classes, and eight absences in his fourth and fifth period classes. Of the four courses reporting scores, he had a D, a D-, an F, and an F-.⁵ Teachers again commented Student's assignments were not completed, low performance and/or test scores were affecting his grade, and he was in danger of receiving failing grades.

⁴ After Mother emailed the school psychologist in charge of 504 Plans on September 22, 2013, to request weekly teacher/student discussions about assignments, the psychologist gave Mother an electronic version of a blank weekly progress report form to have Student present to his teachers for completion; the school psychologist also met with Student and showed him how to use it. There was no evidence that Student took the form to any teachers between September 22, 2013, and the meeting with the Assistant Principal in mid-December 2013.

⁵ The progress report indicated F minus in Biology B.

12. At all times since Student's enrollment, District believed that the 504 Plan it had created was appropriate and faithfully implemented.

13. Father recognized a familiar pattern over Student's years of schooling that although he started the school year eager to work and hopeful about success, he spiraled into failure to complete classwork, failure or refusal to complete or even attempt homework, a defeated attitude and poor grades. Approximately one week after the first progress report of the spring 2014 term, on March 3, 2014, Father emailed a written request that Student be assessed for special education.

14. On March 10, 2014, Student's attorney also wrote to District to re-affirm Father's March 3, 2014 request. Student's attorney specified that Parents were requesting comprehensive assessments for "health and development, vision, hearing, motor abilities, language function [speech/language], general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status."

DISTRICT ASSESSED STUDENT FOR ELIGIBILITY FOR SPECIAL EDUCATION

15. Father met with two school psychologists who worked at Student's high school on March 14, 2014. In addition to talking with District, Father provided a written statement of his perspective on and concerns regarding Student. Father reported that Student had seen multiple therapists, was depressed, had panic attacks, and took medication to address his ADHD (Concerta) and mood (Lexapro and Abilify). Father provided a private neuropsychological evaluation report that had been conducted in 2008.

16. To develop an assessment plan for Student, the two school psychologists used information they obtained from the March 14, 2014 meeting with Father as well as written reports from four of Student's academic course teachers regarding Student's strengths and challenges and recommendations for changes/assistance.

17. Father was presented with and signed the assessment plan on March 18, 2014.

18. Progress reports issued 9 and 12 weeks into the spring 2014 semester, during the 60 day assessment period and before District conducted its assessment, documented that Student continued to have erratic attendance; the April 25, 2014 progress report indicated 6 absences in his zero and third periods, 7 absences in fourth period, 12 absences in first period, and 13 absences in second period. The progress reports also documented that Student continued not to be progressing towards completing requirements towards graduation, namely, that he would not be earning credits for any of his classes. The mid-semester (March 28, 2014) progress report noted a D- and four F's, and the 12 week (April 25, 2014) progress report noted five F's. As before, teacher comments included that Student was not

achieving to his apparent ability, assignments were not completed, he had not made up missed work, low performance/test scores were affecting his grades, he had excessive absences, and he was in danger of receiving F's.

19. When Student was absent, he did not pursue options for finding out material and instruction that he missed, even though those options were available to him and even though he was informed, reminded, and encouraged to take advantage of them.

20. A credentialed special education teacher conducted an evaluation of Student's academic achievement. A credentialed school nurse reviewed a health questionnaire completed by Mother, interviewed Student and completed general health screening procedures. A credentialed school psychologist conducted an evaluation of Student's intellectual development and social/emotional status. District's director of mental health services, a credentialed school psychologist who was also a Licensed Professional Clinical Counselor, evaluated Student's social/emotional status specifically to consider whether, in view of Student's medical diagnosis of and prescription medication for depression, Student might be in need of educationally related mental health services. District defined educationally related mental health services as services to assist a child with a disability to benefit from special education, such as individual counseling, group counseling, counseling and guidance, social work services, and parent counseling and training.

21. All District assessors testified that as to each of their respective areas of assessment and with respect to each instrument or process used to conduct their assessments, they satisfied all of the following legal criteria: 1) each was qualified to conduct the assessments and/or use the evaluative instruments involved, by education, training, licensure and/or experience; 2) each used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by Parent(s); 3) each assessment instrument or procedure used was used for the purpose for which it was designed or validated, was selected and administered so as not to be racially, sexually or culturally discriminatory, was provided in Student's primary language, and was administered in accordance with any instructions provided by the producers of test instruments; and 4) each assessor believed the results obtained from the assessments and procedures were valid and reliable.

22. In addition to reviewing prior schools' and District's own records, reviewing the 2008 private neuropsychological evaluation report, receiving written and verbal input from Parents, Student, teachers and a therapist Parents reported Student had seen, and observing Student in class and on campus, District personnel administered approximately 25 specifically named instruments as part of its comprehensive multi-disciplinary evaluation of Student. The answer forms or protocols for most instruments were admitted into evidence.

23. Student's expert witness, Ann Simun, Psy.D.,⁶ a neuropsychologist who conducted a records review, questioned the use of and criticized some instruments used, what she believed was a high number of instruments used, what she believed was a high number of self-rating instruments used, and the number of raters whose responses were used on some instruments. However, her testimony did not, on the whole, discredit the assessment to the point of it not meeting the legal requirements for a district-conducted assessment, especially in light of the fact that Student's other expert witness, Perry Passaro, Ph.D.,⁷ a clinical psychologist who, like Dr. Simun, is also a credentialed school psychologist, was complimentary of District's assessment, admitting that it satisfied all the legal requirements and was a good report. Dr. Passaro had a different interpretation of the results of District's assessment, but he did not assert that the assessment was legally insufficient.

24. District's assessment confirmed what Parents and District already knew, that although Student had average intellectual ability and although he was taking medication to assist him with attention, he had difficulties sustaining attention and deficits in executive functioning (organization, planning, monitoring, task initiation, and task completion), which had a significant impact on his educational performance. The assessment also indicated that although Student was taking medication to stabilize his mood, Student was struggling with his mood, having an elevated degree of sadness and some anxiety. District's assessment report, as well as items in specific instrument protocols, revealed the presence and non-trivial nature of Student's depression and anxiety, although ultimately District minimized the weight it gave the data it had when it determined what Student's unique needs were and when it offered goals, supports and services to address those needs.

25. For example, Student reported that if he could be invisible for a day, what he would choose to do was sleep. In response to prompts about the ways he thought and felt on the Beck Youth Inventories – Second Edition for Children and Adolescents, he reported that he "often" got nervous, felt lonely, felt sorry for himself, hated himself, felt like crying, felt sad, felt empty inside, and thought his life would be bad, and among other things, he "sometimes" wished he was dead. The resulting numerical scores from Student's responses

⁶ Dr. Simun held a bachelor's degree in Psychology, a master's degree in Counseling with a specialization in School Psychology, and a doctorate degree in Psychology (Psy.D.). She was a credentialed school psychologist since 1989 and worked as a school psychologist at various times for a total of 10 years. She was a licensed psychologist since 1999 and worked as a clinical psychologist for many years. She worked as a neuropsychologist since 2005.

