BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2012040848

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, Office of Administrative Hearings (OAH), State of California, heard this matter on September 4 through 6, 10, 11, and 18 through 20, 2012, in Oakland, California.

Attorney LaJoyce L. Porter represented Parent on behalf of Student. Paralegal Fran Fabian was present the first day of hearing. Attorney Elizabeth Aaronson assisted Ms. Porter on September 11, 20012. Parent was present each day of hearing.

Attorney Lenore Silverman represented the Oakland Unified School District (District). Attorney Melanie Seymour was also present the first day of hearing. John Rusk, compliance coordinator for the District, was present throughout the hearing as the District's representative.

On April 20, 2012, Student filed a request for a due process hearing (complaint) with OAH. On June 22, 2012, Student filed a motion to amend her complaint, which OAH granted on June 27, 2012. On July 5, 2012, Student filed her first amended complaint and all timelines recommenced as of that date. During the prehearing conference on August 20, 2012, Student requested that the hearing be continued from August 29, 2012 until September 4, 2012, due to the medical unavailability of Parent. The continuance was granted.

At hearing, oral and documentary evidence were received. At the request of the parties, the matter was continued to October 15, 2012, to allow written closing arguments. The record closed on October 15, 2012, upon timely receipt of the closing arguments, and the matter was submitted for decision.[1]

ISSUES[2]

1. Beginning on April 20, 2010, did the District deny Student a free appropriate public education (FAPE) during the 2009-2010 school year (SY) by:

(a) failing to conduct the triennial assessment in a timely manner;

(b) failing to make a timely mental health referral;

(c) failing to offer Student any residential placement;

(d) failing to maintain records measuring Student's progress on the goals in her individualized education program (IEP) and provide these to Parent; and

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[1] To maintain a clear record, Student's closing argument is designated as Student's Exhibit S-98, and the District's closing argument is designated as District's Exhibit D-71.

[2] At the commencement of the hearing, Student withdrew her original Issue 2(a) which alleged a denial of FAPE for the 2010-2011 school year in a timely manner. Student also withdrew her original Issue 2(b) which alleged a denial of FAPE due to an untimely mental health referral during the 2010-2011 SY. Both of those issues are limited to the 2009-2010 school year only. Student's issues have been reorganized to provide continuity and clarity.

(e) failing to maintain and provide to Parent records showing Student was performing work consistent with California content standards?

2. Did the District deny Student a FAPE during the 2010-2011 SY by:

(a) failing to offer Student an appropriate residential placement;

(b) failing to implement transition services listed on Student's IEP;

(c) failing to maintain records measuring Student's progress on the goals in her IEP and provide these to Parent; and

(d) failing to maintain and provide to Parent records showing Student was performing work consistent with California content standards?

3. Did the District deny Student a FAPE during the 2011-2012 SY by:

(a) failing to provide an independent educational evaluation (IEE) following Parental request for an IEE on October 25, 2011;

(b) failing to offer Student an appropriate placement;

(c) failing to implement transition services in accordance with Student's IEP;

(d) predetermining that Student was on a diploma track;

(e) predetermining that Student was exited from special education with a diploma;

(f) stopping payment to the residential program in order to force the residential placement to discharge Student;

(g) failing to offer Student an appropriate residential placement once Student was discharged from the prior placement; and

(h) failing to comply with the May 7, 2012 Stay Put Order?[3]

PROPOSED RESOLUTIONS

Student requests orders for the District to provide the following: 1) reimbursement for the costs of unilateral placement at True Life Center Children and Family Services (TLC) in Sebastopol, prior to the District's funding of the TLC placement through Student's IEP; 2) reimbursement for the costs of Student's private assessments by Cynthia Peterson and Melinda Young; 3) reimbursement for the costs of Molly Baron's services to identify an appropriate residential treatment program; 4) special education services for Student through the age of 22; 5) placement in a non-certified residential treatment facility; 6) a fund for specified compensatory education services; 7) reimbursement for the costs of unilateral placement at Innercept in Idaho and related travel expenses; and 8) reimbursement for Parent's wage losses or alternative compensation to Parent for providing full-time care when the District failed to provide a residential placement.

CONTENTIONS

For the 2009-2010 SY, Student contends that if the District had completed a timely triennial assessment she would have been referred sooner to mental health services, and recommended sooner for residential treatment. She alleges the District's

[3] During the hearing, upon questioning by the ALJ, Student clarified that she intended her third issue to encompass a claim that the District failed to comply with OAH's stay put order. Over the District's objection, the ALJ ruled that the alleged violation of stay put was encompassed within Student's first amended complaint. It is therefore now identified as Issue 3(h).

failure to offer an appropriate residential placement for the 2010-2011 and 2011- 2012 SY's, and its violation of the May 2012 stay put order denied her a FAPE. It is Student's position she was not capable of performing diploma level work, her curriculum was substantially modified, her grades for the second semester of her 2009-2010 SY should be invalidated, she did not meet the requirements for graduation and she should not have been on a graduation track. In addition, Student claims she did not make progress on her IEP goals and was denied a FAPE when the District unilaterally changed her placement by improperly graduating her in March of 2012. Student additionally contends that the District failed to implement her IEP when it failed to maintain and provide records of her progress and failed to implement her individual transition plan (ITP), resulting in her inability to function independently upon her departure from TLC. In summary, Student alleges she was not sufficiently prepared academically, socially, or functionally to be exited from special education eligibility.

The District contends that it provided Student with a FAPE at all relevant times. The District concedes that Student's triennial IEP was conducted late but asserts that this did not result in a denial of FAPE. The District argues that its referral for an AB 3632 assessment was timely as it had no information to support a need to refer Student prior to May of 2010. The District contends that it fully implemented Student's IEP's, Student made progress on her goals, progress was reviewed regularly, and Student was not required to perform at a twelfth grade proficiency standard. The District alleges that Student was able to access her educational program, and the curriculum was not modified. It is the District's position that Student met all State and District requirements by December of 2011, earned her diploma by March 16, 2012, and was appropriately graduated based upon her work. The District contends it is not required to ensure that Student is able to function independently or to meet all of her goals in order to graduate from high school. Finally, the District contends that Parent undermined its

efforts to comply with the May 2012 stay put order and that OAH lacks authority to enforce its order for stay put.

PRELIMINARY MATTERS

STIPULATIONS OF COUNSEL

Counsel for Student and the District entered into the following stipulations:

1) Student is mentally ill and has been diagnosed with a myriad of mental health issues including mood disorder, severe psychotic depression and psychotic spectrum disorders including bipolar disorder, schizophrenia and a combination of schizo-affective disorder.
2) Student has had multiple hospitalizations. She has received inpatient and residential treatment and multiple medication trials that have often not proved effective.
3) Student's severe psychiatric illness requires regular access to medical and psychiatric care and observation with access to emergency psychiatric care and crisis management.
4) Student's individual transition plans dated May 24, 2011, January 20, 2012, and February 29, 2012 are identical.
5) Student's triennial IEP team meeting was due on or before April 27, 2010, and was convened late on June 9, 2010.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is a twenty-year-old young woman who suffers from significant mental health challenges. Parent has served as her conservator since January 19, 2012. Parent resides within the District boundaries, and Student most recently resided with her

until August 6, 2012, when Parent unilaterally placed her at Innercept, L.L.C., a residential treatment facility in Idaho.

2. The District first found Student eligible for special education services in April of 2007 under the category of emotional disturbance (ED) due to sudden onset psychosis which impaired her overall life functioning. The District immediately referred Student to Alameda County Mental Health Services, which found Student eligible for AB 3632 services as her emotional issues interfered with her ability to benefit from special education.[4]

3. Special education law provides that therapeutic mental health services are a related service that may be necessary for a student to benefit from her education. At times applicable in this case until July 1, 2011, Chapter 26.5 of the California Government Code (referred to by the parties as AB 3632 for the legislative Assembly Bill that originated the law), set forth a comprehensive system by which a local education agency (LEA) could refer a special education student suspected of being in need of mental health treatment to a local county mental health agency.[5]

4. Parent declined Alameda's offer of a day treatment program and asked the District to fund Student's ninth grade placement at Bayhill High School. Bayhill is an

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[4] Alameda County Mental Health Services became Alameda County Behavioral Health Care Services. For ease of reference, the agency will be referred to as Alameda or Mental Health.

[5] "AB 3632" is an inaccurate nomenclature as many additional bills and amendments have updated Chapter 26.5 of the Government Code over the years. However, given the parties use of the term and evidentiary references, the relevant laws and related services are referred to as AB 3632 throughout this Decision.

accredited non-public school (NPS), certified by the California Department of Education (CDE) to provide special education for students with an ED, specific learning disability or other health impairment. In August 2007 the District agreed to fund Bayhill. In February 2008, the District also agreed to fund counseling at Bayhill and an after school homework club consisting of academic tutoring by a credentialed teacher. Student's level of servicing changed to an outpatient therapeutic program with an NPS placement at Bayhill.

5. Student successfully attended Bayhill for three consecutive SY's until the end of the 2009-2010 SY. By all accounts, Student was very involved in her high school activities including dances, cheerleading, sports, student council, and yearbook. She did very well academically (mostly A's) and formed healthy peer relationships before her mental health challenges resurfaced.

LATE TRIENNIAL ASSESSMENT AND IEP TEAM MEETING, JUNE 2010

6. Failure to conduct a timely triennial assessment and hold an IEP meeting may constitute a procedural violation. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or causes a deprivation of educational benefits.

7. Student contends that the District committed procedural violations because it did not timely complete her triennial assessment and hold a triennial IEP team meeting in the spring of 2010. Based on Student's initial IEP team meeting on April 27, 2007, the District was required by law to conduct her triennial assessments and hold a triennial IEP team meeting on or before April 27, 2010.

The Triennial Assessment

8. The District provided Parent with a triennial assessment plan on March 12, 2010. Parent did not sign and return the assessment plan until April 1, 2010. By law, the District had sixty days from the date of receipt of the signed assessment plan to complete the assessment and hold the IEP team meeting, unless statutory exceptions tolled any days.

9. However, as the parties stipulated, the District's triennial IEP team meeting was due to be held on April 27, 2010, and was not conducted until June 9, 2010, a delay of about six weeks.

10. The District maintained that Parent revoked consent to the April 1, 2010, assessment plan and refused to allow the District to conduct testing on Student, including a psycho-educational assessment, due to her emotional state, and recent hospitalizations. Parent argued she did not refuse testing, but rather explained Student's deteriorating emotional state and left it up to the District how it wished to proceed.

11. Student suffered her second and third psychotic breaks in the spring of 2010. She was hospitalized at Casa Fremont Adolescent Crisis Residential Program from April 21through 27, 2010, due to an inability to cope, a significant increase in self-injurious ideation, and a possible need for medication adjustments. She was re-admitted on May 25, 2010, and remained until June 6, 2010. These psychotic episodes followed several months of increasing mental health symptoms.

12. The evidence established that Katherine Kosmos, District's school psychologist, recommended against any testing at that time.[6] Ms. Kosmos testified

[6] Ms. Kosmos, District psychologist since 1998, has completed hundreds to over one thousand student evaluations. She is the lead psychological consultant for

credibly at hearing, and her opinion was persuasive that assessing Student while she was suffering an active psychosis would not yield accurate information. Both Ana Guimoye and Diane Ashton, District's experts, testified persuasively that a formal assessment should not be conducted until a student reaches a level of stabilization.[7] These experts were found to be well qualified professionals and their testimony was highly credited.

