

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

PLACENTIA-YORBA LINDA UNIFIED

SCHOOL DISTRICT.

OAH CASE NO. 2008100314

DECISION

Administrative Law Judge Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter in Placentia, California on May 18 through 21, 2009.

Student and her father and adoptive mother (Parents) were represented by attorney Warren Finn. Student's parents were present throughout the hearing. Paralegal Glenda Finn was present during the hearing. Student did not attend the hearing.

Placentia-Yorba Linda Unified School District (District) was represented by attorney S. Daniel Harbottle. Joan Akers, Director of Special Education for the District, was also present during the hearing.

On October 8, 2008, Parents filed with OAH their request for a special education due process hearing (complaint) on behalf of Student. OAH granted a continuance of the hearing on November 13, 2008. At hearing, oral and documentary evidence were received. At the request of the parties, the record remained open until June 5, 2009, for the submission of written closing arguments. On that date, the parties timely submitted closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES¹

1. Beginning in February 2008, did the District deny Student a free appropriate public education (FAPE), because the District did not find her eligible for special education and related services under the category of a Serious Emotional Disturbance (ED) for the 2007-2008 and 2008-2009 school years?²

2. Should the District be ordered to reimburse Parents for the costs of Student's out-of-state, privately funded residential school placement, including tuition, room and board, and travel, from February 2008 through December 2009?

CONTENTIONS OF THE PARTIES

Student contends that, beginning in February 2008, and as of individualized education program (IEP) meeting on September 30, 2008, she was, and is, eligible for special education and related services under the disability category of ED. Student asserts that she has exhibited most or all of the five alternative characteristics required by law to support an eligibility determination of ED, over a long period of time since at least 2005, and to a marked degree, and that these characteristics have adversely affected her educational performance. Student believes she has exhibited an inability to build or maintain interpersonal relationships with peers and teachers; inappropriate

¹ The issues have been reframed for the purposes of this decision, but are the issues set forth in Student's complaint, as agreed upon by the parties both at the Prehearing Conference held on April 20, 2009, and at the commencement of the hearing.

² The appropriateness of the District's assessments is not at issue in this proceeding.

types of behavior or feelings under normal circumstances in several situations; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. In addition, Student contends that she exhibited an inability to learn that cannot be explained by intellectual, sensory, or health factors.³ Student therefore asserts that Parents are entitled to reimbursement for all costs they incurred for her private therapeutic residential placement since February 2008.

The District responds that it did not fail to meet its legal obligations to Student because Parents had removed Student from the public schools in May 2007, and did not notify the District of Student's private placement until June 2008. Therefore, the District contends that it was not required to find and assess her eligibility in February 2008. The District contends that, during the relevant time frame from February 2008 to the present, Student did not qualify for special education services under the ED category, and has not demonstrated any of the five alternative characteristics of ED in the school setting. District contends that Student's emotional problems manifested only in the home environment due to Student's socially maladjusted or relational problems with her family, and in particular, a long-standing antagonistic relationship with her adoptive mother (Mother). In addition, District argues that, if Student has exhibited any of the characteristics of ED, it was not over a long period of time, or to a marked degree across environments. In addition, the District asserts that such characteristics did not adversely affect her educational performance or require special education services.

³ Student did not argue in her closing brief that she exhibited an inability to learn; however, she did present a great deal of documentary evidence and testimony on this issue during the hearing. The omission of this issue in her closing argument is therefore not deemed to be a withdrawal of the issue.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student was born in 1995, is now fourteen years of age, and is domiciled with her family within the educational boundaries of the District. The District is therefore responsible for Student's public education as the school district of residence. Beginning in the fourth grade for the 2004-2005 school year, Student attended Woodsboro Elementary School (Woodsboro) in the District. Student has never been made eligible for special education by the District.

2. On December 11, 2006, Student filed a request for a due process hearing, naming the District, alleging that she was eligible for special education since 2004.⁴ On June 8, 2007, OAH dismissed the case based on a confidential settlement between the parties. In connection with that case, the parties agreed to obtain an independent educational evaluation (IEE) of Student, using Dr. Robert Patterson, an independent psychologist. Dr. Patterson assessed Student beginning in January 2007, and issued an amended report on May 5, 2007, in which he found that Student was not eligible for special education under the category of ED⁵.

3. On May 18, 2007, before the end of Student's sixth grade year, Parents unilaterally withdrew her from the District, and she has not attended any public school in the District since that date. Between May 2007 and February 2008, Student was home schooled. Beginning on February 18, 2008, Parents unilaterally enrolled her at the New Leaf Academy, a private therapeutic boarding school in Bend, Oregon. At the time of the

⁴ See OAH Case No. N2006120382.

⁵ Dr. Patterson also assessed Student for autistic like behaviors and found she did not was not eligible for services in that category.

hearing, Student was still attending the New Leaf Academy for the 2008-2009 school year in the eighth grade.

ELIGIBILITY AND CHARACTERISTICS OF ED

4. Student's case is based on eligibility for special education under the category of ED. Under the IDEA and California law, a pupil may be eligible for special education under the disability category of a "serious emotional disturbance" if, because of ED, he or she exhibits one or more of the following characteristics: (a) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (d) a general pervasive mood of unhappiness or depression; or (e) a tendency to develop physical symptoms or fears associated with personal or school problems.

5. In addition to meeting at least one of the above-enumerated criteria, the law requires that the pupil must also have exhibited the qualifying characteristic or condition over a long period of time, and to a marked degree, and it must adversely affect the pupil's educational performance. As with any category of eligibility, as a result of the disability, the pupil must require instruction and services which cannot be provided with modification of the regular school program in order to ensure a FAPE.

6. While ED includes schizophrenia, a pupil whose educational needs are due primarily to social maladjustment, or environmental, cultural, or economic factors is not a child with exceptional needs within the meaning of ED eligibility.

7. In determining the issues, the administrative law judge is required to consider the school district's actions in light of the information available to the district at the time of its actions, and is not to judge those actions in hindsight.

8. District's expert, Dr. Patterson, and Student's expert, Dr. Benveniste, both testified during the hearing. Each agreed that ED is not a medical diagnosis under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR., American Psychiatric Association). Instead, ED is a legal category created by Congress to distinguish a narrow range of pupils with emotional problems who are eligible for special education services. Thus, the criteria regarding emotional disorders in the medical and mental health fields are significantly different than the educational criteria for ED.

9. Both Dr. Patterson and Dr. Benveniste agreed that "over a long period of time" should generally be a minimum of six months, although a shorter duration may be appropriate for certain conditions, such as depression. Congress left to the states the responsibility for defining these terms. In 1986, the California Department of Education (CDE) issued a manual of guidelines for ED identification and assessment which is still in effect. The CDE guidelines for the length of time is consistent with the testimony of Drs. Patterson and Benveniste. The CDE guidelines suggest that the term "to a marked degree" comprises two separate components, "pervasiveness," which means that the inappropriate behavior should be present across most environments (school, home and community), and "intensity," meaning that it should be demonstrated in an overt, acute and observable manner.⁶

Student's 2008 Request for Eligibility as of February 2008

10. Student contends that she was eligible for special education and related services from the District under the ED category beginning in February 2008. She asserts

⁶ (Calif. State Dept. of Ed., Identification and Assessment of the Seriously Emotionally Disturbed Child: A Manual for Educational and Mental Health Professionals (1986) (CDE ED Manual, p. 9.) District cited this manual in its closing brief.

that the District should have taken action to determine that she was eligible for services, under the ED category beginning in February 2008.⁷ District contends that it had no knowledge or notice of Student's enrollment at New Leaf Academy or her request for eligibility and special education placement until Student's attorney contacted the District in late June 2008. In addition, the District asserts that it had no notice of Student's request for reimbursement for her private placement beginning in February 2008, until she filed her due process complaint in October 2008. District therefore argues that it did not have the opportunity to propose or refuse to initiate action on Student's claim of eligibility until they received notice of it.

11. As found above, Student was withdrawn from the District in May 2007. The evidence established that, by letter dated June 18, 2008, Student's attorney, Mr. Finn, wrote to the District to inform it that Student had been diagnosed with "Bi-Polar Disorder [sic], Attention Deficit Hyperactive Disorder, Explosive Disorder, Opposition Defiant Disorder, Major Depressive Disorder, and possibly Asperger's Disorder." He requested an IEP meeting for a determination of Student's eligibility for special education. Mr. Finn's letter informed the District, for the first time, that Student had been attending New Leaf Academy in Oregon since February 2008, and represented that Parents had evaluations to support their request for eligibility. The District received this letter on June 23, 2008. Mr. Finn did not request an assessment, and did not request that the District reimburse Parents for the past costs of Student's private placement at New Leaf Academy prior to the date of the request for eligibility.

⁷ Student does not contend that, commencing February 2008, the District failed to fulfill its child find obligations to locate, identify, and assess her in all areas related to her suspected disabilities. Therefore, child find is not an issue in this proceeding.

12. On July 3, 2008, Ms. Akers responded to Mr. Finn by letter. She pointed out that school staff were on summer break, inquired whether Student would enroll in the District for the 2008-2009 school year, and, if so, offered to schedule an IEP meeting within 30 days of the beginning of the school year. In early August, Mr. Finn replied that Student was "still in Oregon." He indicated that the family wanted an IEP meeting in September 2008, and requested New Leaf Academy's involvement with the IEP.

13. The District thereafter scheduled an IEP meeting for September 30, 2008, at Bernardo Yorba Middle School and invited New Leaf Academy representatives.