⁷ Dr. Passaro held a bachelor's degree in Biology, a master's degree in Education, and a doctorate degree in Educational Psychology (Ph.D.). He was a credentialed school psychologist since 1998 and worked as a school psychologist for 15 years. He was a licensed psychologist since 2005 and worked as a clinical psychologist for many years.

on the Reynold's Adolescent Depression Scale – 2nd Edition, a self-report of overall depression, ranked his total depression as “significant,” with his “dysphoric mood” and “anhedonia/negative affect” sub-scores also being “significant,” at 23 and 21 points, respectively, above the average score of 50. Father reported that Student felt “lost and hopeless regarding school.” Mother reported that despite taking two mood stabilizers, he was “very upset and sad beyond belief. He [wa]s very depressed.” Mother informed District that Student seemed very worried, had lots of anxiety, and that Student’s “sadness and anxiety coupled with some illnesses had caused absences from school.” A therapist Student had seen reported that Student “struggle[d] with mild to moderate depression, generalized anxiety disorder and ADHD, which all affect social relationships at school and home. All three of these ha[d] a negative effect on his self esteem and confidence in the world, which cycle[d] into low performance in school.” The therapist told District that Student was working in outpatient psychotherapy to learn new coping skills to prevent his anxiety and depression symptoms from affecting his life as much as they did, and she stated that “extra support and guidance at school would support [Student’s] success at school, as he makes progress with his mental health issues.”

26. District believed Student’s periodic reports to the school nurse that he experienced headaches or stomach aches were not credible because on self-report instruments administered to Student during assessment, he affirmatively denied feeling sick in his stomach or having headaches. District viewed Student’s complaints to the school nurse as an avoidance strategy to get out of a class or to go home from school. To the extent Student reported headaches or stomach aches to Parents, District viewed his complaints as an avoidance strategy not to come to school. Because Student told administrators and school psychologists that when he was not at school during regular school hours he went out to eat or play golf, District discounted the possibility that Student’s reports of headaches or stomach aches were real and could have been psychosomatic experiences as a result of Student’s depression and/or anxiety.

27. District’s analysis of Student’s absences, which put his total attendance at approximately 77 percent as of the assessment report, was that there were two equal causes of Student’s absences: sometimes Student didn’t attend school due to feeling depressed, tired, and unmotivated to do school work, and sometimes Student didn’t attend school because he had more attractive options available to him, such as golfing and dining out. The two school psychologists together predicted that “[a]s [Student] continues to learn coping strategies to deal with his depressive symptoms, his attendance should improve.”

28. Five days before the IEP team meeting, District requested and Father provided signed release of information forms, authorizing District to communicate with Student’s physician who had prescribed him the psychotropic medications he was taking. District made at least one attempt to contact the doctor; the prescribing physician did not respond.

MAY 14, 2014 IEP TEAM MEETING AND OFFER

29. On May 14, 2014, District held an IEP team meeting with all required participants. District's assessment was reviewed and based on the analysis itemized in the psychoeducational assessment report, Student was found eligible for special education under the category of Other Health Impairment, due to his "significant difficulties sustaining attention and regulating impulses" and his "deficits in executive functioning skills (i.e., organization, task completion, initiating tasks, planning, monitoring, etc.)." Despite Student's depression and anxiety, District did not regard Student as eligible for special education and related services based on Emotional Disturbance, deeming his symptoms not to be "to a marked degree" such that he met the criteria for eligibility under that category.

30. The IEP documented that in the realm of "social emotional/behavioral," Student had "maladaptive behaviors related to educational performance," specifically in the domains of inattention, planning/organization, task completion/initiation, classroom disruption (talking), and attendance. The IEP also noted, "[Student]'s depressed mood and anxiety also affect his school performance."

31. The school psychologist who evaluated Student's possible need for educationally related mental health services concluded and reported that if Student was deemed eligible for special education services, "sad mood/poor academic motivation may be considered as a unique need." However, her opinion seems to have been lost in the integration of each assessor's component reports into the final the psychoeducational assessment report's listing of recommendations. The "Recommendations" section of the psychoeducational assessment report only stated, "The IEP team should consider the following possible unique needs: attendance; task completion; organization/planning." As a consequence, goals were created in those three areas, but no goal specifically identified as relating to mood or academic motivation was created. Dr. Simun opined the May 2014 IEP was insufficient because depression was not explicitly included as an area of unique need.

32. To serve the three goals of attendance, task completion/initiation, and organization/planning, the IEP offered Student general education classroom instruction for 60 percent of the time, and special education instruction for two periods, in English and Study Skills. The IEP stated the reason Student would not participate in the "regular class" was because his significant difficulties sustaining attention and regulating impulses affected his involvement and progress in the general curriculum, and because of his deficits in executive functioning skills. The two periods of specialized academic instruction were intended to afford Student access to small group instruction with a credentialed special education teacher who could work with Student to develop his ability to document and track homework assignments and projects (their existence, progress, and completion) to support Student in earning more points, and therefore higher grades, and therefore credits, in his general education classes. The specialized academic instruction was also intended to provide

a structured and supported environment in which Student could complete any unfinished classwork from his general education courses earlier in the day, again to support Student in earning more points, and therefore higher grades, and therefore credits, in his general education classes.

33. District withdrew Student from Biology, which he was failing, and for the balance of the semester, placed him in the special education Study Skills class.

34. The IEP also offered Student aids, services, program accommodations/modifications, and supports, most of which were similar to those offered in Student's 504 Plan. Student was also offered the ability to "earn variable credit." The idea behind variable credit was that instead of the usual all-or-nothing system in which Student had to complete "enough" work to earn all five credits for a course, or, if he did not complete enough work to earn all the credits, he would not earn any credits, Student could earn less than the full five credits, in an amount that reflected the amount of work he actually completed. Consistent with this opportunity, for the last month of the 2013-2014 school year District withdrew Student from College Prep tenth grade English, which he was failing, and placed him in a special education English credit recovery class; based on the amount of work he completed during the last weeks of school, he earned 2.5 credits of tenth grade English, rather than earning zero (which, as the 12 week progress report indicated, likely would have happened had he remained in the general education English class).

35. As a related service, District offered Student 30 minutes per month of individual "counseling and guidance." The school psychologist who assessed Student had begun working with Student during the assessment process, and used a form of cognitive behavioral therapy. The counseling was intended to address Student's issues with attendance, task completion and initiation, and organization/planning (the three goals in the IEP). According to the school psychologist, the focus of counseling and guidance services for Student was to address executive functioning, motivation, and to problem solve the difficulties that came up at school and to come up with solutions that would work for Student, then check in, evaluate how it was going, and see what needed to be changed. Its purpose was also to address any personal difficulties, such as peer relations or family situations, so Student would have someone with whom he could problem solve emotional/relational things. The school psychologist testified that this service was not psychotherapy and also was not "educationally related mental health services."⁸

⁸ District's director of mental health services, who assessed Student for eligibility for educationally related mental health services and wrote the portion of the multi-disciplinary psychoeducational assessment report that recommended educationally related mental health services, testified that counseling and guidance service is an educationally related mental health service. However, it seems relevant and even important that the person who was primarily responsible for delivering the service to Student did not regard what he provided as an educationally related mental health service.

36. At hearing, District's rationale for the offer was that Student would benefit from counseling with the school psychologist, but due to Student's absences coupled with his failure to obtain make-up instruction, and his low work completion during class time, the school psychologist did not want to pull Student out of class on a day that he actually attended, causing him to miss instructional time and not complete school work; doing so would have only compounded Student's problems with accumulating enough points to pass his classes; and the offer of 30 minutes per month of counseling and guidance with a school psychologist could provide Student the support he needed to benefit from his education without taking him away from a significant amount of instructional and work completion opportunity time.

37. Student finished the spring 2014 semester with two F's, a D, 5 credits but no letter grade for his Study Skills class, and 2.5 credits, at a C, for his credit recovery English class. Although he had been enrolled in five classes, for which he might have earned 25 credits towards graduation, his passing grades in only three classes earned him only 12.5 credits toward graduation, and he had a semester GPA of 0.57.

SUMMER SCHOOL AT FUSION ACADEMY

38. Student attended Fusion Academy during the summer. He completed courses in Biology A from June 23 to July 30, 2014, and Biology B from August 4 to August 21, 2014. He received a B in both courses. Fusion Academy was a private school accredited by the Western Association of Schools and Colleges and the National Council for Private School Accreditation, but it was not accredited by the State of California, Department of Education. Fusion Academy used state standards-based core curriculum and issued high school diplomas. All classes were taught in a one-to-one environment, with just one teacher and one instructor in the classroom. Although some employees of Fusion were credentialed teachers and credentialed special education teachers, it was not necessary to be credentialed to work as an instructor at Fusion. Parents paid \$4,820 for the two courses.

2014-2015 School Year

REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION

39. On August 12, 2014, Parents, via their attorney, requested an independent assessment to "encompass cognitive, behavioral, socio-emotional, and mental health components." On September 10, 2014, District provided Parents prior written notice that informed Parents that District declined to provide an independent evaluation at public expense and would be filing a due process hearing request with OAH to defend its assessment. District filed its Complaint the next day, September 11, 2014.

SEPTEMBER 22, 2014 IEP TEAM MEETING AND OFFER

40. Student began the fall 2014 semester by missing the first three days of school, which began on the Wednesday after the Labor Day weekend. Parents submitted a note from a doctor in Newport Beach, California indicating Student had an ear infection and was unable to fly back home on an airplane at that time. When Student arrived at school the following Monday and a teacher asked him why he had missed the first week of class, he used his fingers to make what are referred to as air quotes as he stated that he had been "sick" in Paris.

41. District had already been suspicious of Student's numerous absences in the 2013-2014 school year, which had been reported by Parents to be health related but, in the District's opinion, were without sufficient substantiation by medical providers. Student's disclosure that he had been on vacation and his Parents had submitted false medical documentation to excuse his absences during the first week of school in the 2014-2015 school year discredited Parents' and Student's past and future claims that Student's absences were health related. District regarded this information as proof that Student was faking illness and Parents were complicit in and responsible for his poor attendance and poor academic performance.

42. There had been a little experience with the May 2014 IEP in the few weeks at the end of the 2013-2014 school year and the start of the 2014-2015 school year, and Parents requested an IEP team meeting to review it. An IEP team meeting was held on September 22, 2014. Student's goal regarding organization/planning was amended to add that when Student recorded homework, classwork, and/or project information in his electronic calendar, each teacher would initial the entry. Additional accommodations were added regarding taking a break during tests.

43. At the 4 ½ week progress report for the fall 2014 semester, Student had been absent five times (including the three from the first week), he was earning a D- in U.S. History and B's in Oceanography and in College Prep eleventh grade English. Because he had only earned 2.5 credits of tenth grade English, he was in a special education English credit recovery class to complete the work necessary to earn the missing 7.5 credits. In that credit recovery class, he worked on the material to earn credit for tenth grade English and on assignments that he did not finish during his eleventh grade English class, with the support and frequent redirection of special education teacher. In his Study Skills class, he worked on developing his organizational skills and on completing homework assignments while still at school, and he was on track to earn ungraded credit for that course.

44. At the 9 week, mid-semester, progress report of the fall 2014 semester, Student had been absent 10 times in first, second, and third periods, and had been absent 13 times in fourth and fifth periods. A few of the absences occurred when Student left school to participate in a psychoeducational evaluation Parents arranged with Dr. Passaro in October 2014. For other dates, in response to District's demand that Parents' provide

medical documentation to support any absences that Parents claimed were health related, Parents submitted notes from Student's physician that uniformly requested that Student's absence on a specified date be excused "due to a medical condition."

45. As of October 22, 2014, Student's attendance remained the same as it was at the time the initial IEP was created in May, at 77 percent. The school psychologist informed Father this had a direct impact on Student's ability to be successful in class, organize materials, and keep track of make-up work.

46. The school psychologist and school nurse testified that although there were no written records documenting dates or the frequency of implementation of the following practice, they collaborated to try to redirect Student to return to class when he came to the nurse's office complaining of a headache or stomach ache. The nurse claimed that for a short time, when Student left class and came to her office, she sent him to the school psychologist to see if he would be able, through talk therapy, to relieve Student's symptoms or alleviate his desire to leave class or leave school. The school psychologist claimed that on the occasions Student was referred to him by the nurse, he provided a form of cognitive behavioral therapy, and after the session Student was able to and did return to class instead of requesting to leave school. It was unclear on how many occasions District attempted to address Student's reported maladies and desire to leave class or leave school in this method before, as District contended, Student and Parent foreclosed District's efforts.

47. Because Student did not drive until very late during his attendance at District, Student came to school with a sibling who did drive. When Student felt unwell at school, Mother sometimes picked him up during the school day, but her employer became dissatisfied with her leaving work to do that. Father established an account for Student with an on-demand ride service, and when Student wanted to leave school, he told his teacher he didn't feel well and wanted to go to the nurse's office, then called Father who informed Student he could leave school and that a ride would come for him. Student then went to the nurse and told her that he was leaving school with Father's permission and a ride was already on the way, and waited while the nurse called Father to verify Student's report. There was no testimony or evidence regarding specific dates on which Student "bypassed" the nurse and school psychologist to leave school or the frequency with which it occurred. However, no evidence rebutted District's version of events. District felt helpless to stop what it interpreted as Student's manipulation of Parents and the school system, and Parents' interference with District's efforts to address Student's unique needs.