14. The evidence established that between February 2008, when Parents privately placed Student at New Leaf Academy, and June 23, 2008, when District was notified of Student's private placement and request for eligibility, the District did not have any legal obligation make a determination regarding her eligibility for special education for the 2007-2008 school year. Student was not enrolled in the District during that time period, and Parents did not provide the District with notice of Student's placement at New Leaf Academy or request an IEP meeting at any time prior to June 23, 2008. By that time, the 2007-2008 school year was over. Therefore, the District had no knowledge or notice of Student's request, and had no opportunity or obligation to propose or refuse to take action regarding her eligibility for special education. Accordingly, the District did not deny Student a FAPE for her seventh grade year, from February 2008, through the end of the 2007-2008 school year in June 2008.

Student's Request for Eligibility for the 2008-2009 School Year

15. Student contends that the District denied her a FAPE by failing to determine that she was eligible for special education and related services under the ED criteria in connection with the IEP meeting held on September 30, 2008. The District contends that Student does not meet the criteria for ED. The specific contentions of the

parties with respect to each characteristic and criterion for ED are set forth as each factor is evaluated.

16. The evidence established that, in connection with the IEP meeting on September 30, 2008, the District was aware, based on Student's historical attendance in the District from fourth through sixth grades, and the prior due process litigation, that Student was a personally troubled youth who had mental health and emotional problems, and that she had received private mental health treatment for many years, to address her anger, aggression, anxiety, inattention, suicidal verbalizations, and depression. In addition, the District had assessed her eligibility for special education twice previously.

17. In preparation for the IEP meeting on September 30, 2008, Student did not ask the District to formally assess her. Prior to the September 30, 2008 IEP meeting, the District requested copies of Student's private evaluations in advance of the meeting. In response, Student sent to the District her records from the New Leaf Academy, including progress reports and academic grades. While Mr. Finn represented in his July 2008 letter to District that Parents had evaluations to support their request for eligibility, the evidence established that Student had not been evaluated or assessed within the meaning of special education law since Dr. Patterson did so in early 2007.

18. For the IEP meeting on September 30, 2008, the District reviewed and considered Student's records and reports, including the following documentary information:

- (a) College Hospital psychiatric evaluation dated September 9, 2005;
- (b) District's psychoeducational assessment report dated January 19, 2006, by Michael Hass, Ph.D., a school psychologist;
- (c) Parents' psychological report dated June 1, 2006, by Mark Lum, Psy.D;
- (d) District's report cards, STAR testing results, and progress reports since 2006;

- (e) San Marcos Treatment Center neuropsychological and educational evaluations dated June 13, 2006, psychological evaluation dated June 22, 2006, and discharge summary dated July 14, 2006;
- (f) University of California, Irvine Medical Center discharge report dated August 14, 2006;
- (g) District's multidisciplinary assessment report dated September 27, 2006, by Gina Armendariz, a school psychologist, and two teachers;
- (h) Dr. Patterson's IEE report dated February 23, 2007, and amended on March 9, and May 5, 2007;⁸
- (i) Private school records from New Leaf Academy, including enrollment and medical notes, progress reports and transcripts, from February 18, 2008, through July 2008;

19. In addition to the above documents, the District considered input from Parents and other members of the September 2008 IEP team, input from representatives of New Leaf Academy, and prior IEP and Student Success Team (SST) documents and school records. Carol Ranstad, the director of academics at New Leaf Academy, and Tiffany Adams, Student's counselor at New Leaf Academy, participated in the IEP meeting by telephone. Mr. Finn asked the IEP team to re-evaluate Student's eligibility for special education based on the new information from New Leaf Academy, combined with all prior assessments and reports in the District's possession, as outlined above.

20. Following the September 2008 IEP meeting, the District sent Mr. Finn a letter dated October 9, 2008, in which it declined to find Student eligible for special

⁸ Dr. Patterson's 68-page report included an in-depth description of Student's historical academic and medical records going back to second grade which he reviewed in connection with his evaluation.

education on multiple grounds. First, the District understood that Student was diagnosed by New Leaf Academy as having a conduct disorder, which the District determined to be socially maladjusted behavior excluded by law from the definition of ED. In addition, the District informed Parents that the information considered showed that Student's behaviors did not occur across environments, and did not adversely affect her educational performance because she was maintaining a high level of academic achievement. Moreover, the District determined that a formal reassessment of Student to obtain more data about her academic and functional performance or unique needs was not necessary at that time.

21. Following the commencement of the present action, Parents and District agreed to select Barbara Hartl, a school psychologist with the District, to conduct a reassessment. Ms. Hartl traveled to Oregon and assessed Student at New Leaf Academy on March 16, 2009. Ms. Hartl concluded Student was not eligible for special education under the category of ED.

22. In April 2009, Parents retained Dr. Valerie Benveniste, a licensed clinical psychologist, to reassess Student by conducting a review of all pertinent medical and educational records, reports, and assessments. Dr. Benveniste did so, and issued a report dated April 2009, in which she concluded that Student meets most of the educational criteria for ED eligibility, any one of which is sufficient to support the first prong of the eligibility determination under the category of ED, and that Student is eligible for special education under the ED category. In addition, she endorsed Student's prior medical diagnoses, known to the District, that Student had bipolar disorder.

23. The assessments by Ms. Hartl and Dr. Benveniste were conducted approximately six months after the September 30, 2008 IEP team meeting when Student was found not eligible for special education and related services. Therefore, these

assessments are of limited relevance to the issue of whether Student met eligibility requirements in September and October 2008.

ED ELIGIBILITY

24. As discussed above, Student contends she was denied a FAPE as a result of the District's failure to determine her to be eligible for special education in connection with the September 30, 2008 IEP meeting. The criteria for eligibility are described in Factual Findings 4 through 6 above. Student contends that she qualifies under the ED criteria because, during relevant times, she exhibited a pervasive mood of unhappiness or depression, over a long period of time and to a marked degree. District contends that she only sporadically exhibited such a depressive mood, and only in the home environment.

Pervasive Mood of Unhappiness or Depression

25. One of the alternative characteristics by which an ED may be found is a "general pervasive mood of unhappiness or depression," over a long period of time and to a marked degree across settings. Drs. Patterson and Benveniste indicated, and the CDE guidelines suggest that, due to its nature, depression under this criterion may be considered even if the length of time involved is considerably shorter than six months, as it is often accompanied by suicidal thoughts.⁹

⁹ CDE indicates that, for major depression under the DSM, the "long period of time" may be as short as two weeks, taking into account such factors as the age of the child, previous emotional history, etiology of the depressive disorder, and intensity of previous behavioral interventions. (CDE ED Manual, p. 12.)

DEPRESSION AND BIPOLAR DISORDER

26. Dr. Patterson established, consistent with the CDE guidelines, that depression, under the ED criteria, involves overt symptoms where the child may appear dejected, depressed, sad, or hopeless; may have insomnia, have loss of motivation or interest in usual activities; loss of energy or fatigue, so even simple activities such as getting dressed become overwhelming; may experience feelings of worthlessness or suicidal ideation; have prolonged periods of crying or confusion; and may appear to show no emotion, or have extreme anger or frustration to the point of defiance persistently.

27. Dr. Benveniste established that, under the medical criteria, bipolar disorder, also known as manic-depressive illness, is a brain disorder or mental illness in which shifts in mood and energy range from depressive to stable to manic states, and may involve comorbid disruptive behavior disorders, violence, anxiety, or suicidal thinking. Depression is therefore an essential component of bipolar disorder.

28. As reflected in the above records, Student has been evaluated and diagnosed by various medical and educational professionals over the years. District contends that matters pertaining to Student's past fifth and sixth grade school years are irrelevant because they preceded the applicable two year statute of limitations, and Student's assessments, diagnoses, behaviors, and academic performance during those years cannot be used to establish her present eligibility.

29. As discussed above, the administrative law judge is required to review the determination of eligibility based on what District knew at the time of the September 30, 2008 IEP meeting. While the statute of limitations, and the scope of the issues, bars litigation of prior matters, the history of Student's past medical, mental, and emotional problems is relevant to inform the nature of her current problems during and after February 2008, and as of October 2008, when the District determined that Student was

not eligible for special education under the ED category, and are relevant to evaluate what the District knew at that time. In addition, as noted above, the criteria for ED contains an element of time, "for a long period of time." Moreover, the criteria include consideration of whether the characteristic occurred pervasively, including in the school environment, and whether the characteristic adversely affected educational performance. In the case of bipolar disorder, if the depression associated with it is by definition episodic and recurrent, rather than ongoing, then past episodes of its manifestation are relevant to understand its relationship to present eligibility and educational performance.

PAST MOODS OF UNHAPPINESS OR DEPRESSION IN THE DISTRICT

30. Student has received mental health treatments since she was separated from her biological mother at the age of two, when Student's biological mother and Father divorced. Thereafter, Student's biological mother did not play an active role in her life. Student received an educational assessment in second grade, which ruled out attention deficit hyperactivity disorder (ADHD). In third grade, Student began having extreme tantrums at home that would last for hours at a time.

31. In 2003 or 2004, Dr. Sandhya Gudapati diagnosed Student as having an intermittent explosive disorder, which was later revised to a diagnosis of bipolar disorder. Student was prescribed psychiatric medications for many years. In September 2005, at the beginning of fifth grade, Student engaged in suicidal conduct, and was held involuntarily at College Hospital. The discharge diagnoses were depression – not otherwise specified (NOS), and bipolar disorder. "NOS" is an indication that there is not enough information in order to make a more specific diagnosis, but the disorder is within the domain of depression. Dr. Mark Lum, a licensed psychologist, began therapy treatment with Student in September 2005, and also diagnosed her with bipolar disorder.