48. Student's IEP's from May and September 2014 offered Student 30 minutes per month of school-based counseling and guidance. The school psychologist testified that he or another school psychologist met with Student at least that frequently, and over time Student began to come to see him on his own, such that the frequency of service approached 30 minutes per week. No evidence rebutted that claim, but Student's IEP was not changed and the service required by District remained only 30 minutes per month.

PRIVATE EVALUATION BY DR. PASSARO

49. In October 2014, Student participated in a private psychoeducational evaluation with Dr. Passaro. Dr. Passaro was acquainted with Student from having provided him two sessions of cognitive behavioral therapy in 2011.

50. Dr. Passaro obtained information about Student from Father, a records review, administration of instruments to and conversations with Student, and by observing Student at school. His opinion was that at the time of his evaluation, Student's greatest and most immediate needs appeared to be psychological, as his emotional state of anxiety and depression affected his access to his education. Dr. Passaro recommended that Student's anxiety and depression be addressed "by the rapid implementation of supportive psychotherapeutic measures or targeted pharmacological medications." As a result of his evaluation, Dr. Passaro referred Student for psychotherapy with Paul DePompo, Psy.D. Dr. Passaro's report stated that it was important for the IEP team to consider that while Student's behavior may appear to be primarily explained through ADHD, there was "another significant underlying psychological disturbance in place," affecting attention, mood, and behavior. Dr. Passaro identified Student as having Depressive Disorder and identified "Goal 1" for therapy as reducing depressive symptoms and "Goal 2" as reducing anxiety. Dr. Passaro's analysis was that Student met the state regulatory definition of having Emotional Disturbance, in addition to having Other Health Impairment.

51. Dr. Passaro's report suggested "further accommodations and modifications as needed," including some things that were already part of Student's IEP, such as "concrete organizational support with regard to assignment/project details and due dates" and extended time on in-class and homework assignments and tests. It also suggested things that were already part of Student's IEP about which Student complained at hearing, such as a quiet room and/or extended or unlimited time for tests "at [Student's] discretion,"⁹ and a reduced course load on request.¹⁰

52. Dr. Passaro concluded that based on Student's poor progress on his "goals for attendance, work completion and achievement" despite being in special education classes for almost half of his instructional day, the IEP services District offered were not sufficient to meet his unique needs. However, Dr. Passaro did not specify what quantity of which services he thought would be sufficient. He made recommendations about approaches to

⁹ Student argued he should not have had to request an alternative testing environment or additional time because it should have been provided to him automatically.

¹⁰ Student argued that with the variable credit courses District offered, he would be delayed in receiving a high school diploma due to the slower accumulation of credits; a reduced course load would seem to have the same effect.

therapy, specifically cognitive therapy and behavioral methods geared to increasing restraint (distress tolerance), but not how much and how frequently therapy should have been offered to meet Student's unique needs in the areas of mood (reducing depressive symptoms and anxiety).

53. Student began seeing Dr. DePompo for cognitive behavioral therapy on November 15, 2014. Parents' copayment for each session was \$150. Student presented proof of payment for 13 sessions occurring in November and December 2014, and in January and February 2015, totaling \$1,950. Father testified Student continued to be treated weekly by Dr. DePompo and that at the time of hearing, Dr. DePompo had recommended reducing sessions to every other week.

DECEMBER 8, 2014 IEP TEAM MEETING AND OFFER

54. District held an IEP team meeting on December 8, 2014. All required District staff, Parents and Dr. Passaro attended. The IEP team reviewed the psychoeducational assessment Dr. Passaro had conducted in October. Dr. Passaro told the IEP team he believed Student's attendance issues were due to depression and anxiety.

55. District amended the IEP and offered Student 30 minutes per week of counseling and guidance service, the amount District believed it was, in fact, delivering.

56. By the time of the December 2014 IEP team meeting, Student was so far behind on his homework and classwork assignments for the term that he seemed to be stuck in an inescapable hole, that no matter how much effort he put forth, it would be impossible for him to complete enough work before the end of the semester to have earned enough points from homework and classwork to earn anything other than all F's. District offered to excuse all homework and incomplete classwork that had not been turned in during the first half of the semester. District also added a third specialized academic instruction class, another Study Skills period, to provide Student the structure and support he would need to tackle the missing assignments for which he was still responsible and to enable him to earn passing marks and therefore credits toward graduation.

REMAINDER OF THE FALL 2014 SEMESTER

57. For the remaining few weeks of the semester, which also continued after a winter holiday break, Student's absences continued as before. During one absence, a teacher encountered Student at a sandwich shop; when asked why he was not in school, Student responded that his girlfriend's mother was picking him up to take his girlfriend out on a surprise date as a Christmas present. On another day, Student excitedly informed his teacher that he had received a car and presented the keys. He denied having work to do, avoided doing the missing assignments and other work options presented to him, and then requested to go home. He informed the teacher that he was leaving for Fusion Academy soon and

would not be at school much longer. He resisted the teacher's efforts to encourage him to do some work to leave on good terms with good grades. Shortly thereafter he reported a stomachache and rejected other opportunities to resolve his discomfort, then said he just wanted to go home. He went to the nurse's office, and Father excused Student from school. The next day, Student informed his teacher that he had gone golfing after he went home; the teacher reported the information to the school psychologist, who then informed Father. The day after, Student was angry with his teacher for notifying Father about the golfing, and explained that it was not that Father was angry with Student for going golfing; Father was angry that District knew Student had gone golfing.

58. Student's final grades for the fall 2014 semester were an F, two D's, a B worth 2.0 credits for his English credit recovery class, and ungraded credit in his Study Skills class. Although he had been enrolled in four classes, for which he might have earned 20 credits towards graduation, and a credit recovery class, for which he might have earned 5 or more credits (he needed 7.5 tenth grade English credits), he earned only 17 credits. His semester GPA was 0.94.

SPRING 2015 SEMESTER

59. Student enrolled at Fusion Academy for the spring 2015 semester and began classes on February 9, 2015.

60. In addition to working with students exclusively in a one-to-one arrangement, Fusion Academy did not provide students work to do at home. All work was completed either in class with the instructor or in what Fusion referred to as the Homework Café. There, students worked on assignments in a common area, with a director and instructors present to supervise, redirect, and assist students. At the location Student attended, there were typically 20 students and 2 to 4 instructors available to assist them.