DISTRICT'S JANUARY 2006 ASSESSMENT

32. District's school psychologist, Dr. Michael Hass, assessed Student in January 2006, for ED and autism, and found that she was not eligible under either category. Dr. Hass was aware of Student's history, reviewed all of her records and reports, observed Student at Woodsboro in fifth grade, and administered formal assessment tools. In 2006, Student was taking two prescribed medications, Depakote, an anticonvulsant used to treat the manic phase of bipolar disorder, and Risperdal, an antipsychotic medication used to treat schizophrenia and bipolar disorder to improve symptoms of behavior, mania, and agitation.

33. Dr. Hass' observations of Student revealed that she engaged in appropriate behaviors with her peers at school. Dr. Hass found that Student experienced more anxiousness and symptoms of depression, compared to her peers. While Parents noted serious problems with aggression, conduct, anxiety, and depression at home, Dr. Hass did not find those problems to exist at all in the school setting. He took into consideration that Student had been diagnosed with bipolar disorder, was being treated by Dr. Lum, and was experiencing significant problems at home with Parents involving "aggressiveness, angry outbursts, uncontrollable rages and family discord."

34. Student had then been experiencing a mood of depression or unhappiness, as reported by herself and Parents, for some time. However, Dr. Hass established through his testimony that, as of January 2006, Student was well behaved and socially appropriate in the school environment, had good grades and minimal absences or tardiness, and did not need special accommodations or interventions in the classroom. Student's depression did not manifest itself in an overt fashion in the school setting in any form, such as overt moods or behaviors, absences, tardiness, uncompleted work assignments, lowered academic performance, manic or depressive episodes, poor appetite, fatigue, impaired concentration, or threats of suicide. Thus, Student's

depression did not then meet the criteria of pervasiveness, to a marked degree, across environments.

35. As set forth in more detail in Factual Findings 98 through 107, by the third quarter of the 2005-2006 school year in fifth grade, Student was not able to complete the class work timely, was not completing homework at home and turning it in, and her school work, grades, and attitude declined. She needed extra time to complete her class work during recesses. Mother established through her testimony that Student came home from school exhausted and upset about daily events, brought both uncompleted class work and homework home, and was unable to focus to complete it, causing nightly arguments involving increasing aggression, depression, and alienation. By June 2006, Student's emotional state and academic performance significantly declined. She received failing grades of an F in three subjects. Parents established that during this time, Student's emotional state deteriorated.

JUNE 2006 SAN MARCOS TREATMENT CENTER EVALUATION

36. On June 5, 2006, Parents admitted Student to the San Marcos Treatment Center in Texas for a month, in a reported state of "high risk" of harm to self and others, suicidal behaviors and aggression. San Marcos evaluated Student on an in-patient basis for 28 days, and discharged her on July 2, 2006, with a primary diagnosis of a mood disorder – NOS, and secondary diagnoses of an intermittent explosive disorder and ADHD. Student was 11 years old. The discharge report by Dr. Rust noted that Student's self ratings on tests resulted in scores in the severe range, including in the areas of sadness, pessimism, concerns about past failure, loss of pleasure, guilty and punishment feelings, self-dislike, suicidal thoughts, crying, agitation, loss of interest, indecisiveness, worthlessness, and loss of energy. San Marcos concluded that Student was suffering from severe depression and a negative self image at that time.

37. In September 2006, Student again attempted suicide and was admitted to the University of California, Irvine Medical Center for eight days, placed on medications, and released to the Community Service Program with a discharge diagnosis of depressive disorder, oppositional defiant disorder, and reactive attachment disorder. In October 2006, Dr. Lum reconfirmed his diagnosis of bipolar disorder, including Student's chronic inability to cope, poor perceptual and ideational inaccuracies, and a tendency to lose control of emotions.

DISTRICT'S SEPTEMBER 2006 ASSESSMENT

38. District's school psychologist, Gina Armendariz, assessed Student in September 2006, for a specific learning disability, and did not find her eligible for special education. Student was then in sixth grade and was still taking medications to address her emotional disorder and aggressive behavior in the home environment. As part of the assessment, a social-emotional evaluation was conducted. Student's teachers did not note any emotional disturbance, moods of unhappiness or signs of depression in the school setting. By this time, Ms. Armendariz was aware that Student was having academic difficulties at school. Student had received grades of an F in several subjects the previous spring, and was tardy often and having difficulty coming to school on time, and was having difficulty completing and turning in her assigned work that fall. Even though Ms. Armendariz knew that Student had been diagnosed with bipolar disorder, she gave credence to Student's self-serving explanation for her failure to complete school assignments: "I wanted to show my mom I didn't have to do my work." Ms. Armendariz concluded that Student's academic difficulties might be due to "extreme discord" and relationship conflicts within the home setting.

DR. PATTERSON'S 2007 ASSESSMENT

39. Student's most recent psychoeducational assessment was conducted by Dr. Patterson in early 2007, when she was in the sixth grade. Dr. Patterson conducted an assessment on January 9, February 23, and March 30, 2007, as agreed upon between the parties to the prior due process proceeding, and issued his report on May 5, 2007. Dr. Patterson's 2007 assessment obtained results consistent with those of Dr. Hass. Dr. Patterson concluded that Student did not meet any of the qualifying criteria for ED, including this category of a pervasive mood of unhappiness or depression.

40. Dr. Patterson holds multiple degrees, including a Psy.D in Psychology and Family Therapy, a Master's degree in Developmental Psychology, and a Master's degree in Education. He holds numerous California credentials including General Elementary, General Secondary, Pupil Personnel Services, and School Psychology. He is both a licensed psychologist and a licensed educational psychologist, and has extensive experience over many years working in both the education and psychology fields, has published numerous articles, and has taught numerous courses, workshops, and lectures.

41. Dr. Patterson used an extensive battery of standardized assessment tools; and also observed Student at Woodsboro. For example, Dr. Patterson administered the Devereux Scales of Mental Disorders to Parents. Parents reported that Student had significant externalized behaviors, including attention problems and depression, and an overall significant score for mental disorders. In contrast, District school staff completed the Devereux Scales for the School and none of the items were in the clinically significant category based upon the teacher's evaluation. Dr. Patterson found similar disparate results on many of his assessment tests, and also found the same pattern of different perceptions, comparing Parents' and teachers' results, as was reported in previous assessments.

42. Dr. Patterson determined that, at the age of 11, Student scored in the mid-average range for negative mood, interpersonal problems, lack of enjoyment and other factors. She scored in the average range for anxiety. On the other hand, on the Personality Inventory for Youth (PIY), he found that Student reported perceptions of herself that were in the clinically significant range in a large number of areas, including inadequate cognitive abilities, impulsivity, delinquency, depression, and social skill deficits, including conflict with peers. Student told Dr. Patterson that the future did not look good, and that she thought about ways to kill herself. Dr. Patterson noted the PIY results: "She sees herself as being highly impulsive and distractible, having problems with anti-social behavior, dyscontrol, and noncompliance, and having psychological discomfort with fears, worries, and depression and social skill deficits." Father's PIY scores resulted in perceptions similar to those of Student.

43. Dr. Patterson's assessment focused on the eligibility criteria for ED, but he also evaluated other areas such as autism and ADHD. While he did not conduct a medical evaluation for bipolar disorder, he administered the Bipolar Checklist, and the Connors Rating Scales for ADHD, which has some similarities to bipolar disorder. Parents' ratings of Student resulted in high scores meeting the ADHD index, particularly in inattentiveness. In contrast, the District's teacher ratings of Student were all in the average range. These results reflected the disparities in perceptions of Student between the home and school environments.

44. As another example, Dr. Patterson administered the Rorschach Comprehensive System for purposes of comparing Student's results with those found in a 1998 of 236 pupils over a six-year period, all of whom were receiving special education under the ED category. While all of the ED pupils had significant scores on indexes for schizophrenia, depression, coping deficit, hypervigilant problems, and suicidal ideation, Student did not have any significant scores in those areas. Dr. Patterson reported that,

during his assessment, Student was friendly, cooperative, in a good mood, and had normal affect. However, Dr. Patterson did not address the question whether his assessment results might have been different if he had assessed Student during a manic or depressive phase of bipolar disorder.

45. Dr. Patterson established that Student had feelings of hopelessness and depression in early 2007, but that these symptoms of depression were not observed to occur in the school environment. He found that Student appeared depressed, sad, and hopeless, experienced loss of energy or fatigue, and had feelings of worthlessness, and suicidal ideation, but these symptoms were only exhibited in the home environment. Dr. Patterson did not assign significance to Student's variable grades, missing and incomplete work and lowered grades and test scores. Dr. Patterson's testimony that Student's depression was masked and not observed during the school day was persuasive because, in addition to conducting formal assessments, he also personally observed Student as she related to peers and teachers and attended class in the public school.

46. Shortly after Dr. Patterson's assessment, Student's emotional condition, primarily in the home environment, deteriorated during the third and fourth quarters of sixth grade. Parents withdrew Student from school in May 2007.

DR. BENVENISTE'S EVALUATION

47. Dr. Benveniste holds a Ph.D in Educational Psychology, and a Master of Science degree in Counseling and Guidance, is a licensed clinical psychologist, and also holds educational credentials as a school psychologist and school counselor, as well as single and multiple subject teaching credentials. She has had extensive clinical experience as a consulting psychologist with Westside Regional Center, Harbor Regional Center and Children's Hospital Los Angeles, along with teaching and publication accomplishments.

48. Dr. Benveniste pointed to various episodes in Student's history, beginning in the fifth grade, where Student threatened or attempted to harm herself or members of her family, notations in the school records of her flat affect, periods of academic failure, and the cyclic depressive phases of her bipolar disorder and determined that Student meets most of the criteria for ED, including a general pervasive mood of unhappiness or depression, which is sufficient to support the first prong of the ED determination, in Dr. Benveniste's opinion. Dr. Benveniste's evaluation occurred subsequent to the September 2008 IEP meeting and consequently was unknown to the District at that time. As found above, the District was already aware that Student had been diagnosed with bipolar disorder.

49. Dr. Benveniste testified persuasively that Dr. Patterson assessed Student when she was in a period of remission from bipolar disorder and presented as typical and asymptomatic. Dr. Benveniste was critical of Dr. Patterson for disregarding or failing to integrate data that reflected the cyclic nature of bipolar disorder. Dr. Benveniste was candid that diagnosing bipolar disorder is very difficult and that "licensed clinicians do not always agree with respect to proffered diagnoses." She noted in her report:

...[I]ndividuals with bipolar disorder have a highly variable presentation based upon the phase of the disorder in which they fall during assessment. Specifically, the DSM-IV-TR describes bipolar disorder as a recurrent mood disorder of *fluctuating* moods that may be depressed, manic, hypomanic, or mixed. Further, "*the majority of individuals with Bipolar Disorder return to a fully functional level between episodes... Psychotic symptoms may develop after days or weeks in what was previously a non-psychotic manic or mixed episode...*" [Emphasis in original.]

50. Dr. Benveniste explained that, in addition to disregarding certain data, Dr. Patterson's assessment was a "snapshot" of Student at a particular point in time. Dr. Benveniste chose to emphasize the evaluations of those professionals who had spent more time with Student. In particular, she reviewed the San Marcos Treatment Center records, and Dr. Lum's reports. As found above, in 2006, after a month of evaluation, San Marcos concluded that Student was suffering from severe depression. San Marcos did not diagnose Student with a bipolar disorder, but with a more generalized mood disorder – NOS, along with an intermittent explosive disorder, and ADHD. The medical diagnosis of a mood disorder – NOS was an indication that mood swings were significant, which necessarily included depression.

51. Dr. Lum obtained a Psy.D. in 1991, had a postdoctoral fellowship at Children's Hospital in Orange County, and has been in private practice for many years. Dr. Lum observed and treated Student in therapy for over two years, and was in a position to experience Student's phasic behaviors over those years. He found that Student had a chronic, major deficit in coping with stresses, and suffered significant, periodic depression and loss of control. Dr. Lum was persuasive that his diagnosis of a bipolar disorder was the best diagnosis to account for Student's periodic, dangerous mood swings, along with a reactive attachment disorder as an additional diagnosis.

52. District argues that Dr. Benveniste's testimony should be given less weight because she did not formally assess or even meet Student prior to issuing her report.¹⁰ In some instances, it is prudent to discount the weight of expert testimony because an expert did not personally observe or assess the pupil, such as when facts about the pupil's needs or functioning are in dispute and further assessment or observation is

¹⁰ Dr. Benveniste met Student for the first time on the Sunday before the hearing began.

relevant to determining those questions. Here, however, Student's records contain substantial information about her needs and functioning, including many educational and medical assessments and evaluations. Dr. Benveniste established that she was able to rely on that information and form knowledgeable opinions regarding the educational criteria for ED without the need for further assessment or observation. There is no conflicting factual information concerning Student's functioning and emotional states; rather, there is a professional disagreement about the significance of the data. Dr. Patterson was dismissive of Dr. Benveniste's evaluation because he assumed she was unfamiliar with special education law and the requirements for ED. However, that assumption was false. Dr. Benveniste is not only a licensed clinical psychologist but is also a credentialed school psychologist, and established that she evaluated Student's records under the ED criteria. Accordingly, Dr. Benveniste is well qualified and her opinions were considered and accorded due weight.

53. While social maladjustment or a conduct disorder, situationally based in the home environment, was a reasonable hypothesis, and was factually accurate to an extent, Student's behaviors, for the most part, were not accompanied by other conduct that commonly reflect social maladjustment, such as disciplinary problems, drug or alcohol use or abuse, truancy, delinquency, or other conduct. There was evidence that Student tried to run away after school a few times, to the homes of classmates, and that Student had a situational antagonistic relationship with Mother. However, Student's behaviors involved a multitude of psychiatric diagnoses of disorders that focused on depression and mood swings, in addition to complications of reactive or oppositional behaviors.

54. No particular psychiatric diagnosis such as schizophrenia or bipolar disorder is required in order to find ED. Even so, the weight of the evidence establishes that Student has bipolar disorder, or at least a mood disorder-NOS, involving mood

swings, including significant depression. Thus, Student's bipolar disorder, while not dispositive, is a relevant factor to be considered in evaluating the ED criteria, and the criterion of a pervasive mood of depression in particular.

PAST MOODS OF DEPRESSION DURING HOME SCHOOLING

55. From May 2007 to February 18, 2008, Student was home schooled by Parents with oversight from the Kolbe Academy Home School (Kolbe), a private religious educational program based in Napa, California.¹¹ Student was home schooled for about the first half of seventh grade, until Parents enrolled her at New Leaf Academy in mid-February 2008. Mother credibly testified that Student's conduct and emotional state had deteriorated beginning in about December 2007, and those difficulties continued until after she was enrolled at New Leaf.

56. During the home schooling, Parents taught the assigned lessons, and an academic advisor from Kolbe reviewed Student's work and verified the grades, apparently by mail. Parents were pleased with Student's initial adjustment to the home schooling program. For the second quarter (September, October and November 2007), Student's grades improved and she received average and above average grades. However, for the third quarter in the home schooling program, Student's grades plummeted, and she received four F grades. The evidence established that, during this time period, Student refused to do school work, engaged in "rages" and explosive anger, and threatened to kill herself, her brothers, and Mother. During this time, Student also exhibited behaviors associated with depression, including poor hygiene, failing to take showers, wash her hair, or brush her teeth.

¹¹ The District was not involved with Student's home schooling and had no knowledge or oversight of the program.

57. Parents consulted with Dr. Lum regarding Student's deterioration and their decision to enroll her at New Leaf Academy in February 2008. Dr. Lum testified that Student had again entered a phase of significant loss of control, involving lying about school work, hiding school work, raging, chronic depression, and threatening the safety of herself and family. Dr. Lum's opinion, based on two years of working with Student, was that the episodes reflected the depressive disorder. However, the evidence also established that Parents, and particularly Mother, placed Student in a precarious situation being schooled at home, primarily by Mother, in spite of an extremely antagonistic relationship between Mother and Student. Thus, both the depressive disorder and situational conflict played a role.

58. The evidence thus established that beginning in December 2007, Student demonstrated a pervasive mood of unhappiness and depression lasting several months, as a continuation of periodic depression since 2005. The depression was manifested in the home setting, not a separate school environment. Since the school and the home were the same environment, there is no evidence whether Student would have manifested the mood of unhappiness or depression in overt fashion during school, had she been attending a school outside of the home.

STUDENT'S MOODS OF DEPRESSION AT NEW LEAF ACADEMY

59. District's school psychologist, Ms. Hartl, traveled to Oregon on March 16, 2009, to assess Student at New Leaf Academy. Ms. Hartl's assessment included both reviewing and verifying information that the District already knew about as of the September 30, 2008 IEP, and gathering new information about Student's academic and functional performance between September 30, 2008, and the date of Ms. Hartl's assessment.

60. Ms. Hartl verified that Student maintained a steady 3.33 grade point average (above average) from the time of her enrollment at New Leaf in February 2008

to September 30, 2008, and from that date through March 2009. There were no significant variations in her grades, and no significant behavioral problems, either at school or in the residential facility. Student had not displayed a general pervasive mood of unhappiness or depression at the New Leaf Academy boarding school setting since she enrolled.

61. Ms. Hartl conducted a comprehensive review of Student's records and reports from both the District and New Leaf; interviews with Parents, Student, and teachers at New Leaf, as well as interviews with Ms. Ranstad, New Leaf therapeutic director Marci Padgett, New Leaf counselor, Cathryn Perkins, and Student's sixth grade teacher in the District, Ms. Grimsley. In addition, Ms. Hartl administered the Behavior Assessment for Children – Second Edition (BASC-2), and observed Student in two classes. Ms. Hartl observed Student participating in her classes appropriately, including interacting with her teachers and peers. New Leaf teachers Katie Vernon (Composition), Laura Beuning (Social Studies), and Stacy Welsh (Science) were also interviewed and completed the BASC-2. Since the BASC-2 was conducted well after the September 2008 IEP meeting, its results are irrelevant to this inquiry. Some of Student's teachers informed Ms. Hartl that they had concerns that Student was emotionally detached, and lacking in conscience and compassion.

62. Student's New Leaf counselor, Ms. Adams, and New Leaf's academic director, Ms. Ranstad, participated in the IEP meeting on September 30, 2008, by telephone. Ms. Adams informed the September 2008 IEP team that Student demonstrated a "conduct disorder" and had difficulty following adult directives. Ms. Ranstad retracted that "diagnosis" during her testimony. She explained that New Leaf does not diagnose illnesses, and that Ms. Adams no longer works there. Ms. Ranstad informed the IEP team, however, that Student has an "emotional disturbance" that interferes with her academic performance and relationships. She used that phrase in a

general fashion, and testified that all of the girls attending New Leaf could be considered to be emotionally disturbed in some fashion, without regard for the legal criteria for ED eligibility. Ms. Ranstad described characteristics of Student's personality, such as flat affect and lack of self esteem. Ms. Ranstad indicated that Student has had times where she has cried about something in the context of the therapeutic setting, but did not report any staff concerns about episodes of observed, overt moods of unhappiness or depression.