61. There were several tracks and options at Fusion Academy. A standard course consisted of 20 50-minute sessions of one-to-one instruction (at a rate of \$119 per session), which usually was completed in 10 weeks. Students who were known to require more time to complete work enrolled on an extended track consisting of 30 sessions, which were usually completed in 15 weeks. If a student did not complete the work required to earn credit for a course within the 20 or 30 sessions contracted for, the student could continue to purchase an infinite number of additional sessions until the required work was complete and credit could be awarded. Although it was theoretically possible for a student not to complete the work and to receive an F, in the two years before hearing, that had not occurred.

62. Student enrolled in six academic classes at Fusion Academy and one independent study physical education course, to be supervised by Student's private golf coach (and for which Student paid Fusion Academy \$475 to earn credit). Due to Student's known issues with attention and work completion, and despite Student's prior success in taking one course at a time at Fusion Academy on the standard track, Student was registered in the extended track for his courses. Parents paid \$22,145.

63. While attending Fusion, Student continued to miss days scheduled for instruction. Fusion Academy's Director of Student Development testified that he had 12 absences, some being for a full day and some partial days on which Student came to school but then went home with parent authorization. An email the Director sent to Father 10 days before hearing reported six full day absences and seven days with partial absences, only some of which noted that Student's absence from morning class or premature departure from school in the afternoon had been authorized by a parent. But when Student didn't attend class, there was no instruction that he missed, and at their next session, the instructor continued just where Student left off at the last class he attended.

64. At the time of hearing, Student was reported to be progressing satisfactorily in his classes; however, it was expected that he was going to require 10 additional sessions, beyond the 30 for which Parents had contracted, for him to complete the work necessary to earn course credit in English, and he was going to need two additional sessions in World History and one additional session in Psychology.

Other Evidence Relevant to the Issues and Remedies

65. At hearing, Dr. Passaro opined that when considering whether a student with a 504 Plan requires a special education evaluation, the student's grades should be considered as they related to indicating progress, and that a couple of progress reports is sufficient time to see if the student is making progress and, if not, to refer the student for assessment for eligibility for special education.

66. Student's World History teacher in the fall 2013 semester was aware that Student had a 504 Plan and claimed to have implemented the accommodations listed in it. She thought that the accommodations were helping him, but she did not think that he was making progress because he was stuck around the same grade for most of the semester. Although she recognized Student's failure to make progress, she did not discuss Student's lack of progress with the school psychologist in charge of 504 Plans or with any administrator.

67. In reviewing District's May 2014 IEP offer, Dr. Passaro opined that in addition to the goals District created for Student, District should also have developed a goal regarding depression and anxiety and how that factored into Student's school attendance and work completion. Dr. Passaro opined that the special education and related services that District offered in May 2014 were designed to allow Student to make educational progress, but that the IEP team should have offered psychotherapy. He believed that based on the data District had at the time of the May 2014 IEP team meeting, Student needed psychotherapy in addition to school-based counseling, and that school-based counseling would have needed to be frequent, meaning weekly, to deal with work completion and attendance (both having him come to school and remain at school).

68. District's director of mental health services asserted that Student's IEP did, in fact, have a social/emotional goal, and it was expressed in the form of "attendance," because attendance was being used as a functional measurement of his social/emotional well-being, as well of his behavior. She viewed the situation as being that Student's depression added to or further exacerbated his motivation towards attending and participating in school. There was a logic in describing measuring attendance as a proxy for measuring progress in improving Student's mood, but it seemed inconsistent with the practice of creating goals specifically designated to address a student's identified areas of unique need. The director of mental health services had identified that Student had unique needs in the area of mental health, specifically regarding depression and anxiety, but her finding had not carried over into itemization in the IEP of Student's unique needs and therefore a goal specifically identifying Student's mood was not created.

69. In reviewing the December 2014 IEP, considering both District's and Dr. Passaro's assessments, Dr. Simun opined that District's offer of 30 minutes per week of counseling and guidance service was insufficient. She did not offer an opinion as to what would have been appropriate.

70. During Dr. Passaro's private evaluation of Student, he observed Student at school during his special education Study Skills class. There were seven students and one teacher; students were working on completing school work, homework, and were doing organizational tasks. Student's teacher was able to keep Student on task, the teacher provided him guidance about how to do the assignment, and she did not accept minimal work from him even when he was looking for a way out. Dr. Passaro thought that class was exactly the type of class that Student would need if he remained at the District high school, and that it was exactly the type of environment he would need to be successful there. He thought the small group setting seemed appropriate for Student to meet all three of his goals and that Student needed a more individualized environment like the one he observed, even to the point of having all classes like that. Dr. Passaro acknowledged that how the teacher would interact with Student would be crucial for getting Student to produce work, and he believed the teacher he observed "did a very good job." Dr. Passaro included a possibility of Fusion Academy in his report because he knew it to be an environment in which Student had been successful, albeit working on only one course at a time, and that Fusion Academy had to at least be considered as an option if keeping him at school did not work.

71. Father testified that at the time he sought out a private assessment by Dr. Passaro, he was terribly concerned for Student's health and welfare because Student was so depressed and expressing suicidal thoughts, and the family was so concerned something terrible would happen to him. With respect to criticism of the IEP's, Father was concerned that there was not enough time to make up the classes that Student had failed and still have him graduate high school on the usual timeline. Parents indicated disapproval of any course District proposed that would not make Student eligible to be admitted to a four year program at a California State University or University of California system school directly after high school.

72. No witness testified that Student required an additional full year of service at Fusion Academy as compensatory education.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA¹¹

1. This hearing was held under the Individuals with Disabilities Education Act, 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)¹² 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 FAPE 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 IEP. (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 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized

¹¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹² All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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 (Ninth Circuit) 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. 950, 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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505.) 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof on Issues One, Three, Four and Five; District, as the complaining party, bears the burden of proof on Issue Two.

Issue 1: Suspecting Student of Needing Special Education under the IDEA

5. In Issue 1, Student contends that District denied him a FAPE from August 2013 through May 13, 2014, by failing to identify, locate, and evaluate him as a child with a disability. Student argues that District should not have waited until Parents requested an assessment for eligibility for special education and related services to refer Student for assessment. Specifically, Student asserts that because District was aware of his status as a student with ADHD, District should have known within the first quarter after he started attending school in District that he was not benefitting from the accommodations in his plan and that he might be in need of special education. District contends that because Student came to District after attending a military academy and with a record of B’s and C’s at that school, which District believed had not implemented the 504 Plan created by a prior school district, District had no reason to suspect Student required accommodations or services

beyond those recommended in his 504 Plan. District argues that Student's low and failing grades were the product of numerous absences, failure to turn in homework, failure to make up missed work, and unwillingness to meet with teachers to make up instruction or assignments. District asserts it had no information that would have given it reason to suspect Student might qualify as a student with a disability under the IDEA.

6. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.)¹³ An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a), 56506, subd. (b).) *Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

7. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities¹⁴ residing in the state. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).) The obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. (34 C.F.R. § 300.111(c)(1); Ed. Code § 56301(b)(1).) California specifically obligates school districts to actively and systematically seek all individuals with exceptional needs, from birth to 21 years of age, who reside in a school district or are under the jurisdiction of a SELPA or a county office of education. (Ed. Code, § 56300.) This duty is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

8. Violations of the duty to identify, locate, and evaluate children with disabilities who are in need of special education and related services are procedural violations of the IDEA and of the Education Code. (*Dept. of Education, State of Hawaii, v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196 (*Cari Rae S.*); *Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) 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

¹³ The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." In this decision the terms mean the same things and are used interchangeably.

¹⁴ The IDEA defines "child with a disability" as a child with any of 10 categories of disabling conditions, including "emotional disturbance" and "other health impairments," who, by reason of the condition(s), needs special education and related services. (20 U.S.C. § 1401(3)(i) and (ii).)

decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

9. A school district's obligation to identify, locate and evaluate a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194.)

10. The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

11. The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149, (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031).)

12. On September 27, 2013, at the first progress report, District was aware Student, with known difficulties with focus and follow through, was earning two D's and an F, had more than the usual number of absences, and was aware his teachers were reporting inadequate work. On October 25, 2013, at the second progress report, District was aware Student was earning two D's and two F's, and had accumulated even more absences. On November 15, 2013, at the third progress report, Student's situation was unchanged. He had gone from having a GPA of 2.58 the year before to being in danger of failing every academic class. Although the school psychologist in charge of 504 Plans met with Student after each negative progress report, she never referred him for evaluation to determine if he required special education and related services. Nor was Student referred for assessment when his final semester grades came in, with two D's, three F's, and only 15 credits toward graduation.

13. Given the low threshold for suspecting that a student has a disability and the information District had available that suggested the possibility that Student's failure to complete work and earn points could be connected to his known Section 504 "handicap", it was not reasonable for District to wait until Parents requested an assessment in March 2014. District should have referred Student for evaluation after the third progress report of November 15, 2013. District did not need to wait for Student to fail courses to suspect that a student identified as having ADHD and doing very poorly at school might need special education. District owed him the duty to evaluate him and District failed in that duty. While Student's low and failing grades were in part the product of numerous absences, failure to

turn in homework, failure to make up missed work, and unwillingness to meet with teachers to make up instruction or assignments, these also related to information in the 504 Plan that should have alerted District about the need to assess Student for special education eligibility.

14. District's failure to identify Student and to refer him for assessment for eligibility for special education and related services resulted in a loss of educational opportunity and/or caused a deprivation of educational benefits. When Student was assessed and an IEP team met to consider the results to determine eligibility, Student was found eligible under the category of Other Health Impairment (based on his ADHD and its effects) and an individualized program of instruction and services was created for him on May 13, 2014. There is no reason to doubt that had Student been assessed sooner, he would have been deemed eligible and received a similar program, including specialized academic instruction and counseling and guidance service to address Student's issues with, at a minimum, attendance, organization, and task initiation and completion. The delay in assessment led to a delay in eligibility and receipt of special education and related services.

15. In summary, Student carried his burden of proof that District's delay in identifying that Student, who was known to have a disability, might have needed special education and related services was a procedural violation that amounted to a denial of FAPE.

Issue 2: Legal Adequacy of District's Assessment

16. In Issue 2, District contends that its multi-disciplinary psychoeducational evaluation of Student in spring 2014 was conducted in accordance with the legal requirements and that Student is not entitled to an independent educational evaluation at public expense. Student contends there were numerous flaws in the instruments and methods District used in conducting its assessment, and that District has not met its burden of proof regarding the legal adequacy of its assessment; Student requests reimbursement for the private evaluation conducted by Dr. Passaro in October 2014.

17. When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral (with limited exceptions not applicable in this case). (Ed. Code, § 56321, subd. (a).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision; the assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).)

18. Once a student has been referred for an initial assessment to determine whether the student has a disability and by reason thereof needs special education and related services, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

19. The IDEA and California state law require that a school district assess a student in all areas of his or her suspected disability. (20 U.S.C. § 1414(b)(3); Ed. Code, § 56320, subd. (f).) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(1)). The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, regardless of whether they are commonly linked to the student's disability category. (34 C.F.R. § 300.304(c)(6).)

20. Assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(iv) & (v), (3); Ed. Code, § 56320, subd. (b)(3).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) A health assessment must be conducted by a credentialed school psychologist or physician. (Ed. Code, § 56324, subd. (b).) Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible; and must be used for the purposes for which the assessment or measures are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(i), (ii) & (iii); Ed. Code, § 56320, subds. (a), (b)(1) & (2).) The school district must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).)

21. The personnel who assess a student must prepare a written report that includes, among other items not applicable to Student's case: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; and (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. (Ed. Code, § 56327.) The report must be provided to the parent after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

22. The procedural safeguards of the IDEA provide that under certain conditions, a parent is entitled to obtain an independent evaluation of a child at public expense. (20 U.S.C. § 1415(b)(1).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).)

A parent has the right to request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an independent evaluation at public expense, the school district must, “without unnecessary delay,” either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense, unless the school demonstrates at a due process hearing that an independent evaluation already obtained by the parent does not meet its criteria. (34 C.F.R. §300.502(b)(4); Ed. Code, § 56329, subd. (c).)

23. A school district must provide parents with prior written notice when it refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).)

24. District responded in writing to Student’s request for an independent evaluation within a month of the request, stated the basis for its denial of the request for an independent evaluation, and filed a request for due process the next day. District did not unnecessarily delay in filing to defend its assessment.

25. District’s psychoeducational assessment met all legal requirements for assessments. District timely responded to Parents’ request for assessment and presented Parents with an assessment plan 15 days after Father’s email request. Each assessor who contributed to the multi-disciplinary evaluation was qualified to conduct the assessment. The assessment instruments were appropriate to administer to Student, they were selected so as not to be discriminatory, and they were administered in accordance with any test instructions. The assessors used assessment instruments that were valid and reliable, as is demonstrated, in part, by the fact that Student’s expert Dr. Passaro had no criticism of the assessment itself, reserving disagreement with the interpretations of the data that would lead to Student being made eligible primarily on the basis of Other Health Impairment, and not on the basis of Emotional Disturbance. However, it was the District IEP team members, not the two assessors, who made that ultimate decision, and which is not at issue in this matter. The assessors used a variety of assessment measures, both standardized and non-standardized, and reviewed existing evaluation data. Student was assessed in all areas of suspected disability within the psychoeducational assessment realm. A collaborative report was prepared by the assessors, which explained the assessment results, described Student’s strengths and weaknesses, and discussed Student’s need for special education and related services. District provided Parents with a copy of the report prior to the timely May 13, 2014 IEP team meeting at which the report was reviewed and discussed.