63. Ms. Ranstad's testimony regarding a conduct disorder or ED eligibility is not entitled to any weight. Neither the therapeutic boarding school nor its staff, including Ms. Ranstad, is qualified to render an opinion regarding a medical diagnosis or eligibility under the IDEA and California law. New Leaf Academy is a private, for profit therapeutic boarding school in Oregon. Ms. Ranstad conceded that public school districts in Oregon are prohibited from funding, and do not fund, special education placements at New Leaf. There is no evidence that any of the staff at New Leaf have special education training or experience. Ms. Ranstad does not hold any professional or educational degree or a teaching credential in the state of Oregon or California, is not a psychologist, and has had no special education training. However, she has been involved in helping at-risk youths for over 30 years and her observations, aside from diagnoses and IDEA eligibility, have been accorded due weight.

64. Student's depression, if now existent, has not manifested itself in the school environment at New Leaf in any form, such as overt moods or behaviors, absences, tardiness, uncompleted work assignments, lowered academic performance, manic or depressive episodes, threats of significant self harm or harm to others, rages, poor appetite, fatigue, impaired concentration, or threats of suicide.¹² Therefore,

¹² Dr. Benveniste met Student on May 17, 2009, and also formed an opinion that Student is currently depressed. However, this recent snapshot of depression is

Student has not displayed a general pervasive mood of unhappiness or depression to a marked degree in the New Leaf Academy boarding school setting since February 2008.

65. Based on the foregoing findings, it is necessary to determine whether Student exhibited a pervasive mood of unhappiness or depression over a long period of time and to a marked degree at the time of the September 2008 IEP meeting. Student established that as of the September 2008 IEP meeting, and District's October 2008 denial of eligibility, she had exhibited symptoms or behaviors demonstrating a mood of unhappiness or depression, as recently as December 2007, and January and February 2008. Due to the recurrent nature of Student's depression, the evidence supports a finding that Student has demonstrated a mood of unhappiness or depression over a long period of time, on a periodic basis, since at least 2005, and for at least three months in late 2007 and early 2008. This depressive period, up to the time she enrolled at New Leaf in February 2008, was only about seven months prior to the September 2008 IEP meeting, and well within the statute of limitations. It was not so remote in time as to preclude consideration. In addition, although the evidence did not show the depression existed for six or more months, the shorter time frame met the requirement that it be for a long period of time under the California guidelines. Accordingly, Student meets the first prong of this criterion for ED.

66. The next question is whether Student's mood of unhappiness or depression was pervasive across settings and overtly, to a marked degree, or whether it

unpersuasive because Student has been living away from home and would understandably exhibit situational stress in being evaluated the day before the due process hearing. In addition, Dr. Benveniste never observed Student in the school setting either at New Leaf or in the District.

did not involve the school setting. District contends that there is no evidence that Student exhibited a mood of unhappiness or depression in the school environment.

67. The evidence established that during historical periods of time when Student's emotional state in the home deteriorated, her depressive mood did not manifest itself pervasively, in overt behaviors in the school setting, such as appearing sad, depressed or hopeless, engaging in manic or depressive episodes while in school, or any reported episodes of isolation, fatigue, impaired concentration, or threats of suicide.

68. As set forth in Factual Findings 98 through 107 below, the evidence establishes that, historically, Student's mood of unhappiness and depression manifested in an overt fashion in the school environment to the extent that it may have contributed to her receipt of failing quarterly grades in some subjects for the fourth quarter of fifth grade in the 2005-2006 school year. During that quarter, Student refused to do homework, and her cyclic mood swings, unhappiness, and depression resulted in tardiness to school, missing and incomplete homework, and uncompleted class work, while, in other subjects, Student maintained average or better grades. However, Parents withdrew Student from the District before the end of the quarter to enroll her in home schooling, and the lowered grades also reflected that she did not complete the classes. During sixth grade, although Student had difficulties arriving to school on time and had many missing homework assignments, she still maintained average, and above average quarterly grades.

69. The evidence established that, within the statute of limitations, there was no overt manifestation of Student's mood of unhappiness or depression in a school environment, outside of the home setting. For the third quarter of seventh grade in home schooling, between December 2007, and February 2008, Student's depression again cycled downward, and Student received four Fs and two Ds. However, Parents

withdrew Student from the program before the end of the quarter to enroll her in New Leaf Academy on February 18, and these grades also reflected the fact that she did not complete the school work. In addition, because Parents were Student's teachers in the home schooling program, the evidence did not establish that Student's depressive mood was exhibited to a marked degree, pervasively, in a separate educational setting. Moreover, during the sixth and seventh grade school years, there is no evidence of any other acute, overt symptoms of depression in the school environment, apart from the home setting.

70. Based on the foregoing, the weight of the evidence established that Student's pervasive mood of unhappiness and depression, over a long period of time, was not pervasive, to a marked degree in the school environment. Even if the home schooling constituted a school environment, the lowered academic performance for one quarter out of both the sixth and seventh grades was an isolated episode. Accordingly, Student failed to meet this second prong of the depression criterion for ED.

Inappropriate Types of Behavior or Feelings Under Normal Circumstances Exhibited in Several Situations

71. Another of the five alternative characteristics by which ED may be found is "inappropriate types of behavior or feelings under normal circumstances exhibited in several situations," over a long period of time, and to a marked degree, pervasively across settings. Socially maladaptive behaviors are excluded from this criterion.

PAST BEHAVIORS IN THE DISTRICT

72. As for past behaviors, both Janeen Hill, Student's fifth grade teacher, and Michelle Grimsley, Student's sixth grade teacher, persuasively established that Student did not engage in any significant inappropriate behaviors during her attendance at

school for the fifth and sixth grade years in the District, aside from being “slightly anxious or withdrawn.”

73. In 2007, Dr. Patterson found a distinct divergence of clearly inappropriate behaviors and feelings in the home setting, and a clear absence of exaggerated responses in the school setting. For example, Student’s multiple suicide attempts in 2005, and one attempt in August 2006, qualified as catastrophic or inappropriate behaviors. They occurred over a period of about a year and a half in connection with the home setting only, and did not occur in the school environment. Dr. Patterson did not find any qualifying behaviors related to the school setting.

74. Dr. Benveniste, on the other hand, points out that multiple licensed mental health professionals have documented Student’s history of difficulties with emotional regulation and impulse control that led to active self-injury (cutting), suicidal gestures, and violent aggression toward family members (including pushing her one year old brother under the water in the bathtub in a state of anger).

75. On July 2, 2006, when the San Marcos Treatment Center discharged Student after a month of in-patient care, they recommended psychotherapy to focus on her “distorted and unstable perceptions of self and others... and controlling untoward impulses....”

76. Dr. Lum treated Student in therapy from the fall of 2005 until her enrollment at New Leaf in February 2008. He found that Student had a significant deficit in coping with stresses, perceptual inaccuracies, poor logic, and faulty judgment, rendering her vulnerable to poor decisions and behaviors. He was persuasive that small incidents such as parental arguments over completing Student’s homework resulted in her extreme reactions such as wanting to harm herself or kill her family.

BEHAVIORS AT NEW LEAF ACADEMY

77. As found above, for a few months prior to February 2008, Student verbalized desires to kill her siblings and Mother and engaged in episodes of rage and explosive anger that were clearly inappropriate responses to the home schooling and living circumstances. In addition, Student's ability or desire to care for herself hygienically had deteriorated.

78. According to the New Leaf Academy, and as Ms. Ranstad reported to the September 2008 IEP team during the IEP meeting, Student had not engaged in any rages, explosive behaviors, or other catastrophic or otherwise inappropriate responses to everyday occurrences that meet this criterion since her enrollment in February 2008. Thus, there had not been any episode of a manic or depressive nature, during which Student might have engaged in rages, suicidal ideation, or violence. Overall, Student has displayed some anger at adult directives and has cried at times, all within the bounds of the therapeutic setting. At the September 2008 IEP meeting, Ms. Adams reported to the IEP team that Student had engaged in a "couple of minor self-harm behaviors when upset (e.g. hitting herself; biting hand to point of bruising or possible drawing blood)." Student's self-care skills had improved in the therapeutic boarding school environment.

79. Based on the foregoing, as of the September 2008 IEP meeting, Student had engaged in inappropriate qualifying behaviors as recently as December 2007, and January and February 2008, when she verbalized desires to kill her family and engaged in raging behaviors before going to New Leaf Academy. These behaviors are not so remote in time as to preclude consideration. They existed over a long period of time because Student has periodically engaged in inappropriate behaviors in otherwise normal circumstances since at least 2005. However, the evidence does not establish that Student's past exaggerated responses to normal incidents were pervasive, to a marked degree, across environments, because they occurred only in the home setting and did

not manifest in any way in the school setting. Student's last documented suicidal conduct in August 2006 occurred in the summer, and was not shown to be related to school. There is a singular absence of evidence of any inappropriate or exaggerated behaviors in the school setting, both in the past at Woodsboro in the District, and at New Leaf Academy. Therefore, Student did not establish that she meets this criterion for ED.

Inability to Build or Maintain Interpersonal Relationships with Peers and Teachers

80. Another characteristic by which a ED may be found is "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." Because of the use of the word "and," the pupil must show serious impairment in relationships with both peers and teachers, in the conjunctive. This criterion should be found to have existed for a long period of time, pervasively across domains (school and community),¹³ and of an acute, observable intensity.

PAST RELATIONSHIPS IN THE DISTRICT

81. Ms. Hartl's review of Student's records for fifth and sixth grade while she was at Woodsboro in the District established that Student had friends with whom she appropriately interacted in the classroom and on the playground. Ms. Grimsley, the sixth grade teacher, testified that Student had a group of friends with whom she sat, talked, and played games, and that she was not withdrawn but sought out other students. Both Ms. Grimsley and Ms. Hill, Student's fifth grade teacher, established persuasively that they had good relationships with Student. In addition, they did not recall observing

¹³ It is notable that parents are not included along with peers and teachers in this criterion.

questionable relationship issues with her peers during the school days, except for her sensitivity when some children called her names. Since name-calling and teasing are a normal part of elementary school interactions, they did not view it as a serious problem.

82. In comparison, Parents reported that Student would come home from school during the fifth and sixth grade years and engage in rages complaining that no one at school liked her, and that she was being taunted. For example, Student had gained weight due to the prescriptive medications, and was depressed and enraged to be called "pregnant" by school peers. She did not say or do anything to express or delay her feelings during the school day, but brought the feelings home with her. Mother credibly established that Student did not have friendships outside of school, and did not talk with friends on the telephone, for example. Student consistently reported to Dr. Lum, in 2005 and 2006, and Dr. Patterson in 2007, that it was difficult for her to make friends. In addition, Student reported to Ms. Hartl in March 2009 that when she attended Woodsboro in the District, some of the pupils there did not like her.

83. Dr. Benveniste pointed to the above matters in concluding that Student demonstrated an inability to have interpersonal relationships with peers. If Student had peer relationships, they would probably have carried over into her life after school. The fact that they did not is troubling. Student and Parents have consistently and credibly reported a long history of Student's difficulties in her relationships with peers, based on Student's self-reports, and Parents' observations and perceptions in the home environment. However, even if Student did not have reciprocal relationships with peers, Dr. Benveniste did not analyze Student's relationships with her teachers and did not interview any of Student's teachers.

84. The fact that the District staff thought Student had friends during both fifth and sixth grade at school, at least superficially, could indicate that the District's teachers were unaware of the nature or quality of those relationships. However, both

Ms. Grimsley and Ms. Hill were experienced general education teachers, and their testimony that Student did have friends at school is credible because it was based on daily observations of Student in a variety of school settings in class, at lunch, and recess, over a period of almost two school years. Dr. Patterson's classroom observations of Student were consistent with the teachers' observations. In contrast, Dr. Benveniste never observed Student in any school setting.

85. Dr. Patterson and the District witnesses were more persuasive than Dr. Benveniste because she never observed Student's interactions with either peers or teachers. Student did not exhibit an inability to have relationships with both peers and teachers in the school setting at the time of Dr. Patterson's 2007 assessment. Dr. Patterson relied on District's teacher reports and interviews that Student had relationships with peers during the school day as well as his own observations. While he respected Student's and Parents' perceptions that she had no real friends in the home setting, he did not find any record of such a problem at school. He testified persuasively that Student's difficulties in her interpersonal relationships with her family (and absence of friends after school), were distinctly different than her ability to maintain relationships with peers and teachers in the school environment.

RELATIONSHIPS AT NEW LEAF ACADEMY

86. At the September 2008 IEP meeting, the New Leaf Academy representatives, Ms. Randstad and Ms. Adams, reported to the IEP team that Student had demonstrated an unspecified degree of apathy, arrogance, difficulty following adult directives, inappropriate touching with other girls at school, and exhibiting a lack of care or concern for others, or shame for her actions. Ms. Adams, Student's counselor, reported that Student was building a relationship with her but did not discuss Student's relationships with her classmates.

87. The evidence from New Leaf staff and Ms. Hartl's assessment established that Student had a specific group of friends, and one close friend, but did not open up to all the girls, was introverted, and had strong opinions. This information is consistent with what the District knew as of the September 2008 IEP meeting. District had been given copies of New Leaf's progress reports which showed that, in all academic subjects, Student demonstrated good relationships with the teachers. The evidence therefore established that, as of the September 2008 IEP meeting, Student had interpersonal relationships with both peers and teachers at New Leaf. There is no evidence that she avoided interacting with others, was fearful, unable to relate, withdrawn or isolated.

88. Based on the foregoing, Student did not exhibit a significant inability to build or maintain interpersonal relationships with her teachers at school at any time within the statute of limitations, including during her attendance at New Leaf from February 2008 to the September 2008 IEP meeting. The New Leaf teachers are working well with her and have established relationships. The evidence shows that Student's past problems in peer relationships were not pervasive across environments and occurred only in connection with the home setting. The evidence also established that Student has built and maintained interpersonal relationships with her peers at New Leaf, including a close friend, although some of those relationships may be inappropriate. However, even if such relational problems with peers were so inappropriate as to meet this criterion, the law requires a showing of poor relationships with both peers and teachers. The evidence established that Student has developed interpersonal relationships with her teachers at New Leaf. Parents were her teachers from May 2007 to February 2008. However, parental relationships are excluded by omission from this criterion and are therefore excluded from this analysis. Accordingly, Student does not meet this criterion for ED.

Tendency to Develop Physical Symptoms or Fears Associated With Personal or School Problems

89. Another alternative characteristic by which an ED may be found is “a tendency to develop physical symptoms or fears associated with personal or school problems” over a long period of time, with intensity and pervasively across settings. While the physical symptoms or fears may be associated with personal problems, as opposed to school problems, they must nevertheless manifest to a marked degree in the school domain.

90. Dr. Patterson found in 2007 that Student had some elevated assessment scores demonstrating anxiety which were not significant. He was persuasive that Student did not exhibit physical disorders that had no organic cause, or persistent, irrational fears resulting in disabling anxiety. Dr. Benveniste, Student’s expert, agreed with Dr. Patterson’s assessment opinions and also did not find that Student demonstrated physical symptoms or fears that met the requisite characteristics. Therefore, Student does not meet this criterion for ED.

Inability to Learn Not Otherwise Explained

91. Another alternative characteristic by which ED may be found is an “inability to learn which cannot be explained by intellectual, sensory, or health factors.” CDE guidelines suggest that this criterion is designed to rule out other possible reasons for a child’s inability to learn, including other eligibility categories such as mental retardation, autism, speech and language disorder, hyperactivity, motivational factors, non-attendance, or behavioral difficulties.¹⁴

¹⁴ CDE ED Manual, p. 10.

DR. PATTERSON'S 2007 ASSESSMENT

92. Dr. Patterson established that Student's achievement scores in his 2007 psychoeducational assessment were all in the upper portion of the average range or higher, with the exception of one measure for written expression in the average range. He did not observe any severe disturbances in the "thought process of learning, including reasoning, long or short term memory or awareness of reality." Dr. Patterson credibly established that Student was performing in the high average range cognitively. Dr. Patterson also reviewed her prior medical and educational records and reports, including grades. He noted Student's variable quarterly grades in fifth grade and the first part of sixth grade, and attributed them to her lack of effort, not an inability to learn. As found above, Student's periods of lowered academic achievement coincided with her periods of deteriorated emotional balance, and increase in depression and aggression. Nevertheless, Dr. Patterson was persuasive that Student did not demonstrate an inability to learn under the ED criteria at the time of his assessment.

HOME SCHOOLING

93. As set forth above, Parents withdrew Student from sixth grade in the District in May 2007, prior to the end of her sixth grade school year, due to a deterioration of her emotional state. Parents home schooled Student with oversight from the Kolbe Academy. The Kolbe "school year" was from June 2007 to June 2008.

94. Kolbe's grade transcript showed that Student received variable grades for the first quarter, including two Fs. Parents were pleased with her initial adjustment to the home schooling program. For the second quarter (September, October and November 2007), Student's grades improved and she received grades in the average to above average range. As Student's emotional state again deteriorated into depression and aggression, Student's grades for the third quarter in the home schooling program

plummeted, including four Fs. Parents enrolled Student at New Leaf Academy before the end of the quarter, and she did not complete the classes.

95. Student's failing grades in some, but not all, academic subjects for the third quarter of seventh grade in early 2008 reflected both Student's emotional problems and her lack of completion of the quarter. The evidence did not establish that she was unable to learn at that time.

LEARNING AT NEW LEAF ACADEMY

96. The New Leaf Academy academic records for Student for her spring 2008 semester in seventh grade, and 2008 summer session, established that she was performing above grade level in all subjects. The program for the middle school goes through eighth grade in three phases in which the pupils are closely supervised and monitored. As of the September 2008 IEP meeting, Student had received the grades of A's and B's in all subjects, including Math, U.S. History, Physical Science, English Literature, and English Composition. District's school psychologist, Ms. Hartl, verified that Student maintained a steady 3.33 grade point average at New Leaf.

97. Based on the foregoing, Student's failing grades and uncompleted school work in the months immediately prior to her enrollment at New Leaf Academy do not establish that she then had an "inability" to learn, as she was cognitively bright and capable of learning. The evidence shows that Student had variable academic achievement, which was negatively impacted by the state of her emotional problems. As set forth below, the evidence establishes that Student's emotional problems historically contributed to her receipt of some failing grades in the District for the fourth quarter of fifth grade, and the third quarter of seventh grade. This is relevant to the issue of whether her emotional problems adversely affected her educational performance, as discussed below, not that she was "unable" to learn. Therefore, Student did not establish that she meets this criterion for ED.

Adverse Affect on Educational Performance

98. Student contends that her emotional disturbance adversely impacted her educational performance. District contends that Student does not meet the criteria for ED. Even if she did meet the ED criteria for at least one of the characteristics, for a long period of time, and to a marked degree, the District asserts that Student made appropriate progress academically, both while attending Woodsboro, and while at New Leaf Academy.

99. In addition to meeting one or more of the characteristics of ED, over along period of time and to a marked degree, the ED characteristic must be found to have an adverse impact of the pupil's educational performance. California primarily gauges educational performance through academic measures.

100. As found above, Student does not meet the ED criteria for a pervasive mood of unhappiness or depression, because, although the depression has existed periodically over a long period of time, it was not manifested to a marked degree, pervasively, in the school environment, but only in the home setting. Therefore, the issue of adverse affect on educational performance need not be reached. However, since this issue is related to the previous question of whether Student's depression manifested itself in overt symptoms in the school environment, it is addressed below.

PAST ACADEMIC RECORD

101. Dr. Benveniste characterized Student's historical school records from fifth and sixth grade as showing "highly variable quality and consistency" in produced work and assignments, consistent with bipolar disorder. For the 2005-2006 school year in fifth grade, Student's school grades and work deteriorated in the spring of 2006, during a time in which Student's emotional state had also deteriorated. For the first quarter of the school year, Student received average to above average grades in all subjects. However, for the third quarter of that year, Student's grades declined somewhat, and by

the fourth quarter of 2006, Student's emotional behaviors in the home had deteriorated; she was not doing daily work in class, and had incomplete projects and missing homework. For the year-end (fourth) quarter, Student received grades of an F in three academic subjects of Reading, Spelling, and Social Studies, and variable grades in other subjects. Where her previous grades for Effort were generally Satisfactory or Very Good, for the fourth quarter she received two grades of Unsatisfactory. Parents withdrew Student from the District prior to the end of the school year and admitted her to the San Marcos Treatment Center for evaluation. Hence, Student did not complete her classes for the fourth quarter. District attributed Student's lowered grades for the fourth quarter of fifth grade to "uncompleted work" because she did not turn in missing work before she was withdrawn. In fact, because Student had performed throughout most of the rest of fifth grade at or above grade level, the District promoted Student to the sixth grade.

102. District witnesses also attributed Student's variable academic performance in fifth grade to her unwillingness to do her homework or study to pass the quizzes and tests because of relational problems with her parents at home. Ms. Hill, Student's general education fifth grade teacher, conceded that, by the spring of 2006, Student was not able to complete all class work timely, was not completing homework at home and turning it in, and her school work, grades, and attitude declined. Ms. Hill accommodated Student's slowness in class by requiring her to complete class work during recess. The recess accommodation helped Student complete some, but not all class work. In the fourth quarter, Student's work habits and grades continued to deteriorate, and Student also refused to do certain projects assigned by Ms. Hill, as well as refusing to do homework in the home.

103. On June 1, 2006, the District held an SST meeting to address Student's problems in the school environment. The SST team noted that Student's behavior and attitude toward school was getting in her way and she was acting "passively defiant,"

was “not remorseful,” had “flat affect,” and could be “manipulative,” and that discipline did not seem to affect her actions. As a result, the team noted that Student’s grades went down in the third quarter, and “dove” in mid-May 2006. The team considered the idea that Student was “playing home against school.” The team noted that Student had “possible” diagnoses for oppositional defiance disorder, bipolar disorder, or “attachment disorder.” The subject of depression was not discussed. When Parents admitted Student to San Marcos Treatment Center for a complete evaluation on June 5, San Marcos thereafter diagnosed Student to be severely depressed.

104. Thus, based on Ms. Hill’s testimony and other evidence, Student’s lowered academic performance at the end of fifth grade reflected uncompleted homework and failing grades, as well as her withdrawal from school before the end of the quarter. Student’s emotional problems were not just manifested in the home environment, but they also manifested overtly in the school setting by contributing to her receipt of three Fs in academic subjects. Accordingly, Student’s pervasive depressive mood also adversely affected her educational performance for one quarter of fifth grade.

105. For the first half of sixth grade in the 2006-2007 school year, Student received a failing grade of an F on a multitude of homework assignments, was late to school many times, and had many missing assignments in September, October, and November 2006. Student’s tardiness was due to her tiredness and inability to get up in the morning.¹⁵ However, Michelle Grimsley, Student’s sixth grade teacher, explained that for sixth grade, heavier weight was given to tests (70 percent) and quizzes (20 percent) than to homework (10 percent). The evidence shows that Student’s actual quarterly grades for the first three quarters of sixth grade were consistently in the B (above

¹⁵ Per Dr. Patterson, fatigue or exhaustion is a common clinical sign of depression. (CDE ED Manual, p. 13.)

average) and C (average) range. For example, by March 2007, Student's writing grade had improved to an above average grade of a B. Student's lowest quarterly grades were two grades of C+, one in Social Studies and one in Science.

106. The District established that Parents' perception that Student was failing, upon seeing reports showing that Student had a lot of Fs for missing homework assignments, was therefore incorrect. While the law does not require failing grades in order to establish adverse impact, Student's academic performance reflected appropriate educational progress during sixth grade, and did not demonstrate a notable adverse impact, despite her difficulties. This is the case even though Student experienced a high number of days (almost 40 days) in which she was tardy to class, often involving several hours of missed classes while Mother struggled to get Student up, dressed, and ready for school.

107. Thus, based on the above, when Parents withdrew Student from school in May 2007, due to her deteriorated emotional state in the home, the evidence demonstrates that Student was performing at grade level at school, albeit with homework and tardiness problems. The only quarter during Student's fifth and sixth grade years in which Student established that her state of depression adversely impacted her educational performance was the fourth quarter of fifth grade.

ACADEMIC PERFORMANCE IN HOME SCHOOLING

108. As set forth in Factual Findings 93 through 95 above, during Student's period of home schooling through the Kolbe Academy between May 2007 and February 2008, she received variable grades, primarily in the average to above average range. Student's grades for the third quarter in the home schooling program (December 2007, January and February 2008) plummeted, including four Fs. This period of failing academic grades coincided with Student's deteriorating emotional state, as credibly described by Parents.

109. However, the circumstances in which Student's academic failure in the third quarter of seventh grade occurred are questionable. This academic failure occurred in the home setting, not in a separate school environment. Given the historical difficulties between Student and Mother, in particular, Dr. Lum's judgment in agreeing with Parents' idea for Mother to become Student's teacher in the home environment was questionable. The evidence did not establish that Parents had any training in being a teacher. Mother, who acted as the primary teacher for Student, undertook this task knowing that Student and she had a long history of personal conflict, accompanied by severe arguments, and that conflict was foreseeable to arise and escalate during the home schooling. At some point, Father began teaching a few subjects in the evenings after work.

110. No one from Kolbe Academy testified regarding the nature of the home schooling program or how Parents performed as teachers. In addition, Student was withdrawn from this program and enrolled at New Leaf Academy in mid-February 2008, and Student therefore did not complete the school work for the quarter. Moreover, the record does not establish the state of her grades prior to being pulled out of the program. Thus, while Student's depressive mood played some role in her home schooling grades, she did not finish the quarter. This period of deterioration of Student's educational performance, in the home setting, is therefore not accorded great weight.

ACADEMIC PERFORMANCE AT NEW LEAF ACADEMY

111. As set forth in Factual Findings 96 and 97 above, since Student's enrollment at New Leaf Academy in February 2008, she has maintained a steady 3.33 grade point average. There have been no significant variations in her grades, and no significant behavioral problems. Even taking into consideration that Student's achievement has occurred in the context of a therapeutic boarding school, at the time of the September 2008 IEP meeting, Student's academic performance had been consistent

for well over seven months with no periods of decline, and continues to be so. Ms. Hartl, the District's school psychologist who traveled to Oregon to meet the New Leaf staff and assess Student, determined that no modifications or accommodations were provided Student in her classes, and that Student was performing at grade level commensurate with standards in the District.

112. Overall, the evidence does not demonstrate that Student met the ED criteria of a pervasive mood of unhappiness or depression, to a marked degree across settings, or of a relevant adverse impact on Student's educational performance. Student demonstrated that her pervasive mood of depression historically negatively impacted her academic success for only the fourth quarter of fifth grade.

113. In all other respects, the evidence established that Student performed at grade level, obtaining average and often above average grades throughout most of sixth and seventh grade. Student's missing grades for the fourth quarter of sixth grade and failing grades for the third quarter of seventh grade were in great part attributed to parental removal of Student before the end of those quarters. Student's lowered grades just before enrolling at New Leaf in February 2008 involved only one quarter out of the sixth and seventh grade school years in which Student's depressive mood manifested overtly in the home schooling program and home environment, under questionable circumstances. In addition, as of the September 2008 IEP meeting, Student's academic performance at New Leaf was consistently in the above average grade range for over seven months.

114. Accordingly, Student did not sustain her burden to establish that her mood of unhappiness or depression, even if it were shown to have existed to a marked degree, adversely affected her educational performance during the relevant time period, and as of the September 2008 IEP meeting when the District evaluated her academic and functional performance. Therefore, Student's depressive or unhappy mood, while

troubling, does not amount to an ED, and does not render Student eligible for special education and related services.

Requiring Special Education and Related Services

115. The law requires that, although a pupil may be found to have a qualifying disability which adversely affected the pupil's educational performance, the pupil is not determined to be eligible for special education unless the pupil establishes that, as a result of the disability, the pupil needs special education instruction and services which cannot be provided with modification of the regular school program in order to ensure a FAPE.

116. It is not necessary to reach the question whether Student requires special education services because Student did not establish that she has a qualifying disability that adversely affected her educational performance as of the September 2008 IEP meeting.

REMEDIES AND REIMBURSEMENT

117. Student contends that Parents are entitled to reimbursement for the costs incurred for her placement at New Leaf Academy from February 18, 2008, through December 2009. District contends that Student is not entitled to any reimbursement.

118. When a LEA 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. 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 and replaced services that the district failed to provide. Parents may receive reimbursement if the private placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral

placement is not required to meet all requirements of the IDEA. The pupil need not have already received special education services in order to be entitled to reimbursement.

119. As set forth above, Student is not entitled to reimbursement for her private placement at New Leaf Academy because she did not establish that she was eligible for special education and related services as of September and October 2008.

LEGAL CONCLUSIONS

BURDEN OF PROOF AND FAPE

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

2. Under both the federal IDEA and state law, pupils with disabilities have the right to a free appropriate public education. (FAPE) (20 U.S.C. §§ 1400, 1412(a)(1)(A); Ed. Code, § 56000.) The term “free appropriate public education” means special education and related services that are available to the pupil at no charge to the parent or guardian, that meet the state educational standards, and that conform to the pupil’s IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56000.)

3. California Education Code section 56501, subdivision (a), provides that OAH has jurisdiction to adjudicate special education disputes between parents and school districts regarding a proposal or a refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE, or when there is a disagreement regarding the availability of a program for the child, including the question of financial responsibility.

STATUTE OF LIMITATIONS

4. The IDEA allows states to determine the time by which a request for a due process hearing must be filed. (20 U.S.C. § 1415(b)(6)(B).) California law provides that a request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code § 56505, subd. (1); see, *Miller v. San Mateo-Foster City Unified Sch. Dist.* (N.D.Cal. 2004) 318 F.Supp.2d 851, 860-61.)¹⁶

Beginning in February 2008, did the District deny Student a FAPE because the District did not find her eligible for special education and related services under the category of ED for the 2007-2008 and 2008-2008 school years?

Eligibility

5. In California, a pupil is eligible for special education if the pupil has been identified by an IEP team as a "child with a disability" under federal law. (Ed. Code, § 56026, subds. (a) & (b).) The IDEA requires funding for special education services only for a narrow range of specified disabilities, and not every deficit a pupil may have will render the pupil eligible for the services. The definition of a "child with a disability" includes a child with a qualifying disability who, "by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).) Thus, in addition to meeting the criteria for a specified category of disability, the IEP team must determine that the qualifying impairment "requires instruction and services which cannot be provided with modification of the

¹⁶ Effective October 9, 2006, the California Legislature amended the statute to reduce a prior three-year statute of limitations to two years. This amendment applies to all requests for due process filed after that date.

regular school program in order to ensure that the individual is provided a ...[FAPE]....” (Ed. Code, § 56026, subd. (b).)

6. The ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If the district failed to identify a pupil as eligible for special education, and therefore failed to develop an appropriate IEP for the pupil, the district has denied a FAPE. (*Dep’t. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197.) 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 by & through Adams v. 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* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

7. A pupil may be eligible for special education and related services under the disability category of a ED if the following conditions are met. Because of ED, a pupil must exhibit one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affect educational performance. (Ed. Code, § 56026, subds. (a) & (b); Cal. Code Regs., tit. 5, § 3030, subd. (i); *Student v. San Diego Unified Sch. Dist.* (2006) OAH Case No. N2006020294.)

- (a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
- (d) A general pervasive mood of unhappiness or depression; or

(e) A tendency to develop physical symptoms or fears associated with personal or school problems.

8. Based on the foregoing legal requirements, the disability category of ED is a restrictive definition. The United States Department of Education, Office of Special Education Programs (OSEP) has long provided that a pupil who is making normal academic progress in his or her educational program is not eligible, even if he or she has a serious mental illness resulting in dangerous behavior or a need for institutionalization. (*Flour Bluff Independent Sch. Dist.*, 26 IDELR 86 (SEA TX 2001); *OSEP Letter to McNulty*, 213 IDELR 108 (1987).) The characteristic of an inability to build or maintain interpersonal relationships sets a high standard to meet because it requires the pupil's difficulties to be both with peers and teachers. (*R.B. v. Napa Valley Unified Sch. Dist.* (2007) 4496 F.3d 932, at 944.) The characteristic of pervasive unhappiness or depression must be demonstrated to a marked degree in the school setting. (*Ibid.* at p. 947.) Since California primarily gauges educational performance through academic measures, a pupil's grades and achievement test scores are probative of whether there is an adverse affect on educational performance. (*Id.* at p. 946.)

9. Special education law does not define the emotional disturbance limitations of "a long period of time,"¹⁷ or "to a marked degree."¹⁸ According to

¹⁷ The guidelines from the California Department of Education (CDE) provide that a "long period of time" is defined as a minimum of six months following extensive and comprehensive efforts at behavioral intervention and change, or a shorter duration may be appropriate for certain conditions such as Major Depressive Episode. For major depression, the time frame may be as short as two weeks. (CA State Dept. of Ed., *Identification and Assessment of the Seriously Emotionally Disturbed Child: A Manual for Educational and Mental Health Professionals* (1986), pgs. 8, 12. (CDE ED Manual).)

OSEP, the states generally set the minimum length of time somewhere between two and nine months; and the pervasiveness across settings or “marked degree” of the emotionally disturbed characteristics should generally include the school setting. In *Letter to Anonymous* (August 11, 1989), 213 IDELR 247. OSEP stated:

With regard to your fourth inquiry concerning whether the serious emotional disturbance (SED) characteristics must be exhibited in both the school and home environment, EHA's [Education for the Handicapped Act]¹⁹ primary focus is education of children with handicaps. Its general provisions and requirements relate to the educational environment. However, care should be taken with regard to SED students to insure through appropriate evaluation that the behaviors are occurring across a number of instructional settings (both academic and nonacademic). While for eligibility purposes, the student must meet the parameters of the SED definition within the educational environment, knowledge of the student's continuation/discontinuation of such behaviors in

¹⁸ Per CDE, the term “to a marked degree” comprises two separate components. The first component is “pervasiveness” which is that inappropriate behaviors are present across almost all domains (school, home and community). The second is “intensity” which refers to the demonstration of negative behaviors in an overt, acute and observable manner primarily related to the individual’s condition. (CDE ED Manual, p. 9.)

¹⁹ Congress renamed the EHA as the IDEA in 1990.

other settings (e.g., home, community) may be helpful in program planning.

10. Emotional disturbance includes schizophrenia. However, unless disabled under the seriously emotionally disturbance criteria, a pupil whose educational needs are due primarily to social maladjustment, or environmental, cultural, or economic factors is not a child with exceptional needs. (34 C.F.R. § 300.8(c)(4)(ii) (2006); Ed. Code, § 56026, subd. (e).)

11. As set forth in Factual Findings 1 through 3, and 10 through 14, and Legal Conclusions 1 through 3, beginning in February 2008, Parents did not provide the District with notice of Student's placement at New Leaf Academy or request an IEP meeting until after the 2007-2008 school year was over. Student notified the District of her request for eligibility and special education placement in late June 2008. District did not propose or refuse to propose to take any action with respect to Student's eligibility and education between February and late June 2008, because the District had no knowledge or notice of any request for action by Student and Parents during that time period, and Student was not enrolled in the District. Therefore, the District did not deny Student a FAPE for her seventh grade year, from February 2008, through the end of the 2007-2008 school year in June 2008.

12. As set forth in Factual Findings 15 through 114, and Legal Conclusions 4, through 10, the weight of the evidence established that, as of the September 2008 IEP meeting, Student exhibited a pervasive general mood of unhappiness or depression during a three month period from December 2007 through February 2008, within the applicable statute of limitations. This time period qualified as a long period of time," because it was a major depression and lasted more than two weeks. However, the evidence did not establish that Student's general depressive mood was "to a marked degree," that is, overtly and pervasively across settings, including the school

environment, because Student's depressive mood did not manifest in any overt fashion in the school environment, apart from the home setting, at any relevant time within the statute of limitations. Therefore, Student's depressive mood did not meet all of the criteria for a qualifying ED.

13. Even if Student's failed grades in February 2008, in the home schooling program, taught by Parents under questionable circumstances in the home setting, were to qualify as a separate environment for purposes of establishing that the depressive mood was pervasive in an educational setting, the lowered academic performance for one quarter out of both the sixth and seventh grades was an isolated episode. Thus, the evidence demonstrated that Student's pervasive mood of depression historically manifested itself in the school environment, and negatively impacted her academic success in school only twice for isolated months: specifically, the fourth quarter of fifth grade, a remote period in time beyond the statute of limitations, and possibly the third quarter of seventh grade. As of the September 2008 IEP meeting, Student had received above average grades at New Leaf Academy on a consistent basis for over seven months. Based on the foregoing, the evidence did not establish that Student's mood of unhappiness or depression, even if it were shown to have existed to a marked degree, adversely affected her educational performance during the relevant time period, and as of the September 2008 IEP meeting. Therefore, even if Student's depressive mood met all other criteria for a qualifying ED, the evidence established that there was no adverse impact on her educational performance.

14. Overall, while Student's behaviors met the ED criteria of a pervasive mood of unhappiness or depression, over a long period of time, as of the September 2008 IEP meeting and the District's October 2008 denial of eligibility, the evidence does not establish that her depressive mood was manifested overtly, to a marked degree, in the school environment, or that it adversely affected Student's educational performance.

Accordingly, the evidence did not establish that Student qualifies for eligibility under the ED criteria.

Should the District be ordered to reimburse Parents for the costs of Student's out-of-state, privately funded residential school placement, including tuition, room and board, and travel, from February 2008 through December 2009?

Reimbursement

15. Parents may be entitled 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); 34 C.F.R. § 300.148(c) (2006); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S. Ct. 1996, 85 L.Ed.2d 385]; *Forest Grove School District v. T.A.* (2009) 557 U.S. ____ [109 LRP 36046].) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S. Ct. 361, 126 L.Ed.2d 284].)

16. Based on Factual Findings 117 through 119, and Legal Conclusions 14 and 15, Student did not establish that she is eligible for special education services and hence, did not establish that she is entitled to reimbursement for the costs of her private placement at New Leaf Academy.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. The parties have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: July 10, 2009

DEIDRE L. JOHNSON

Administrative Law Judge

Office of Administrative Hearings