26. In sum, the evidence showed that District’s spring 2014 psychoeducational assessment of Student was conducted in accordance with the legal requirements. District satisfied its burden of proof on this issue and Student therefore is not entitled to an independent evaluation at public expense.

Issue 3: Denial of FAPE in May 13, 2014 IEP Offer

27. In Issue 3, Student contends that District denied him a FAPE in the May 13, 2014 IEP by failing to offer services to address Student's mental health needs, goals designed to address Student's academic and mental health needs, and supports and services to enable Student to make progress. District contends that it offered Student appropriate goals and services to meet his unique needs and Student therefore was not denied a FAPE.

28. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

29. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

30. At the time of Student's May 13, 2014 IEP team meeting, District's assessment had revealed Student's mental health issues and District had formed an idea of how those issues impacted his progress in the general education curriculum. District was aware that Student's doctor had prescribed medications to support Student's attention and to stabilize Student's depressed and anxious mood. Any lack of understanding of the severity of Student's mental health challenges and what caused Student's doctor to prescribe three medications to assist Student was due to District's own delay in seeking the information, waiting until only two business days before the IEP team meeting to even attempt to obtain information from the doctor. District's director of mental health services recognized that Student's mental health issues were impacting him in the school setting and recommended that his "sadness and depressive symptoms" warranted identifying "sad mood/poor academic motivation . . . as a unique need."

31. The preponderance of the evidence established District denied Student a FAPE by failing to develop an appropriate goal and to offer Student services relating to his unique needs in the areas of educationally related mental health. District's assessment indicated

Student's mood, and specifically his depression and anxiety, were impacting his educational progress, but District failed to itemize in his IEP mood, mental health, depression, anxiety, or any similar category as an area of need, and failed to create a specific goal to target that need. In spite of the abundance of information indicating that right before the May 2014 IEP team meeting Student had significant challenges with his mood that impacted his participation and progress in his education, and in spite of the availability of a wide variety of educationally related mental health counseling services, District offered a minimal amount of counseling in the form of school-based counseling with the school psychologist. The evidence established that District's IEP offer of 30 minutes of counseling per month was insufficient to meet Student's mental health needs as they impacted him in the school setting.

32. Student did not persuasively establish that District's May 13, 2014 IEP offer was inadequate with respect to goals designed to address Student's academic needs or with respect to supports and services designed to enable Student to make progress (apart from the issue of mental health services addressed above). Student did not offer evidence regarding what additional or different supports and services Student would have needed beyond those offered in the IEP. At the time they were offered, the goals concerning improving Student's attendance, task initiation and completion, and organization, as well as the placement and supports and services offered to enable Student to make progress on and achieve those goals, were reasonably calculated to provide Student some educational benefit.

33. Student met his burden of proof by establishing by a preponderance of evidence that District's May 13, 2014 IEP failed to develop an appropriate goal and to offer Student sufficient services to address his educationally related mental health needs. However, in all other respects, District's May 2014 IEP offered Student a FAPE.

Issue 4: Denial of FAPE in September 22, 2014 IEP Offer

34. In Issue 4, Student contends that District denied him a FAPE by failing to offer services to address Student's mental health needs, goals designed to address Student's academic and mental health needs, and supports and services to enable Student to make progress. District contends that it offered Student appropriate goals and services to meet his unique needs and Student therefore was not denied a FAPE.

35. Legal Conclusions 28 and 29 are incorporated by reference.

36. The only changes to Student's IEP at the September 22, 2014 IEP team meeting were regarding Student's organization/planning goal, adding that when Student recorded homework, classwork, and/or project information in his electronic calendar, each teacher would initial the entry; and regarding accommodations, adding the ability to take a break during tests. No other information about Student was reported to have changed, and no new or different needs were identified.

37. Just as the May 13, 2014 IEP denied Student a FAPE for failing to include a goal and an appropriate amount of service to address Student's educationally related mental health needs, so did the unchanged September 22, 2014 IEP. And similarly, just as the May 13, 2014 IEP had been reasonably calculated to provide Student some educational benefit in all other respects, so did the unchanged September 22, 2014 IEP.

38. In sum, Student met his burden of proof by establishing by a preponderance of evidence that District's September 22, 2014 IEP failed to develop an appropriate goal and to offer Student sufficient services to address his educationally related mental health needs. However, in all other respects, District's September 2014 IEP offered Student a FAPE.

Issue 5: Denial of FAPE in December 8, 2014 IEP Offer

39. In Issue 5, Student contends that District denied him a FAPE by failing to offer intensive individual instruction, services to address Student's emotional disturbance, goals designed to address Student's mental health needs, and supports and services to enable Student to make progress. District contends that it offered Student appropriate goals and services to meet his unique needs and Student therefore was not denied a FAPE.

40. Legal Conclusions 28 and 29 are incorporated by reference.

41. In response to the evaluation conducted by Dr. Passaro, District's December 2014 increased the amount of specialized academic instruction it offered Student, adding another period of Study Skills class to give him more time during his school day to complete classwork and to do his homework. This is precisely the type of small environment with the support of a credentialed special education teacher to provide redirection, encouragement, and instruction in organization and planning that Dr. Passaro had in mind when he recommended an individualized learning environment. Consistent with maximizing Student's time in the general education environment, District maintained Student's placement in the general education academic classes in which he was enrolled and only added a period of instruction, increasing his school day from five to six periods, to provide a structured and supported environment in which Student could complete work and be successful in school.

42. Student did not persuasively establish that District's December 8, 2014 IEP offer was inadequate with respect to intensive individual instruction. Consistent with Parents' desire for Student to continue on the high school diploma track and earn credits that would not only count towards graduation but also make Student eligible – grades permitting – for direct admission to a California State University or University of California college, District maintained Student in general education classes for as much of the school day as possible, balanced with an opportunity for Student to be taught and to develop executive functioning skills that would be necessary for high school, employment, college of any level or caliber, and life. Student did not persuasively establish that the accommodations and modifications Dr. Passaro suggested be considered (that were not already part of Student's IEP) were necessary to provide Student "some educational benefit."

43. Dr. Passaro's report informed District that at the time of his evaluation in mid - to late- October 2014, Student was depressed and anxious and needed psychotherapy of the cognitive behavioral therapy type. Rather than increasing Student's counseling and guidance service or changing the type of service it offered Student in reaction to the information from Dr. Passaro, District increased its offer of counseling and guidance service from 30 minutes per month to 30 minutes per week to match what it claimed it was in reality providing.

44. But with respect to a service to address the educational impact of Student's depression and anxiety, what District was doing was not providing Student adequate educational benefit. Counseling and guidance at a rate of 30 minutes per week had not been effective in bringing about improvements in the data District asserted it was using to measure/determine if Student was making mental health progress: his attendance. Student continued to struggle with his mood, motivation, and attendance and it cannot reasonably be said that 30 minutes per week of a service the school psychologist denied constituted educationally related mental health services had "maxed out" what District could have done in a reasonable attempt to address Student's ongoing mental health challenges and the impact they were having on his education. Although Student failed to present evidence of what, precisely, and how much, precisely, would have afforded Student the "basic floor of opportunity" to which he was entitled, what District offered was not reasonably calculated to confer some educational benefit on Student.

45. District continued not to develop a goal specifically directed to Student's sad mood/low academic motivation.

46. For the same reasons as it was a denial of FAPE to fail to develop a goal specifically regarding Student's educationally related mental health needs and to provide an appropriate level of service regarding those needs in the May and October 2014 IEP's, it was also a denial of FAPE at the time of the December 2014 IEP.

47. In sum, Student met his burden of proof by establishing by a preponderance of evidence that District's December 8, 2014 IEP failed to develop an appropriate goal and to offer Student sufficient services to address his educationally related mental health needs. However, in all other respects, District's December 2014 IEP offered Student a FAPE.

REMEDIES

1. 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 appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*).) When school district fails to provide a FAPE to a pupil with a

disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA. ALJ’s have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

2. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents’ placement need not be a “state approved” placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child’s needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. 7, 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child’s potential. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, at 1159.)

3. 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); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

4. Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Ibid.*)

5. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case, and the conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d 1489, 1497.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim, supra*, 464 F.3d 1025, 1033.)

6. Student prevailed on Issue 1, and parts of Issues 3, 4, and 5, in that District denied Student a FAPE by failing identify and evaluate Student before Parents requested that he be assessed for eligibility for special education and related services, and by failing to appropriately address Student’s educationally related mental health needs in the three IEP’s it offered Student. As a remedy, Student requested compensatory services in the form of reimbursement for psychological counseling from Dr. DePompo and for instructional services from Fusion Academy. Student requested reimbursement for counseling received

for one hour per week on a weekly basis from November 15, 2014, at a rate of \$150 per session. Student requested reimbursement for instructional services from Fusion Academy during summer 2014 (\$4,820) and spring 2015 (\$22,145). Student also requested that District be ordered to establish a compensatory education fund on a reimbursement basis in an amount sufficient, but unspecified, to fund Student's continuing education at Fusion Academy for the 2015-2016 school year.

7. Had District timely referred Student for evaluation, it would have done so no later than the November 15, 2013 progress report. Accounting approximately for timelines for presenting parents with an assessment plan, for parents to consider and return an assessment plan, and to conduct assessments with an intervening winter holiday break, Student likely would have had an IEP team meeting at which he would have been offered special education and related services around March 15, 2014, two months earlier than he in fact did. Given the credit Student was able to earn for English in the short time he received specialized academic instruction in English credit recovery, it is reasonable to expect Student could have done more work and earned more credits, as well as possibly earned at least D's instead of F's in other courses, if he had received special education and related services during those two months.

8. To allow Student to earn credit in courses required to graduate with a regular high school diploma, Parents paid for Student to attend Fusion Academy in summer 2014. An award of \$4,820 is equitable to compensate Student for District's denial of FAPE related to its duty to identify, locate and evaluate Student.

9. To address Student's mental health needs, Parents paid for Student to participate in cognitive behavioral therapy once per week from November 15, 2014, through the hearing, after which time it was expected the therapy would reduce to once every other week. No testimony was introduced establishing a specific amount of service that Student should have been receiving since his first IEP in May 2013. Parents submitted a receipt proving payment for 13 therapy sessions between November 15, 2014, and February 21, 2015, at a rate of \$150 copayment per session, for a total of \$1,950. There were approximately 15 more weeks between the last session for which Student submitted documentation of payment and the end of the 2014-2015 school year. Due to incomplete evidence but in recognition that Student required mental health service, Student is awarded \$1,950 as an equitable remedy to compensate Student for District's denial of FAPE related to failing to develop a goal and provide appropriate service regarding Student's educationally related mental health services, and Student may be reimbursed up to an additional \$2,250¹⁵ upon submitting to District proof of payment for mental health services between February 22, 2015 and June 10, 2015.

¹⁵ This amount is calculated based on Father's testimony that Student continued to participate in weekly therapy with Dr. DePompo and based on the expectation that each session continued to cost Parents \$150.

10. District denied Student a FAPE and Parents exercised their right to unilaterally place Student in a different program. The program Parents chose for the spring 2015 semester, Fusion Academy, was not a state approved placement, but it offered Student instructional services for which he could earn credits toward a high school diploma. The evidence established that Student's attendance and participation were not without flaws, but the uncontroverted evidence was that Student was making progress in his education and, whether through early effort or extended time, would receive passing marks in his classes and earn credits toward a high school diploma. The evidence did not establish that Student needed physical education credits in the spring 2015 semester and payment to Fusion Academy of a fee so Student could earn credit in an independent study physical education course by taking golf lessons from his existing golf coach was not necessary to enable Student to receive educational benefit. Student's attendance at Fusion Academy in the spring 2015 semester also compensated Student for the denials of FAPE in the May, September, and December 2014 IEP's. Student is awarded the tuition and fees paid to Fusion Academy for spring 2015, less the fee for independent study physical education, for a total of \$21,670, both based on Parents' exercise of their right to unilaterally place him due to and as an equitable remedy to compensate Student for District's denials of FAPE.

11. Student requested that District be ordered to pay for Student's tuition at Fusion Academy for the 2015-2016 school year. Student did not establish that he required an additional full year at Fusion Academy to compensate him for District's failures to offer him FAPE. Student's request is denied.

ORDER

1. Within 45 days of this decision, District is ordered to reimburse Parents for the cost of Student attending Fusion Academy during the summer of 2014, in the amount of \$4,820. No further proof of payment is required as sufficient proof was submitted at hearing.

2. Within 45 days of this decision, District is ordered to reimburse Parents for individual counseling provided by Dr. DePompo, in the amount of \$1,950, for which no further proof of payment is required as sufficient proof was submitted at hearing. Within 45 days after submission of required proof of payment, District is ordered to reimburse Parents an amount of up to \$2,250, as supported by invoices or receipts and proof of payment, for individual counseling provided by Dr. DePompo.

3. Within 45 days of this decision, District is ordered to reimburse Parents for the cost of Student attending Fusion Academy during the spring of 2015, in the amount of \$21,670. No further proof of payment is required as sufficient proof was submitted at hearing.

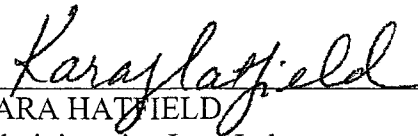
PREVAILING PARTY

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, District prevailed on Issue 2, and Student prevailed on Issue 1 and prevailed in part on Issues 3, 4, and 5.

RIGHT TO APPEAL THIS DECISION

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: August 3, 2015


KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings