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emergency crisis response teams at the high school level. She received her bachelor of arts in psychology from Mills College in 1990 and her masters of education from Harvard University in 1992. She holds an educational specialist degree in school psychology and teaches graduate courses in assessment, consultation and behavior management at Holy Names University.

[7] Dr. Guimoye has been in the mental health field for twenty years and obtained her doctorate in clinical psychology from the Wright Institute in Berkeley, California in 2009. She is an expert in residential treatment programs and since 2002 has worked for the County of Marin as a mental health practitioner and residential case manager responsible for duties pursuant to AB 3632.

Dr. Ashton is currently the special education director for the Cotati-Rohnert Park Unified School District. She is a Fulbright Scholar who taught for four years at the University of Namibia Department of Psychology and Special Education. She obtained her Ph.D in educational psychology from the University of Southern California in 1979. She served as the principal, assistant director and director of the Sonoma County Special Education Local Plan Area from 1985-1994 and then founded the West Sonoma County Consortium consisting of 11 districts where she served as the director of educational services until 2004.

13. Ms. Kosmos' triennial assessment the end of May 2010 and beginning of June 2010, consisted entirely of reviewing existing records and conducting interviews. Ms. Kosmos did not assess nor meet with Student. Based upon her interviews and document review, Ms. Kosmos determined that Student was displaying psychotic features with rapid cycling. Student had periods where she was emotionally stable and could self-regulate and tolerate stress, but when Student cycled, she was not able to manage stress or her emotional needs. Following her assessment, Ms. Kosmos recommended an AB 3632 referral and that the appropriateness of Student's current placement at Bayhill be carefully considered.

June 2010 Triennial IEP Team Meeting

14. The District convened Student's triennial IEP team meeting on June 9, 2010. Parent and her attorney participated in this meeting, along with the District, Bayhill staff, and Karen Orsulak.[8] The evidence established that this team meeting occurred about six weeks later than that required by law for Student's annual or triennial team meeting. In addition, in order for the District to conduct its triennial assessment in advance of an IEP team meeting on April 27, 2010, in light of the 75-day assessment timeline permitted by law (15 days for negotiation and consent to the plan, plus 60 days to assess and convene the meeting), the District should have presented Parent with an assessment plan no later than February 12, 2010. Thus, the District committed procedural violations when it failed to timely commence the assessment process by

[8] Ms. Orsulak obtained her license in clinical social work in 1995 and is employed at Kaiser Oakland Department of Child Psychiatry. She obtained a master's in public health in 1990 and a master's in social welfare and clinical social work in 1991 from the University of California at Berkeley.

serving the assessment plan, timely complete the assessments, and timely convene an IEP team meeting.

Whether the 2010 Procedural Violations Denied FAPE

15. Ms. Kosmos' review established that beginning in 2010, Student experienced a significant decline in emotional management and coping. Student became very anxious about completing her school work and was easily overwhelmed by her studies. Student was taken off her psychotropic medication Depakote, which can slow mental processing, and placed on Lithium in an attempt to increase her mental functioning. Lithium can result in numbing and reduced reactivity and by February, Student was switched back to Depakote. Thereafter, Student began to experience a significant increase in anxiety and depression.

16. The evidence established that anxiety from falling behind in class work caused Student to cycle. Parent funded educational therapy to support Student's academics and help manage her anxieties. Educational therapy is specialized tutoring by a teacher trained to work with students with disabilities on remediating deficits. The District refused Parent's request for this service during the 2009-2010 SY, as Student was making progress and earning good grades. Parent was persuasive in her testimony that Student's anxiety about school work impacted her ability to access her educational program, and Student required the educational therapy to manage her anxiety, regardless of the grades she earned.

17. The school noticed an increase in Student's anxiety both social and academic, and as the second semester progressed, Student's ability to access her educational program including extra-curricular activities declined. The school was on notice of Student's needs due to her frequent absences and requests to leave class. Student would request to see her therapist or to meet with the dean during class time,

or request to sit in the office when she did not feel capable of class. Numerous times during the second semester, Student would seek refuge in the girls' bathroom and call her Parent sobbing. By April 2010, she would seek out her counselor on a near daily basis. Parent notified Bayhill that on April 13, 2010, Student felt overwhelmed and left school, something she had not done since January when she was fatigued from medication changes.

18. The June 2010 IEP team agreed to refer Student for an AB 3632 assessment regarding a higher level of care out of concern that Bayhill might not remain an appropriate placement for Student. The District continued to offer placement at Bayhill with the expectation that Student would attend the extended school year, pending the AB 3632 assessment. The District also continued to offer counseling twice a week and added educational therapy three times a week for the 2010-2011 SY.

19. Had the District timely conducted Student's triennial assessment and convened an IEP team meeting by the end of April 2010, the IEP team would have had the opportunity to consider Student's increasing mental health needs and need for academic supports. The evidence established that sometime after the November 2009 annual IEP, Student experienced increased anxiety and depression which impacted her ability to attend to her studies. Feeling overwhelmed with her school work further contributed to these negative emotions and downhill spiral. In delaying the triennial assessment, the District missed an opportunity to conduct a full re-evaluation of Student prior to her April 2010 hospitalization. Dr. Cynthia Peterson, Student's expert, credibly testified that a psychological assessment was a critical component for a triennial due to Student's emotional disability and the fact that no prior testing was administered.[9]

[9] Dr. Peterson obtained her Ph.D. in clinical psychology in 1996 from the California School of Professional Psychology, and completed her fellowship in

Administering a full battery of tests would have uncovered the nature and extent of Student's mental illness and its impact on her education. Due to the District's delay, this information was not available to the team by the end of April. The weight of the evidence suggests that by April 2010, Student required additional mental health supports to access her education. Therefore, the delayed triennial resulted in a deprivation of educational benefit. It further resulted in Parent incurring expenses to fund private educational therapy. Parent worked with Bayhill to again privately fund this service in April 2010.

TIMELINESS OF 2010 REFERRAL FOR AB 3632 ASSESSMENT

20. Under AB 3632, Student could be referred to Alameda for intensive mental health services if her IEP team determined that she had emotional and behavioral characteristics that were significant, observable by qualified staff, not sufficiently addressed through school counseling, and which impeded her from benefiting from educational services.

21. District witnesses were not persuasive in their testimony that nothing triggered the need for a referral to AB 3632 services prior to Student's second psychotic break and second hospitalization in May of 2010. Ms. Kosmos acknowledged that while an individual with bipolar disorder can cycle back, when there are associated psychotic features, this can be more difficult. The District witnesses were not persuasive as they

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neuropsychology. She holds a teaching credential and previously taught in elementary school. She works as a consultant for school districts, conducts IEE's, and provides expert testimony. She has been in private practice for the past 10 years conducting neuropsychological assessments and is an assistant clinical professor at the University of California Berkeley where she supervises graduate students in the area of assessments.

compartmentalized Student's hospitalization in April as a medical issue relating to medication management, implying there was no educational component so the District had no obligation to act.

22. As outlined above, the evidence was clear that by the end of April 2010, not only the District and its qualified school psychologist knew or should have known of the gravity of Student's emotional breakdown and its impact on her education, but also that Student required far more intensive mental health services than what she was receiving through school counseling. Based on this knowledge, the District should have initiated an AB 3632 referral in April, six weeks earlier than it eventually did. The District committed a procedural violation by failing to refer Student until the June 9, 2010 IEP team meeting.

23. However, not every procedural violation results in a denial of a FAPE. Student did not establish that the District's failure to refer her to AB 3632 services in April of 2010 impeded her right to a FAPE or denied her educational benefit. Given the legal timelines that govern the AB 3632 referral process, the team would not have been required to meet any sooner than they did at the start of the 2010-2011 SY. Upon receipt of the referral, Alameda had 15 days to assign the case and send a consent form to the parent. Within 60 days of receiving parental consent, Alameda was required to complete its assessment and the District was required to hold an IEP meeting. Student did not establish any harm from the District's delayed referral in June of 2010. Although Alameda conducts assessments over the summer break, the law does not require the District to convene an IEP team meeting during the summer.

24. Alameda received the District's referral on June 23, 2010, and sent an assessment plan to Parent on June 29, 2010. Parent signed consent to this assessment plan on June 30, 2010 and mental health received this on July 2, 2010. The IEP team met on August 26, 2010. The evidence established that the District complied with all

required timelines in completing the June 2010 AB 3632 referral, obtaining a timely assessment report and convening an IEP team meeting within 60 days.

Student's Continued Decline, Summer 2010

25. One month after the June 2010 IEP team meeting, Parent notified the District that Student had further declined and that Parent intended to unilaterally placed Student at TLC in Sebastopol, on or about July 23, 2010. Due to Student's suicidal ideation, Ms. Orsulak had referred Student to an emergency residential program at Eastfield Ming Quon (EMQ)/Families First Crises Residential Program. Student resided at EMQ from June 21, 2010, until July 21, 2010.

26. Ms. Orsulak was persuasive that by the end of July 2010, Student required a residential placement. Due to Student's particular vulnerability, Ms. Orsulak advised Parent and Alameda that Student should not be placed with physically aggressive, sexually acting out, or verbally threatening teens. She supported placement at TLC. Parent therefore unilaterally placed Student at TLC on July 23, 2012.

August 2010 Amendment IEP Team Meeting

27. Following the IEP team's June 2010 AB 3632 referral, Alameda completed its assessment report early on August 4, 2010, and recommended a residential treatment placement for Student. The District convened the IEP team meeting 22 days later on August 26, 2010, prior to the start of the 2010-2011 SY.

28. The purpose of the August 2010 IEP Amendment team meeting was to change Student's level of service from an NPS to a residential treatment placement. Given Alameda's recommendation for residential placement, the District agreed to fund Student's ongoing placement at TLC where she would attend their accredited NPS, Journey High School. Psychological counseling continued at twice a week with

educational therapy at three times per week. Parent signed consent to an IEP Amendment authorizing residential treatment.

FAILURE TO OFFER RESIDENTIAL PLACEMENT, 2009-2010 SY

29. The standard for residential placement is that a student requires this therapeutic level of care in order to access her educational program and derive meaningful benefit. In light of Student's eligibility for a residential treatment placement for the 2010-2011 SY, Student contends that the District should have offered her a residential placement during the 2009-2010 SY. However, Student's claims can only reach back in time two years prior to the filing of her original complaint. She is therefore precluded from litigating this claim for the time period prior to April 20, 2010.

30. In order for Student to be considered appropriate for the restrictive nature of a residential placement, Student's IEP team would have first had to refer her to Alameda. This would have been followed by Alameda conducting its own assessment and the parties holding an expanded IEP team meeting which would offer Student placement in a residential facility. Nothing in this case established that this required process should not have been followed or that there were exigent circumstances requiring an immediate placement of Student in a residential placement. During this time, Student's therapist Ms. Orsulak remained supportive of placement at Bayhill; Bayhill intensified supports and acted to accommodate Student's needs; and the District was required to consider these additional supports in her current setting prior to considering a move to a more restrictive placement.

31. As discussed above, while the evidence established Student's need for additional mental health supports, Student did not establish that she was in need of a residential placement the end of April 2010. Expert testimony proffered by both the District and the Student established that Student's second psychotic break and her

second hospitalization in May are what triggered an additional need to consider a higher level of care. These subsequent events cannot be considered when determining whether the failure to conduct a timely triennial IEP team meeting by April 27, 2010, resulted in a denial of FAPE. Further, even if the District had timely referred Student to Alameda, the mental health assessment and resulting IEP team meeting would not have occurred until the 2010-2011 SY due to the summer break tolling the time requirements to hold the IEP team meeting. Accordingly, the District and Alameda would not have been legally obligated to make an offer of residential placement prior to the start of the 2010-2011 SY. Therefore, Student failed to establish that she was denied a FAPE because the District failed to offer placement in a residential treatment facility during the 2009-2010 SY.

RECORDS OF PROGRESS ON IEP GOALS AT BAYHILL, 2009-2010 SY

32. A student's IEP must contain a statement of measurable annual goals that are designed to meet the student's unique needs related to her disability to enable her to be involved in and make progress in the general education curriculum. The IEP must also contain a description of the manner in which the progress of a student toward meeting the annual goals will be measured and when periodic reports on the progress the student is making towards meeting the annual goals will be provided. The law requires at a minimum that goals be reviewed annually for progress. Special education law does not specify any record keeping requirement.

33. Student contends the District did not report to Parent on her progress or maintain and produce records measuring her progress towards IEP goals for the 2009-2010 SY. For the remainder of the 2009-2010 SY, on and after April 20, 2010, Student's operative IEP was the November 2009 IEP. According to the November 2009 IEP meeting notes, Student met her goals for the 2008-2009 SY with the exception of

written language skills. The team developed six new academic goals, two each in the areas of math, reading and written language, as well as three social-emotional goals. The IEP indicated that the District would provide Parent with quarterly progress reports on goals by way of annotated goal reports.

34. Student did not present evidence demonstrating that the District failed to provide Parent with a quarterly progress report regarding Student's annual goals for the time period of April 20 through June 9, 2010, the date of the IEP team meeting. Student further failed to establish that Parent requested any records on Student's progress during this time frame. Accordingly, Student failed to prove any procedural violation.

ACADEMIC RECORDS, CONSISTENT WITH CALIFORNIA CONTENT STANDARDS, BAYHILL, 2009-2010 SY

35. California law provides that the grade awarded to any student shall be the grade determined by the teacher in each specific class. The determination of a student's grade by the teacher, in the absence of clerical or mechanical mistake, fraud, bad faith, or incompetency, shall be final. Neither the governing board of the school district nor the superintendent shall order a grade changed without input from the teacher. Proceedings to challenge an award of a grade or the accuracy of information in student records maintained by the District are separate proceedings before the superintendent and school board, are governed by separate rules and regulations, and are not within the jurisdiction of OAH.

36. Student contends the District failed to provide Parent, upon request, copies of Student's educational records, including work samples, documenting that Student's academic performance was consistent with "California content standards," and

that this violation substantially impeded Parent's participation in the decision-making process and resulted in a denial of FAPE.[10]

37. Student failed to establish either that Parent requested any documentation of Student's academic progress for the period from April 20, 2010, to the end of the school year, or that the District failed to report Student's grades, levels of performance, and academic progress to Parent. On the contrary, Student established that Bayhill posted all assignments and grades on their online grade book called JupiterGrades. Parent was able to view this data at any time. Further, during the June 9, 2010 IEP team meeting, the District provided detailed reports on Student's then-present levels of performance in all of her academic courses. Parent was present at this IEP team meeting. Accordingly, Student's contention fails.

38. The evidence established that Student passed all of her courses at Bayhill, that Bayhill utilized the California content standards, that none of her courses were modified, and that Student earned credits towards her diploma.

39. At Bayhill, the school year is divided into two semesters consisting of two quarters each. A student's semester grade is calculated based on the grades from each quarter and the final exam. Rachel Wylde was persuasive in her testimony that calculation of credits is determined on a case-by-case basis and that whether Student's excessive absenteeism would prevent her from completing her courses was an

[10] In the absence of evidence from either party as to what the California content standards are, it is understood to refer to course requirements established by the California Department of Education.

individualized determination.[11] At the June 2010 IEP team meeting, the team developed a plan to provide Student with extra help to complete her course requirements at Bayhill during the 2009-2010 extended school year (ESY). Despite Student's multiple absences and her inability to attend ESY 2009-2010, the evidence established that she earned grades and received credit for work completed pursuant to Bayhill's standard grading practices.

40. During her third quarter for the 2009-2010 SY, which ended in April 2010, Student received grades of A, B, and C and maintained a 3.0 grade point average (GPA). For her fourth quarter, Student's GPA dipped to a 2.4 and she received an incomplete in English. Student maintained a GPA of 3.2 her final semester and was awarded a semester grade for each class, including a B in English. She accumulated a total of 70 credits her junior year of high school. That Student received fourth quarter grades, including one incomplete in English, and final semester grades, demonstrates Student earned credit for work completed per Bayhill's standard grading practices.

41. Student requested that this ALJ invalidate her second semester grades based upon her contentions that she did not complete the necessary work and her Bayhill transcript, issued in November of 2010, was not valid as it was signed by an unauthorized office administrator instead of by Ms. Wylde. A due process hearing is not the appropriate forum to contest the validity of a transcript. The evidence established that Student accumulated 195 credits during her three years of attendance at Bayhill through the 2009-2010 SY. Once she left Bayhill, Student only needed 35 credits to meet the District's requirements for the issuance of a diploma. A determination as to

[11] Ms. Wylde was the executive director of Bayhill until July of 2011. She has a master's degree in special education and in educational leadership. She served as an administrator for 24 years and is currently an educational consultant.

how Bayhill teachers calculated Student's final semester grades for the 2009-2010 SY, and whether they did so correctly is not an issue to be decided in this Decision. Student did not prove her contention that she was not performing work consistent with that required for a diploma.

APPROPRIATENESS OF TLC AND JOURNEY, 2010-2011 AND 2011-2012 SY'S

42. As found above, Parent unilaterally placed Student at TLC, a residential placement in Sebastopol, on July 23, 2010, following a month long stay at EMQ. Student's therapist supported this placement due to Student's escalating needs. TLC is classified a level 12 treatment facility by Community Care Licensing and the Department of Social Services which set standards for levels of residential treatment based upon the intensity of need of the residents and level of services provided. A higher level of care provides for higher level of needs. A level 12 facility is one level below a level 14, which is the highest level of residential care short of a locked facility. TLC provides residential care and mental health services and operates an accredited NPS called Journey. Following the AB 3632 recommendation for residential placement, the IEP team offered and Parent accepted TLC as Student's educational placement for the 2010-2011 SY. Parent now contends that TLC was an inappropriate placement for Student.

43. To the extent that Student's contentions can be ascertained from the hearing, Parent believed that TLC did not provide Student a FAPE because it did not provide Student with a therapist for the first two weeks of placement, it delayed in seeking necessary inpatient care, it was not capable of meeting Student's psychiatric needs, it substantially modified its program for Student, Student did not make any progress, and it was unable to assist Student in reaching independence. Student failed to establish that placement at TLC denied her a FAPE for the 2010-2011 and 2011-2012 SY's.

44. Parent testified that TLC delayed in assigning Student a therapist for two weeks post admission. However, the District's experts credibly testified to the nature of a residential placement such as TLC. TLC is a therapeutic facility with trained staff that daily assessed the functioning of Student and provided continual therapeutic interventions. Although Student suffered psychological decompensation at TLC resulting in hospitalization from August 18 through 25, 2010, she was discharged back to TLC. Student did not establish that an alleged delay in assigning a therapist rendered TLC an inappropriate placement.

45. In early September 2010, Student again showed signs of psychological decompensation, including slurred speech, long latency of response and an inability to organize her thoughts. As of September 9, 2010, Parent diagnosed Student as being in psychosis, and wanted Student immediately hospitalized.[12] TLC advised against this until September 14, 2010, when Student presented in a catatonic state.[13] Student was hospitalized at Alta Bates Hospital in Oakland until October 19, 2010. Although Parent contended that TLC did not adequately and timely respond to Student's psychiatric crisis, and that advance planning and timely hospitalization would have prevented the need for such an extended length of stay, the evidence did not establish this. Student was entitled to remain in the least restrictive environment (LRE) suitable to meet her needs. TLC arranged for inpatient treatment once it was clear that Student required this level of intervention.

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[12] Parent is a pediatric critical care physician and treats newborns through young adults. She is experienced in treating children with psychiatric illnesses, is able to differentiate symptomatology, and is knowledgeable about psychotropic medications.

[13] Catatonia is a state of being unable to respond despite being awake.

46. Despite Parent's preference for Student to receive psychiatric care at Stanford Hospital where she had started a medication trial, and although Parent transferred Student's care to Kaiser Psychiatry Santa Rosa in November of 2010, Student did not establish that TLC failed to provide suitable psychiatric care. The weight of the evidence demonstrated that Student displayed a complicated psychological profile and had struggled with medication management since the fall of 2009. Dr. Peterson testified persuasively that only one percent of the population had a profile consistent with Student's responses on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2).

47. Although Parent contended that she did intend to replace TLC psychiatric services with those provided by Kaiser, the evidence established that Parent transferred Student's psychiatric care to Kaiser and Student was treated by Alicia Duenas.[14] Parent next contended that TLC failed to communicate with Dr. Duenas so Parent had to provide updates. Dr. Melinda Young, Student's expert psychiatrist, opined that Student did not see her psychiatrist often enough nor did her psychiatrist receive sufficient information from the treatment team, school or residence.[15] However, the evidence established that it was Parent's decision to transfer Student to Kaiser for psychiatric

[14] Dr. Duenas received her medical degree from the University of Rochester in 2004 and became board certified in general psychiatry in 2007. She completed her child and adolescent psychiatry fellowship in 2009 at Harvard and has been on staff with Kaiser psychiatry since November 2009.

[15] Dr. Young is a child and adolescent psychiatrist and has been in private practice since 1988. She received her medical license from University of California at Los Angeles in 1982 where she also completed her residency in general psychiatry and a fellowship in child and adolescent psychiatry.

services. Additionally, the TLC quarterly reports established that staff attempted to collaborate with Parent and to communicate with Dr. Duenas. Dr. Duenas did not indicate that she was unable to effectively treat Student due to any lack of communication.

48. Contrary to Parent's assertion that TLC's need to modify Student's program demonstrated that it was not capable of providing a FAPE, the evidence established that TLC and Journey appropriately modified Student's program during her stay to meet her unique needs. TLC implemented a reintegration plan and the services of a one-on-one aide to transition Student from her hospitalization back to her full educational program. She participated solely in the residential program for a couple weeks. During this period of time, Student required assistance to complete her activities of daily living. Student's expert, Dr. Peterson, opined that having suffered four recent psychotic breaks, it would take a period of time for Student to stabilize. District's expert, Dr. Guimoye, was persuasive in her testimony that requiring a one-on-one aide did not necessarily mean Student was in need of a higher level of care. TLC documentation established that Student presented with the same intellectual capacity after her hospitalization as upon initial intake, and demonstrated the ability to do her course work but required constant prompting. To address Student's unique needs and facilitate her recovery, a staff member accompanied Student to school as a support. Staff support was faded out by December 2010.

49. Student returned to her academic program on a limited basis by the end of October 2010. She attended a study skills class at Journey and then worked one-on-one during first period with Kelly Henderson, special education teacher and case carrier,

who assessed Student's academic functioning.[16] After a one-week assessment period, Journey slowly increased her school day one period at a time. Student made slow but overall steady progress, and by December 7, 2010, she was attending school full time. Engadaw Berhanu, Student's Alameda case manager, testified persuasively as to why Student required this transition and how effective TLC was in implementing this plan.[17] His testimony was accorded great weight.

50. Mr. Berhanu, who met face-to-face with Student every three months from August 2010 until her discharge in May 2012, reported that Student made slow steady progress. The TLC quarterly reports presented consistent reports of progress. Student progressed socially as well, developing appropriate peer relationships. Dr. Guimoye provided a concise, credible summary of Student's functioning as follows: this young lady struggled with significant symptoms, and at times she was compromised and unable to engage, but at other times she was able to function and to benefit from her education.

51. Ms. Henderson established that by January 2011, Student was more comfortable, presented with decreased anxiety, and was able to appropriately utilize her educational therapy to manage feelings of being overwhelmed with school.

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[16] Ms. Henderson, Student's study skills teacher and educational therapist, obtained a bachelors in psychology from Sonoma State and holds a professional level II teaching credential for students with mild/moderate disabilities. She started working for TLC in 1994, taught at a level 14 assessment program and then started teaching at Journey in 2003.

[17] Mr. Berhanu has worked as a residential case manager with Alameda for more than 24 years.

52. Parent testified that she did not agree with Mr. Berhanu's case notes, Journey's teacher reports, or the TLC quarterlies prepared by Student's treatment team. Parent contended that while Student went from catatonic to non-catatonic, and from being mute to being able to whisper, Student could not consistently complete her activities of daily living even through January of 2012. Parent's testimony that Student's level of functioning did not improve at TLC was not credited. Parent was not persuasive in her attempts to support her opinion by pointing out that four times a year she had to take Student to the dentist because she did not brush her teeth, and that Parent had to do her hair for her and prompt her to do the laundry even through the time of her discharge. She repeatedly referenced and compared what she referred to as the TLC Student and the Bayhill Student. While these comparisons clearly detailed a significant decline, and while it is unimaginable how difficult it must be for Parent and Student to deal with their changed reality, Student's treating mental health and academic professionals credibly reported progress over time.

53. Dr. Guimoye persuasively testified, based upon her 10 years of experience in working with TLC, that the TLC staff would not retain Student if they believed they could not meet her needs. The evidence established that Student was appropriately placed at TLC and Journey, and the program allowed Student to receive meaningful educational benefit. Each quarter, Scott Matsuura, residential social worker and Student's case manager at TLC, as well as Mr. Berhanu signed a report attesting that the agency remained able to meet Student's needs.

54. Student made enough progress that she traveled with her family to Hawaii during summer 2011. Once Student demonstrated safe behaviors at TLC, she was able to earn home passes for family visits. Jessica Shussett, program specialist, along with

Mr. Berhanu and Dr. Guimoye, established the significance of this event.[18] The goal for a residentially placed child is to return home. That Student was functioning well enough to travel on a plane and participate in a family vacation, demonstrated that Student had the capability to successfully reunify and return home. Parent again focused on Student's decline in functioning, and compared the Bayhill Student during the family vacation in summer 2009, as independent, active, and communicative, to the TLC Student in 2011 who would not indicate any preferences and preferred to sit in the bungalow and stare. The quarterly reports established that TLC staff would often report progress, and Parent would report the opposite after a home visit.

55. Despite Parent's contention that TLC was not suitable for Student's level of functioning, the evidence established that TLC individualized a program for Student from which she received meaningful benefit. Student entered TLC on the "fundamental one" track which focused on compliance, hygiene and attendance at school and therapy. Her performance was low compared to peers and she needed staff assistance to even get out of bed. TLC modified Student's program to meet her individualized needs, providing extra assistance or relieving her of a chore when she lost focus or was overwhelmed. By January 2012, Student progressed to the independent living skills track at TLC which was a big accomplishment. Dr. Young's testimony that TLC was not

[18] Ms. Shussett has served as a program specialist for the District for the past three years. She holds elementary and special education teaching credentials, a multi-subject and an administrative services credential. She obtained her masters in special education from California State University East Bay in 2010. She previously worked as a special education teacher for eight years at Berkeley Unified School District and at Seneca Center, a day treatment program with four residential homes.

appropriate as staff were not able to move Student toward independence was refuted by this evidence of Student's advancement.

56. A comparison of Mr. Berhanu's evaluations of Student at intake and one year later revealed noted improvement in her overall progress, academics and community relations. Mr. Berhanu's testimony established that Student made significant progress over the year at TLC, as did Alameda's Community Functioning Evaluation forms for Student from September of 2010 and August of 2011. These rating forms detailed substantial improvement in all areas including education, emotional and behavioral, social, and independent living skills. At her initial evaluation, Student's scores reflected many serious and severe issues across all plains of functioning. By the time of her annual evaluation in August of 2011, many areas of functioning were no longer identified as a problem, and others improved to the mild or moderate level.

57. At the time of intake as well as one year later and again at discharge, Dr. Pamela Culver, Student's therapist, and Dr. Paula Solomon, clinical director of TLC, completed the Child and Adolescent Functioning Scale to compare Student's levels of functioning in relationship towards self, others, and community.[19] Again, Student improved across all domains. The global assessment of functioning (GAF) scale is an evaluation tool that assesses psychological, social, and occupational functioning. Student's GAF score was 31 at the time of intake in July 2010, indicating impaired functioning and this improved to a GAF of 45 one year later, and a score of 51 at discharge in May 2012, indicating moderate symptoms.

[19] Dr. Solomon has been with TLC for 21 years. She received a Ph.D in clinical psychology from Pacific Graduate School of psychology in 1991, and has been licensed since 1994. She holds a master's in Education and in psychology.

58. Dr. Peterson discounted TLC's multiple subjective rating scales. Dr. Peterson weighed them against her empirically validated objective assessments which showed severe impairment even one and a half years after Student's psychotic break in April of 2010. Dr. Guimoye testified persuasively that TLC's rating scales are scales that she is familiar with and has relied upon in her many years of working with residentially placed students. Dr. Peterson's disregard of these rating scales called into question her own objectivity. Her premise that Student's treating professionals had overlooked Student's deficits or intentionally overstated her abilities was therefore not credited.

59. Commencing with Student's 2011-2012 SY at Journey, Student began to struggle to get to class on time. Dr. Culver and the house staff modified Student's program to assist in motivating her. A revised school schedule allowed Student to receive morning points so long as she arrived to school during her non-academic study skills class prior to the start of first period. The evidence established that this was an appropriate, individualized modification that did not impact her core curriculum. Student responded positively to her new program. During this same time, Student struggled to complete her assignments and her GPA dropped. However, Ms. Henderson persuasively testified that despite her fluctuations, Student showed steady progress over time and demonstrated her capacity for independent work by answering questions in her texts, participating in class discussions, preparing short essays, reading novels, and answering science and economics questions. Additionally, Student formed solid peer relationships and enjoyed participating in school dances.

60. Although Dr. Duenas, Student's Kaiser psychiatrist, agreed that Student's level of functioning improved over time, she discounted Student's progress on her modified program and testified that staff had lowered their expectations. Dr. Duenas was not persuasive. Student only minimally interacted with Dr. Duenas in her thirty minute monthly office meetings. Dr. Duenas never saw Student in her milieu, something

that she acknowledged would have been of benefit, and her primary source of information was Parent. Dr. Duenas had minimal interaction with TLC, did not receive the quarterly reports, did not know that Student had a mental health case manager and never spoke with Student's teachers. For these reasons, Dr. Duenas' testimony was not accorded much weight.

61. Dr. Solomon was persuasive in her testimony that although Student was more disturbed than typical TLC clients during her first two months of placement, for the bulk of her stay, she was quite typical of the range of TLC clients. By the time Student left TLC, she was pretty typical in her adaptive functioning. Dr. Solomon testified credibly that Student left the TLC program in much better shape than when she entered. Dr. Solomon's testimony established that Student's educational program was tailored from a clinical point of view in terms of class size and accommodations. The support services and environment met her anxiety and mood instability and difficulty in concentration. Student's mental health needs were appropriately addressed by the residential and clinical services at TLC. In light of the above, Student did not prove her contention that the District denied her a FAPE by failing to provide an appropriate residential placement reasonably calculated to meet Student's unique needs related to her disability for the 2010-2011 and 2011-2012 SY.

RECORDS OF PROGRESS ON 2010-2011 IEP GOALS AT JOURNEY

62. Student contends that the District was required to maintain and provide to Parent records documenting progress on her annual goals for the 2010-2011 SY. Parent alleges that the District did not provide her, upon request, with work samples, graded exams, or other data documenting Student's progress towards her academic goals. The District claims it reported on Student's goals as required, that the teachers maintained

score sheets and grade books, and sent all graded work including exams home with Student.

63. At the June 9, 2010, IEP team meeting, given Student's deteriorated condition at that time, Parent did not agree with the decision of the District members of the IEP team that the November 2009 goals remained appropriate for the 2010-2011 SY. Parent did not consent to the June 2010 IEP and Parent revoked consent to the November 2009 goals via her June 18, 2010 "Parent Attachment." Parent additionally did not consent to the December 2010 and May 2011 IEP's. Given Parent's refusal to consent to the implementation of the November 2009 goals or the proposed 2010-2011 goals, the District had no obligation to provide progress reports on any of these goals.

64. Although the evidence established that the District unilaterally implemented goals that it drafted in June of 2010, December of 2010, and May of 2011, Student did not raise the issue of a denial of FAPE by the District's unilateral implementation of goals to which Parent did not consent. Additionally, Student did not identify as an issue for hearing whether the District was required to file for a due process hearing to implement Student's IEP's. Therefore, these issues will not be decided here.

65. The IEP team notes from November of 2009 established that Student's prior goals for the 2008-2009 SY had been met aside from a written language goal that was modified by the November 2009 IEP. The written language goal from October 2008 called for the rewriting of grade level text matching purpose, audience and context in order to develop organizational skills. Student did not contend nor establish that this outdated goal remained operative for the 2010-2011 SY.

66. District witnesses were not credible in their testimony that a parent must affirmatively "dissent" to an IEP or the goals. Their testimony, that with a mere refusal to sign the IEP, the IEP is presumed to provide a FAPE and the District is free to implement it, was not credited. Nevertheless, following June 18, 2010, Student did not establish

that the District had any authority, let alone obligation, to implement and report on the proposed IEP goals to which Parent did not consent.

67. Parent subsequently consented to the District's August 26, 2010 Amendment to the June 2010 IEP which authorized residential placement at TLC. This consent was limited to the placement offer. Student did not contend otherwise.

68. Despite Student's failure to establish that Student had any operative goals that the District should have implemented and reported upon, the evidence established that the District timely reported on goals that it unilaterally implemented. The District provided a quarterly progress report by way of annotated goals in October of 2010, noting no progress on the June 2010 goals due to Student's hospitalizations. Next, the full IEP team met in December of 2010 for a delayed 30-day placement review. The team reviewed and modified Student's academic and social-emotional goals and developed a behavioral goal to address school attendance. The District provided quarterly progress reports on three of Student's academic goals, by way of annotated goals in March 2011 and May of 2011. Finally, in May of 2011 the IEP team convened and noted progress on the December 2010 goals, continued the academic goals for more time, and developed new social-emotional goals and a transition goal.

69. The testimony of Gregory Boyle, the principal of Journey, and Ms. Henderson, established that Journey's protocol was to mail goal updates to Parent at the end of each quarter along with class progress reports and grades.[20] Student failed to present any evidence that Journey did not comply with their protocol during the 2010-2011 SY.

[20] Mr. Boyle, Student's Economics and government teacher, has taught at Journey for the past twenty-five years.

70. In a February 2012 email to Journey, Parent's attorney asked for a specific accounting as to whether Student met her May 2011 goals and for the supporting documentation by way of work samples or data. Apparently Parent, even after withdrawing her consent to the 2009 annual goals, and after failing to consent to the 2010-2011 and 2011-2012 goals, expected the District to ensure implementation.[21] Student did not prove that the District had any obligation to report on goals that were not agreed to, or that the District was required by any of her IEP's to deliver to Parent written measurement data supporting progress toward her goals. Student failed to establish any obligation by the District to implement any goals much less a procedural violation in this regard for the 2010-2011 SY.

RECORDS OF ACADEMIC WORK AT JOURNEY, 2010-2011 SY

71. Parent also challenges the quality of Student's work at Journey and the accuracy of academic reports. However, as found in Factual Finding 35, OAH does not have jurisdiction to evaluate and change a student's school course grades. The accuracy or appropriateness of Student's grades at Journey is not at issue in this proceeding.

72. Restating the issue as a special education issue, Student contends that for the 2010-2011 SY, the District failed to document or to provide Parent with documentation that Student's academic performance met state standards, and thereby denied her a FAPE because the lack of these records significantly impeded Parent's

[21] Student's complaint does not contain any issue about providing records of progress on goals or academic grades for the 2011-2012 SY.

participation in the decision-making process. Parent contends she verbally requested Student's work samples at the December 2010 and May 2011 IEP team meetings.[22]

73. The evidence established that Journey prepared written progress reports on Student's academic performance and sent these home every quarter. (Factual Finding 69). Additionally, Principal Boyle, Erin Biber,[23] Student's English and vocational educational teacher, as well as Ms. Henderson consistently and persuasively testified to the Journey teachers' practice of returning all graded work and exams to Student who could either bring her work home or maintain it in a folder at the school. This folder was sent home at the end of the year. As Student's educational therapist, Ms. Henderson regularly went through Student's backpack and learned that Student maintained most of her graded work in a binder in her backpack. Student did not establish that her work samples constitute educational records maintained by the school. Parent's testimony that she never saw any of Student's work or a graded test was not persuasive.

74. Student contended but did not establish that her academic work was not consistent with the California content standards in pursuit of a diploma. The evidence established that Journey has adopted the West Sonoma County Union High School District curriculum which follows California state standards. Journey teaches to State standards, meaning students are provided with accommodations only, as opposed to

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[22] Parent's request for records in her June 17, 2011, email, October 2011 letter, and her verbal request at the January 2012 IEP team meeting fall outside of Student's issue which is limited to the 2010-2011 SY, which ended on June 16, 2011.

[23] Ms. Biber has been a special education teacher for 12 years and also provided educational therapy to Student.

modifications which change the essential nature of the lesson plan. The evidence established that neither District nor Journey modified Student's curriculum. Given Student's hospitalizations early in the 2010-2011 SY, Student started accruing credits during the second quarter. These first grades were reported to Parent in December 2010. There was no evidence that the District was required to provide to Parent underlying data documenting her academic performance as part of her IEP or under applicable special education law. Accordingly, Student did not establish for the 2010-2011 SY, that Student was not performing work consistent with a high school diploma track, or that the District withheld any required information that would seriously infringe upon the Parent's ability to participate in the development of Student's educational program.

IMPLEMENTATION OF TRANSITION SERVICES, 2010-2011 AND 2011-2012 SY'S

75. Beginning not later than the first IEP to be in effect when a student with a disability turns 16, and updated annually thereafter, the IEP must also include appropriate measurable post-secondary goals related to training, education, employment, and, where appropriate, independent living skills. The IEP must also include transition services to assist the student in reaching those post-secondary goals. An individual transition plan (ITP) consists of an assessment and a plan, focused on Student's post-graduation activities. Failure to implement transitional services may be a procedural violation of the IDEA.

76. Student contends that the District failed to implement any of the transition services listed on her IEP for the 2010-2011 and the 2011-2012 SY's at Journey. Student did not raise as an issue for hearing the appropriateness of the transitional goals or activities. This Decision addresses only Student's contention that the District failed to implement any transition services.

77. The evidence established that Parent did not consent to the June 2010 ITP. In her Parent Attachment, Parent withheld consent to "the remaining services listed on the [June 2010] IEP." While Parent consented to the August 2010 IEP Amendment, that consent did not authorize the entirety of the June 2010 IEP, merely the offer of residential placement. (See Factual Finding 67.) In addition, the evidence established that Parent failed to consent to the December 2010 IEP and every IEP thereafter. In withholding consent to the June 2010 IEP, and the 2010-2011and 2011-2012 ITP's, Parent waived any right to contest the District's alleged failure to implement any additions to the previously consented to ITP from November 2009.

78. The parties did not contend that Parent's revocation of consent to the November 2009 goals also revoked consent to the November 2009 ITP. At hearing, both parties elicited testimony regarding the implementation of Student's June 2010 and May 2011 ITP's and stipulated that the May 2011 ITP was identical to the January 2012 and February 2012 ITP's. As Student delineates her issue as an alleged failure to implement transition services, this Decision will consider the November 2009 ITP to contain the last agreed upon transition services. Additionally, reaching back in time to the October 2008 IEP for which consent was never revoked, Student's October 2008 ITP is substantially similar to the November 2009 ITP.[24]

79. The District's November 2009 IEP, when Student was 17 years old and in her junior year, contained an ITP that was developed by the IEP team including Student. Student expressed her intent to attend college. The transition goals included participating in an internship program, continuing her volunteer jobs, participating in

[24] The October 2008 ITP lists additional independent living skills goals of learning to cook, opening a bank account, and exploring additional creative classes. Student did not elicit testimony as to these goals.

college admissions information sessions, continuing to earn high school credits, exploring the driver's permit test, managing her earnings and building interest in post high school planning. The only identified transition service is for Student to complete her 11th grade classes successfully.

80. The evidence established that during both Student's 2010-2011, and 2011-2012 SY's, the District, TLC, and Journey implemented her operative ITP and provided additional transitional services as well. Witnesses credibly testified that Student participated in services addressed toward virtually all of her November 2009 transition goals with support from her residential program.[25] Student participated in transitional services through Ms. Biber's vocational education class which was a year-long course for the 2011-2012 SY. The basic requirements of the course as to employment included preparing a resume, completing job applications, and practicing interviewing skills. The evidence established that Student participated in all of these transitional activities. As part of this course, Student learned to budget and shop, worked on nutrition and meal planning, and learned to read a train schedule, look up a flight, read a bus schedule and take a bus excursion with a peer. Student also participated in community activities such as the class trip to the grocery store to work on budgeting and healthy meal planning, and going to Target to practice looking for household goods.

81. The evidence established that Student enrolled in and attended an independent living course and dance class at the junior college. She did not complete these courses due to her emotional fragility and need for greater supervision and structure. During her treatment at TLC, Student remained too emotionally fragile for college classes due to her social anxiety. For a period of time, Student was able to

[25]The record is silent as to whether Student engaged in any transition services relative to her independent living skills goal of exploring the driver's permit test.

volunteer at the Humane Society one time per week with adult support. According to the TLC quarterly reports, Student was not motivated to take on a new position as she believed this would interfere with her home visits and she was focused on graduating.

82. That Student did not complete a college course, obtain a new volunteer position or paid employment, or learn to take public transportation on her own does not establish that the District failed to implement her transitional services. Student's ITP goals focused on the process of developing independence, and did not require a particular result. Student not only participated in all her transitional services, she accomplished her goals which focused on the process rather than an outcome: Student was to research, explore and participate in activities. It was not a legal or IEP requirement that Student complete her ITP goals fully so much as to make progress.

83. At the May 2011 IEP team meeting, Student's IEP team remained concerned about her transition from residential placement and her ability to live independently. TLC and Journey stretched out Student's credits so she could remain in the program longer and have more time to work on transition. The team discussed independent living and transitional housing options for Student and a referral to the transitional assessment team (TAT), a program for youth eighteen years of age and older. The TAT would assess Student and recommend specific programs to address her mental health needs, including case management, housing, therapy, and assisted living. Mr. Berhanu was prepared to refer Student to the TAT once her discharge date was known.[26] The IEP team agreed to meet in the fall of 2011 regarding a post-graduation transition plan.

[26] Parent eventually declined the TAT referral, informing the team that this level of service would not be able to meet Student's ongoing needs.

84. Student's advancement to the independent living skills track at TLC by January 2012, constituted significant progress. Student demonstrated she was capable of managing some of her daily activities and was ready for new program expectations which focused on job skills, transportation, self-regulation and initiative. These new residential program responsibilities supplemented her transitional goals and services.

85. That Student may not have been able to function independently upon her graduation does not establish that the District denied her a FAPE by failing to implement her transition services. Student did not establish her contention that the District committed a procedural violation by failing to implement her transition services for the 2010-2011 and 2011-2012 SY's.

INDEPENDENT EDUCATIONAL EVALUATION (IEE)

86. An IEE is an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. To obtain an IEE at public expense, the student must submit a written request to the LEA stating that the student or parent disagrees with an assessment obtained by the public agency and request an IEE from the agency. The provision of an IEE is not automatic. Following the student's request for an IEE, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing that the assessment obtained by the parent did not meet agency criteria.

87. In an October 25, 2011, letter from her attorney, Student stated her disagreement with the District's 2010 psycho-educational assessment and requested an

IEE by Dr. Peterson at public expense. Although Student was not required to state the specific nature of her disagreement, Student contended the District's 2010 triennial evaluation was inadequate as there was no objective testing, and the District psychologist failed to observe Student and therefore could not draw her own opinion about Student's functioning from a school perspective. Parent wanted to find out Student's level of functioning and whether the expectation of diploma level work remained realistic. The District thereafter failed to respond to Student's request for an IEE.

88. District witnesses provided no legal support for their contention that the District must be given advance notice and an opportunity to respond before a Parent initiates a private assessment which is the subject of a request for an IEE. The District overlooked its affirmative duty to *respond*. Its failure to respond is inexcusable. The District cites no legal authority for its contention that it was relieved of its obligation to timely respond because the Parent had already contracted for the IEE and the evaluation was already underway at the time of Parent's request.

89. Dr. Peterson testified that Parent contacted her in early September and the IEE was underway as of October 24, 2011. Even applying the District's own reasoning, the District did not establish that it knew the IEE was underway at the time it received Parent's request. The evidence established the District simply failed to respond. Dr. Peterson completed her independent evaluation and issued a report mid-January 2012. Parent submitted the report to the District at the January 20, 2012 IEP team meeting.

90. The District acknowledged that it is familiar with Dr. Peterson, her credentials, and her work, and that the District has asked Dr. Peterson to conduct IEE's in the past. The evidence established that Special Education Director Sharon Casanares

delegated Parent's letter request for an IEE to John Rusk.[27] Mr. Rusk forwarded Parent's letter to program specialist Jessica Shussett, who he knew would follow-up at the January 2012 IEP team meeting. Ms. Shussett testified credibly that she was not asked to address the IEE request, and she simply awaited the January 2012 meeting, wherein both Dr. Peterson and Dr. Young presented their reports to the team. Student established that the District failed to fund an IEE, or file for a due process hearing without unreasonable delay, to defend its 2010 triennial evaluation. This was the most recent school evaluation which continued to drive Student's educational programming.

91. At hearing, District witnesses attempted to discredit Dr. Peterson's report claiming it did not meet agency criteria.[28] In particular, Mr. Rusk and Dr. Ashton argued that a psycho-educational evaluation must be conducted by a school psychologist who has unique training in education, school systems and learning styles, whereas Dr. Peterson is a neuropsychologist. Dr. Ashton testified that Dr. Peterson's report does not constitute a valid psycho-educational evaluation as it fails to address the educational code criteria for eligibility, fails to provide recommendations for instructional

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[27] Mr. Rusk holds a special education specialist instruction credential, originally issued in 1994, an administrative services credential issued 2007, and single subject teaching credential issued in 1993. He holds a resource specialist added authorization originally issued in 1997.

[28] If an IEE is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an IEE. (34 C.F.R. § 300.502(e)(1).)

programming, and simply provides medical recommendations. These critiques were not credited and do not reflect the applicable law. First, the District failed to produce evidence of its criteria for IEE's. Second, Dr. Peterson is well qualified, and there is no legal authority to exclude neuropsychologists from IEE reimbursement as it would be incompatible with the right to obtain an IEE outside of a school district, if only a school psychologist could conduct assessments for educational purposes. In contrast, school districts are required by law to use school psychologists for their mandated assessments. Third, by the District's own admission, eligibility under the category of ED was never an issue. Finally, in trying to draw a bright line between educational needs versus medical needs, the District overlooks the nature of residential treatment which is inextricably intertwined with the provision of psychiatric care to meet mental health issues of a medical nature to enable a student to access and benefit from her educational programming. That the District disagreed with Dr. Peterson's conclusions does not establish that the report failed to meet agency criteria such that the District is not required to fund the evaluation.

92. Student contends the District should also reimburse Student for her costs in obtaining the two additional consultations recommended by Dr. Peterson – the educational consultation with Molly Baron and the psychiatric consultation with Dr. Young. The law requires Student to identify with specificity the evaluation with which the Student disagrees. Student disagreed with the June 2010 psycho-educational assessment and the evidence established that she is entitled to reimbursement for Dr. Peterson's evaluation only. Although Dr. Peterson recommended additional consultations that the Parent chose to obtain, Student did not establish that the District is required to reimburse these expenditures.

93. Based on the foregoing, the District unreasonably delayed in either funding Student's IEE or filing a request for a due process hearing to establish the

appropriateness of the District's June 2010 psycho-educational assessment. The District is therefore responsible to reimburse Parent for the costs of Student's IEE by Dr. Peterson.

STUDENT'S CLAIMS OF PREDETERMINATION, 2011-2012 SY

94. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, and is unwilling to consider other alternatives.

95. The IEP process provides that the parents and school personnel are equal partners in decision-making, and the IEP team must consider the parents' concerns and the information they provide regarding their child. The IDEA considers parental participation a fundamental part of the IEP development process. A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way.

96. The weight of the evidence established that Parent meaningfully participated in each and every IEP team meeting regarding Student. She attended each meeting, brought her attorney, asked questions as needed, requested that follow-up actions be taken, and submitted a written response as to what she did or did not consent to in the June 2010 IEP. Such evidence of active and concerned participation effectively removes any viable claim of predetermination. Furthermore, the evidence supports a finding that while the District may not have adopted every suggestion of Parent or her attorney, the District did not come to the IEP team meetings with a "take or leave it" offer of FAPE.

Predetermination of Diploma Track

97. For the 2011-2012 SY, Student contends that the District predetermined she would graduate from high school on a diploma track. As set forth below, the evidence did not support Student's contention.

98. The evidence established that the issue of whether a student will participate in a curriculum designed toward a graduation track or a certificate of completion track is typically discussed the first year of high school because the number of required credits is vastly different for these two tracks. A certificate of completion entails a modified curriculum based upon functional skills rather that academic skills. Typically, students functioning far below a basic level of academic achievement participate in a certificate track. Even students functioning at a below basic level are sometimes able to successfully participate on a diploma track. However, the law requires the issue to be reviewed annually. Here, Student's issue is limited to the 2011-2012 SY, her final year of high school.

99. As agreed to by Parent, Student was on a diploma track from the start of her freshman year. Student had a successful academic year for both her freshman and sophomore years at Bayhill. She participated successfully in college preparatory courses and maintained a high GPA, receiving mostly A's and a few B's. In spite of her mental health challenges, Student maintained a 3.42 GPA her junior year at Bayhill in such challenging courses as Geometry, Spanish II and Chemistry.

100. Parent fully participated in the June 2010 IEP with her attorney and thereafter completed a Parent Attachment delineating what she did and did not consent to. She remained silent as to whether she agreed to the team's plan of a continued diploma track. However, pursuant to the last operative IEP of November 2009, Student remained on a graduation track.

101. Contrary to Parent's contention, the fact that Student required one-on-one basic assistance with her daily activities immediately upon her release from the hospital in October of 2010 did not establish that Student was no longer able to function on a graduation track. Stephanie Tower, Student's original TLC case worker, described Student as presenting with the same intellectual capacity upon her release from the hospital as she did upon initial intake, and although Student required prompts, she demonstrated the ability to do her school work. Student returned to a more regulated level of functioning within a short period of time and was able to earn credits toward a diploma.

102. Dr. Duenas' testimony that Student was not capable of earning a diploma was not accorded great weight because she relied predominantly upon Parent for updates, she never consulted with Student's teachers, only met with Student in her office at most once a month for 30 to 45 minutes, had not reviewed Student's transcripts, and was not aware of Student's educational curriculum.

103. Parent and her attorney meaningfully participated in the December 2010 IEP team meeting. Parent shared with the team her concern that Student was not capable of earning credits and remained very low functioning. The notes from this meeting establish that Parent wanted Student to complete work consistently but did not want to overwhelm her for the purpose of graduating *on time*. Although Parent did not consent to this IEP, the team continued to look at a graduation plan for Student, and Parent provided her input about the timing of Student's graduation date. Hence, Student's graduation track plan, as part of her IEP from November 2009, continued to remain in effect.

104. At the May 2011 IEP team meeting, Parent participated with her attorney and again expressed concern about Student not performing academically. The District, Alameda, and Journey IEP team members' consensus was that Student was progressing

academically and behaviorally and as of June 2011 was anticipated to have earned 220 of her required 230 credits for graduation. The testimony of Mr. Berhanu and Ms. Shussett established that no one, including Parent, questioned that Student only had ten credits remaining. The plan was for Student to complete the remaining credits by the end of the fall 2011 semester and to be discharged late that year or early 2012. Parent sent a follow-up email to Mr. Boyle on June 17, 2011, asking that Student's few remaining course credits be split between the fall 2011 and spring 2012 semesters so Student could try a community college course in the spring. Although Parent did not consent to this IEP, the expectation was that Student would graduate from high school, in the near future.

105. At hearing, Parent contended that Student should not have continued on a graduation track. Parent disputed the number of credits that Student allegedly earned and also questioned how she could earn any credits based upon Parent's observations of Student's alleged low functioning level at TLC throughout her stay. Additionally, Parent perceived TLC's lowered expectations for Student (that she was not able to attend a junior college dance class), indicated that Student needed a functional, non-academic program and services through her 22nd birthday. While the District was required to consider Parent's information and position, they were not required to adopt it. That the District disagreed with Parent does not mean they predetermined Student's graduation from high school. The evidence established that Parent meaningfully participated in the decision-making process.

106. For the January 2012 IEP team meeting, Parent brought Dr. Peterson and Dr. Young to present their findings. She also had her Educational Consultant Molly Baron participate by telephone. The evidence clearly established that Parent meaningfully participated in this meeting. For the first time, Parent indicated that she would refuse a diploma and requested that Student be transferred to a certificate of

completion track and be placed at Innercept. Parent requested work samples and the team agreed to reconvene in February to provide further information at Parent's request. Parent contended but did not prove that at the February 2012 IEP team meeting, all IEP team members except Ms. Shussett decided that Student should not earn her diploma. The evidence established that the District, Alameda, and Journey continued to find that Student appropriately remained on a diploma track to graduate from high school after the 2012 IEP team meetings.

107. In connection with the May 2011 IEP team meeting for the 2011-2012 SY, as well as the January and February 2012 IEP team meetings, the evidence established that the District, Alameda, and Journey school members of the IEP team listened with an open mind to Parent's concerns that Student did not have the ability to graduate. Accordingly, Student did not establish that the District predetermined her educational diploma track for the 2011-2012 SY merely because the District did not adopt Parent's position.

108. Student additionally contends that the District "predetermined" a diploma track in the sense that they disregarded evidence that Student lacked the capacity to earn a diploma. While Student's expert Dr. Peterson compellingly testified about the impact psychological disorders can have on cognition, such as thought disorders impairing reasoning and depression slowing processing, her testimony did not establish that Student could not learn and complete high school credits leading to a diploma.

109. The District's experts persuasively testified that with the progression of Student's condition and her medications, a drop in cognition as revealed by Dr. Peterson's testing was to be expected. In fact, they would be surprised if there was not cognitive slippage given Student's serious psychotic breaks. However, Student's ability to learn was not impaired by her cognitive drop; Student remained able to assimilate information when mentally available, and her availability increased over time. No

testing demonstrated that Student suffered a developmental delay or otherwise indicated her ability to learn was impaired. Student did not establish that she lacked the capacity to earn her diploma.

Predetermination of Exit from Special Education

110. Graduation is a change in placement, and the school district is required to convene an IEP meeting prior to terminating special education services. An individual with exceptional needs who graduates from high school with a regular high school diploma is no longer eligible for special education and related services. State law and school district policy exclusively determine diploma and graduation requirements. If a student with a disability meets all state and school district requirements for award of a regular high school diploma, she cannot be denied a diploma simply because she has a disability.

111. Further, the IDEA does not make achievement of a disabled student's IEP goals a prerequisite for awarding a regular high school diploma. The law does not require the District to ameliorate a student's underlying disorder but to provide an educational program reasonably calculated to confer educational benefit. The District is not required to guarantee specific results or a specific level of functioning for a student. Assuming the IEP was reasonably calculated to provide a FAPE, the District can terminate services to a student who earned a diploma but did not meet all of her IEP goals and is not able to live independently.

112. The evidence showed that Parent continued to participate in the IEP decision making process during the 2011-2012 SY, and that her participation was meaningful. Parent attended the 2012 IEP meetings with her attorney and made known her position that Student should not graduate and that Parent would not accept a diploma. Parent arranged for a private evaluation with Dr. Peterson in October 2011,

and a consultation with Dr. Young and Ms. Baron, and brought her evaluator and consultants to the January and February 2012 IEP team meetings. This level of participation undercuts Student's contention that the District predetermined her exit from special education. While the District is required to consider Parent's information and position, they are not required to adopt it. That the District disagreed with Parent does not mean they predetermined Student's exit from special education.

113. The evidence established that Student earned 195 credits during her high school years at Bayhill. According to Mr. Boyle's calculations, Student completed the remaining 16 percent of her graduation requirements at Journey, for a total of 230 course credits. The evidence showed that Student earned her high school diploma, as substantiated by her successful passage of all her courses, which, according to the credible testimony of Bayhill, Journey, and District witnesses met state standards. Student's passing grades were evidenced by her performance on projects, classwork, homework, quizzes, and exams.

114. While Parent shared her concerns about Student's level of functioning and academic abilities, Parent's objection to Student earning a diploma was not brought to the attention of the IEP team until the January 2012 IEP team meeting. During this meeting Parent also requested that Student be residentially placed at Innercept in Idaho as she was aging out of TLC.

115. During the January 2012 IEP team meeting, Student's expert Dr. Peterson, presented her findings. Dr. Peterson had administered a battery of tests to Student in the areas of psychological assessment, neuro-cognition and academic achievement and informed the IEP team of the following: Student had suffered a decline in basic functioning in almost all areas of cognition, academics, adaptive functioning, and psychological functioning when compared to prior testing, and this decline had persisted one and a half years after her April 2010 psychotic break. Based upon Dr.

Peterson's testing, her December 2011 observation of Student at Orchard House, and her January 2012 observation at Journey, Dr. Peterson concluded that Student was unable to function at even a basic level cognitively, adaptively, and emotionally and opined that Student was not an eligible candidate for a diploma or graduation. She recommended residential care and special education until age 22.

116. Ms. Henderson's testimony that Dr. Peterson's report was not an accurate portrayal of Student was more persuasive. Ms. Henderson worked with Student daily at Journey and observed her at TLC. She never knew Student to simply stand and stare or require help with basic functions from the end of October 2010 until her discharge in May 2012. Ms. Henderson was detailed and specific when she credibly testified to examples of Student's independent functioning and goal-oriented behavior, and readily conceded that Student required prompts, just not constantly, and was slow in her processing and easily overwhelmed. Student had been challenged with a processing disorder since the time of her initial diagnosis in third grade and had struggled with her anxieties and becoming overwhelmed with school since her initial break in 2007. Ms. Henderson was persuasive in her testimony that despite these challenges, Student managed to succeed in high school at Journey on a diploma track. Her opinion was accorded great weight.

117. While Dr. Peterson observed Student to be concrete and easily distracted in her morning Economics class, the evidence established that Student participated and understood. Additionally, Ms. Henderson credibly pointed out that Economics is a more challenging class and it was in the morning which is a more difficult time for Student who struggled to get going each morning. Dr. Peterson's description of Student in class was not an accurate reflection of Ms. Henderson's experience with Student or how Student's teachers at Journey generally described her. According to Ms. Henderson, Student was described as often one of the most insightful students, and contrary to Dr.

Peterson's report, her level of participation continued to increase. The teacher inventories that Dr. Peterson relied upon described Student's struggles but did not paint the picture of a student incapable of benefiting from her academics and achieving graduation.

118. Dr. Peterson acknowledged that TLC's quarterly reports, Mr. Berhanu's reports and Journey's reports of Student's functioning and progress were not consistent with her data or her observations of Student. Her only explanation for the inconsistency was that the TLC treating professionals and Alameda were utilizing subjective measures and did not have the full information about the level of Student's decompensation. However, the testimony of TLC professionals who worked with Student daily, and Mr. Berhanu who remained very involved for over one and one-half years, was accorded greater weight due to the extent of their involvement over time. While Dr. Peterson's reports of observing Student disengage and stare at nothing, and Dr. Young's observations that Student was suspicious, not oriented to time and appeared to be responding to internal stimuli, are very concerning, these facts do not establish that Student was unable to function in her school setting or that her educators were inaccurate in their reporting. That Student's functioning was somewhat impaired did not establish that she could not have earned her remaining 35 credits over the 2010-2011and 2011- 2012 SY's at Journey and achieve graduation.

119. During the January 2012 IEP team meeting, Journey reported that Student would complete her final courses by March 2012. At Parent's request, Student's IEP team agreed to gather work samples and meet again in February 2012.

120. The evidence established that the tone of the February 2012 IEP meeting was heated and that Journey staff felt their integrity was being questioned. Mr. Boyle credibly testified that he became confused and lost track of the conversation when questioned by Parent's attorney. It was his opinion that Student had earned her credits

and completed the required work, but he could see how someone might think Student should be on a certificate track. The IEP team notes prepared by Ms. Shussett, established that Mr. Boyle agreed Student should be on a certificate of completion track after being questioned by Parent's attorney. Given the numerous descriptions of this meeting, the weight of the evidence established that all team members were impacted by the significance of a determination of graduation and the ramification that Student would then exit special education. Regardless of individual team members' opinions as to graduation at the February 2012 IEP meeting, the evidence established that Student had already completed all California and District graduation requirements by December of 2011, two months prior to this IEP team meeting.

121. The District presented the testimony of program specialist Dennis Nelson, the "go-to" person for transcript evaluation, to explain Student's calculation of credits. The District requires 230 credits for graduation. The State requires 13 core courses, each worth 10 credits for a total of 130 credits, whereas the District requires 170 core credits plus an additional 60 elective credits. Student completed over and above all District required courses by December 2011.[29] Student earned a grand total of 308.5 credits over her high school career. No modified courses are noted on Student's transcript, and for any accommodated work pursuant to her IEP, Student was entitled to full credit.

122. As a student with an IEP, Student was not required to pass the California High School Exit Examination. As a student attending an NPS, Student was not required to complete the District requirement of a senior project as the District does not require an NPS to adhere to this requirement. Therefore, the evidence established that Student met all requirements for her diploma.

[29] Student earned a total of 275.5 credits by December 2011.

123. After the January 2012 IEP meeting, Ms. Shussett prepared a prior written notice (PWN) dated February 23, 2012. This PWN explained that Student met all State and District requirements for graduation and rightfully earned her diploma, and that the District was denying Parent's requests to transfer Student to a certificate of completion track and arrange for her placement at Innercept in Idaho.

124. Ms. Shussett was persuasive in her testimony that Student would not receive educational benefit from a non-academic, certificate of completion program. She clearly documented in the PWN and credibly testified that earning a high school diploma is a higher level of achievement and reflected Student's true academic abilities. Ms. Shussett had the authority to calculate credits and issue Student her diploma. Once it was determined that Student fulfilled her credits, the IEP team did not have the right to deny Student a diploma and switch to a certificate of completion track. The February 2012 PWN, as well as Ms. Shussett's testimony, additionally established that Student progressed educationally, vocationally, therapeutically, behaviorally and with her mental health and transition goals. The evidence established that Student felt she should be done with school and allowed to graduate since she finished her requirements.

125. Based on the foregoing, Student did not establish that the District predetermined Student's exit from special education. Student exited special education by operation of law when she completed her graduation requirements and was issued her diploma. There is no legal requirement that Student physically receive her diploma prior to an effective exit from special education and related services.[30]

[30] *T.M. and J.M. v. Kingston City School District*, -- F.Supp.2d -- , (N.D. N.Y. September 18, 2012, No. 1:11-CV-605) 2012 WL 4076146.

DEPARTURE FROM TLC AND LACK OF ALTERNATE PLACEMENT

126. The third quarter grading period for the 2011-2012 SY ended March 16, 2012. The District did not respond to TLC's requests for an update on Student's status prior to the end of the third quarter. TLC's philosophy was that discharges should be planned in advance to best serve clients and provide closure. Ms. Shussett informed Dr. Solomon on March 23, 2012, that Student's placement was no longer being funded through her IEP and that it was up to the treatment facility how long they wished to continue to house her. The District stopped payment in March 2012, based on the prior written notice and the February 2012 IEP team meeting and determination that Student had graduated from high school. On March 16, 2012, Ms. Shussett prepared District data transmittal forms indicating that all services had stopped due to Student's graduation with a diploma.

127. Student filed her special education complaint with OAH on April 20, 2012, along with a request for an order that TLC be designated as Student's stay put placement or, if she were to "age-out" of TLC, that OAH deem Innercept to be Student's stay put placement. The District did not respond. On May 7, 2012, OAH granted Student's motion for stay put at TLC/Journey and ordered the District to hold an IEP meeting to place Student in a residential treatment center which provides similar services as provided by TLC/Journey in the event Student was asked to leave TLC.

128. TLC's additional efforts to contact the District and clarify if it would fund placement pending resolution of Student's due process complaint went unheeded through April 2012, prompting Dr. Solomon to send Parent a letter on May 3, 2012, informing her that the District was no longer funding Student's placement and that TLC would be terminating Student on May 11, 2012.

129. Student provided TLC with the stay put order from OAH, and TLC extended Student's stay until May 31, 2012. TLC indicated that Student would participate in a graduation ceremony with her peers on May 31, 2012, and that would mark the end of their ability to provide appropriate services to Student as they could no longer provide an appropriate adult peer group, regardless of Student's educational status.

130. Mr. Rusk was not persuasive in his testimony that TLC did not contact him regarding matters of payment. He was not clear on details or dates. The evidence showed that Dr. Solomon sent Mr. Rusk an email regarding funding concerns on May 3, 2012. Dr. Solomon credibly testified that the District's non-response triggered TLC's notice of termination. Sometime after Student's discharge from TLC, the District paid TLC for services rendered through May 31, 2012.

131. Parent participated in the pre-graduation IEP team meetings in January and February 2012. The District provided Parent with a clear, detailed PWN on February 23, 2012, announcing Student's exit from special education the following month. However, OAH's issuance of an order for stay put on May 7, 2012, required the District to fund placement at TLC or, if Student were asked to leave, to hold an IEP to place Student in a residential treatment center which provided similar services.

STAY PUT PLACEMENT

132. Until due process hearing procedures are complete, a special education student is entitled to remain in her current educational placement, unless the parties agree otherwise. This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated

exactly for purposes of stay put. The stay put provision of the IDEA entitles a student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account changed circumstances.

133. Once the District was aware that TLC was discharging Student as of May 31, 2012, it was required by order of OAH to hold an IEP team meeting to place Student in a residential placement that provided services similar to those provided by TLC. On May 21, 2012, the IEP team met for the final time. TLC shared that they could not keep Student as a stay put placement as they no longer had an appropriate program for her, nor was Student appropriate for their over-age 20 program, given her inability to function independently.

134. TLC is a level 12 placement. Students at TLC are emotionally disturbed and many have learning disabilities. TLC does not take conduct disordered or substance abusing students. The District, in conjunction with Alameda, conducted an extensive search to find an equivalent placement for Student. There are very few placements that accept students over the age of 18 due to licensing issues which prohibit the comingling of children and young adults absent a waiver. Mr. Rusk spoke with Steve Perez who oversees NPS and residential placements with the CDE. Mr. Perez was persuasive in his testimony that there is a paucity of programs for youth over the age of 18, and Devereux, with several out-of-state facilities, is the primary placement. Parent's educational consultant Molly Baron was only able to identify two suitable residential placement options for Student which further established that placements for young adults with emotional challenges are few and far between.

135. At the May 2012 IEP team meeting, the District officially offered placement at Devereux, specifically at the Texas or Georgia locations. Mr. Rusk and Mr. Berhanu personally spoke with the directors for each program as well as with Claudette May, the California placement coordinator for Devereux. Mr. Rusk was assured that Devereux

could meet Student's needs before he offered the placements. Ms. May informed the District that Texas and Georgia would accept Student. The District offered Devereux solely for stay put reasons as they contended Student had appropriately exited special education upon meeting District graduation requirements.

136. Devereux is a level 14 placement which specializes in serving students with cognitive challenges and emotional difficulties. The District established that Devereux provided services similar to TLC. Despite Devereux being a higher level of care, and despite Dr. Solomon's concerns about Student being a possible victim in a higher level of care facility authorized to house students with a higher level of need and acting out tendencies, the weight of the evidence established that Devereux would have satisfied the District's stay put obligations. Mr. Rusk and Mr. Berhanu had successfully placed students at Devereux previously, and they both persuasively testified that based upon their investigation, Student's needs could be met at Devereux. The stay put order did not require the District to place Student in a level 12 placement.

137. District's expert Dr. Guimoye established that there are some licensed facilities for young adults but either their educational component is not certified or it is difficult to implement. Some of these placements send their residents to a regular adult education program or, if necessary, bring in a credentialed teacher. These are typically mental health facilities, not educational placements. The District also identified a placement called The King's Daughter School in Tennessee at the May 2012 IEP but they had no openings until September 2012. After the May 2012 IEP team meeting, the District identified a third Devereux placement in Colorado called Cleo Wallace and sent a referral packet on behalf of Student.

138. Devereux, however, did not accept Student into any of their facilities. On May 25, 2012, Ms. May reported to Mr. Rusk that Student was not accepted as Parent "sabotaged" the placements by her negativity and her resistance to Student attending

Devereux. According to Mr. Rusk, Ms. May reported that Parent's demeanor aroused the suspicion of the placement team who rejected Student, in part, out of fear of legal exposure. They were concerned with threats of litigation by Parent if they accepted Student, as Parent did not feel the placements were suitable.

139. Parent directly called both Devereux Georgia and Texas the morning after the May 21, 2012 IEP. She had her attorney fax Dr. Peterson's and Dr. Young's evaluations to the programs. She asked about the populations they serve and inquired if Student could be segregated from any disordered or violent populations. Parent also asked when she could visit and when she could talk to their psychiatrists.

140. It is clear that Parent is a very involved parent with understandably high expectations for any placement for her daughter. The District did not prove that Parent's alleged interference prevented the District from complying with the stay put order. First, the District relied on double hearsay accounts, which Parent disputed, as to what Ms. May purportedly heard from Devereux as to what influenced their decision to decline Student, which she then relayed to Mr. Rusk, who then testified at hearing. Ms. May was not called to testify at hearing and she was a key witness to establish any contention of parental non-cooperation which thwarted the District's ability to offer a stay put placement. Second, there was no evidence that the District attempted to assuage Devereux' concerns or to lay further groundwork for a re-referral. Third, District's own expert, Dr. Guimoye, reported that she provided the District with the names of what she referred to as mental health placements. Although these placements did not have internal educational programs similar to TLC, she established that to make the educational component work, Student could be sent to an adult educational program or a credentialed teacher could be brought in. The District simply did not respond with a continuum of options once TLC gave notice and Devereux declined placement.

141. The evidence established that while the District made good faith efforts to search for a residential program with an educational component, and preliminary efforts to place Student at Devereux, the District failed to comply with the stay put order.

142. The District was ordered by OAH to place Student residentially in a program which provided services similar to those provided at TLC. If no residential placement could be found, the District was free to request a reconsideration of the order based on new, critical information and propose an alternative level of care or supportive aide service. There was no evidence that the District explored any option aside from awaiting reports of Student being hospitalized and Parent arranging her own placement if the District did not act.

143. Parent first requested that the District consider Student's placement at Innercept in Coeur d'Alene, Idaho at the January 2012 IEP team meeting. Innercept officially extended an offer of acceptance in February 2012, and Parent traveled to Idaho to personally visit the center. Innercept opened in 2004 and runs both a residential adolescent program and a young adult program for youth ages 18 to 24. The adolescent program is licensed by the Idaho State Department of Health and Welfare, but there is no Idaho state licensure for the young adult component, meaning there is no official oversight of this program.

144. The District established that it cannot seek a waiver for an unlicensed facility. Certification and the waiver process are only for the NPS portion; there is not a mechanism to waive residential placement licensure as California does not provide residential facility waivers. The District may request that CDE waive the requirements of the Educational Code so that a student can be placed in an NPS. Mr. Perez credibly established that there are many reasons why the District might not pursue a waiver. The District must ensure it is a school they endorse in order to put forth a waiver. Mr. Perez was persuasive in his testimony that it is risky to place a student in a school that is not

certified. There are no standards to determine coursework, level of care and quality of treatment, or qualifications and standards for staff. According to Mr. Perez, CDE recommends that districts refrain from filing for waivers. Mr. Perez was clear in his testimony that based upon his experience, it was unlikely CDE would certify Innercept as every school needs to show that their state approved them for the provision of special education, and it would need to show there is some minimal oversight. Mr. Perez credibly established that the purpose of the waiver is to limit bureaucracy, not to avoid the protections of the law.

145. The District did not support Innercept based on its investigation. On cross examination, Dr. George Ullrich, the director of Innercept, acknowledged there was a written criticism of Innercept by an educational consultant called Family Light.[31] He also confirmed two reports of students who walked away from Innercept and were later found after extensive searches. The District informed Parent, given its concerns and inability to assure Student's safety in an unlicensed facility, that it would only agree to this placement through a settlement agreement.

146. Student was discharged from TLC as anticipated on May 31, 2012, with no services or plan in place. Parent took off from work to care for Student and had trouble accessing services through Kaiser.[32] As predicted by her treatment team, Student

[31] Dr. Ullrich is the medical director and founder of Innercept, established in 2004. He is board certified in child and adolescent psychiatry since 1994 and in general psychiatry since 1992. He completed his residency in child and adolescent psychiatry at Children's Hospital in Washington D.C. and his general psychiatry residency at George Washington University.

[32] Although Student listed lost wages as a proposed remedy, Student did not introduce any evidence on this issue nor did either party brief the issue of the availability

decompensated without the supports of a structured residential placement. Student started inflicting cuts on her body and experienced auditory hallucinations after her release from TLC. Dr. Duenas adjusted her medications. On July 15, 2012, Student went to the emergency room to be admitted for an evaluation of her psychotic symptoms short of catatonia. Student was hospitalized for over a week and started a new anti-psychotic medication. She was discharged to a partial day hospital program. Parent gave notice to the District that if it did not provide a residential placement, she would unilaterally place Student at Innercept.

147. Parent brought Student to Innercept on August 6, 2012, following her hospitalization. The evidence established that Innercept offers various levels of care from the intensive transitional level, where Student is currently placed, through an aftercare component which provides apartments and homes for the most independent clients. Additionally, there is a stabilization home which offers support to a resident in crisis. According to Dr. Ullrich, the most important aspect of the facility is how they use the community and different homes to help residents gradually gain independence. There is an extensive team of professionals that work with each resident, from nurses to psychiatrists, to licensed therapists, educators and dieticians. There are weekly staff meetings and the team also uses an electronic chart to communicate the needs and progress of each resident.

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of this remedy under the IDEA. While the statute does allow for the award of "appropriate relief," the Ninth Circuit pointed out that this refers to the court's jurisdiction rather than a license to award retrospective damages. The Court observed that the plain language of the IDEA does not indicate the availability of compensatory or nominal damages. (*C.O. v. Portland Public Schools* (9th Cir. 2012) 679 F.3d 1162.)

148. At Innercept, Student attends the orientation classroom on campus where she is working on high school material. As she progresses she will work on vocational skills at the administrative office classroom. Student meets once a week with her psychiatrist, and meets with therapist Julie Krapfl twice a week for individual counseling and once a week for a family counseling session.[33] Student also attends numerous process groups each week. According to Ms. Krapfl, Student has struggled to meet program requirements. Ms. Krapfl provided hearsay testimony that Student is unable to complete academic assignments and produces very low level high school work, according to her current teacher. This is not sufficient, in itself, to establish Student's current level of performance.[34] Dr. Ullrich opined that Student will likely remain in her current intensive program for a couple months and then advance to the regular transition program. Student established that Innercept's program and services are substantially similar to those provided by TLC.

149. While the District was not required to offer Innercept as a stay put placement, the District is required to reimburse Parent for the costs of placement at Innercept as well as related travel expenses for Parent in securing a stay put placement for Student. The District did not provide a stay put placement and therefore Parent took action to locate a placement similar to TLC. Student established that Innercept provides services similar to those provided by TLC, which is sufficient for Parent to be entitled to reimbursement. When analyzing a stay put violation and Parent's right to

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[33] Ms. Krapfl is a licensed associate marriage and family therapist pursing her full licensure and working under supervision. The counseling session is facilitated by the Internet Skype program.

[34] Cal. Code. Regs., tit. 5, § 3082(b).

reimbursement, Student is not required to establish that she has derived benefit so much as to establish that the placement is appropriate for her unique needs.

150. Even if Student was required to show that she derived some benefit from her placement at Innercept, she need not establish that she has benefitted educationally. The evidence showed that Student was likely to decompensate without the structure, supervision and mental health supports of a residential placement. Student did decompensate upon her discharge home from TLC, such that she required a hospitalization. The purpose of Student's stay put placement was to prevent further deterioration by providing a structured therapeutic milieu. Student established that she has not required the intensive services of the stabilization house at Innercept and has been able to maintain in the residence without psychological decline. In this sense, Student established that she benefitted. Therefore, the District is responsible for reimbursing Parent for her unilateral placement at Innercept and related costs.

REMEDIES/REIMBURSEMENT

151. Student requests compensatory education for the District's procedural violations resulting in a denial of FAPE, in the form of a fund to which Student could apply for reimbursement for academic and educationally-related mental health services until she reaches the age of 22. The law provides that a student who obtains a regular high school diploma is not necessarily prevented from being awarded compensatory education for past violations of a FAPE.

152. As discussed above, Student established that the District's failure to conduct a timely triennial assessment and convene a timely IEP constituted procedural violations and resulted in a denial of a FAPE. Student did not establish what services would compensate for this past denial. An equitable remedy, based upon the evidence, is for the District to establish an educational fund, as compensatory education for the

period of April 20, 2010, through August 26, 2010, consisting of the equivalent of the current market rate for 18 weeks of educational therapy services at a frequency of three hours each week. Student may use this fund for current educational, tutoring, mental health supports, or other academic, special education or related services.

153. As discussed above, the delayed triennial resulted in the denial of the provision of increased mental health services. Student did not establish what compensatory education services would account for the District's failure to provide additional mental health supports for the period of April 20, 2010, through August 26, 2010. An equitable remedy is for the District to reimburse Parent the cost of the mental health component of Student's placement at TLC from her admission on July 23, 2010, through the time of the August 26, 2010, IEP, which authorized this placement. As established by Dr. Solomon, Student's clinical program billed at $2.61 per minute with the cost running $1500-$2000 per month. The District shall reimburse the full mental health expenses charged to Parent for this time frame.

154. The District is responsible for not only funding Dr. Peterson's 2011 evaluation of Student and subsequent observations, but also her time and expense in presenting her report at both the January and February 2012 IEP team meetings. The United States District Court for the Northern District of California held that the purpose of the IEE protections is to level the playing field between the parent and district. In overturning an ALJ's denial of reimbursement for the costs of an evaluator's presence at the IEP team meeting, the Court held that a parent would not be able "to match the firepower" of the District if she were not able to fund the presence of the evaluator.[35] Parent submitted invoices establishing Dr. Peterson's costs. The District is to reimburse Parent for the cost of the evaluation ($5,718) plus Dr. Peterson's two observations of

[35] *M.M. v. Lafayette School Dist.*, (N.D. Cal. 2012) 2012 WL 398773, 11-12.

Student including travel ($1980), plus Dr. Peterson's attendance at the January 2012 IEP meeting ($1100) and at the February 2012 IEP meeting ($1210) for a total of $10,008.

155. The evidence established that the District's violation of stay put from June 1, 2012 until the issuance of this decision resulted in a denial of FAPE. Student established that Innercept is a residential placement which provides services similar to those provided by TLC. Therefore, the District is responsible for reimbursing the costs of Innercept from August 6, 2012 through November 5, 2012, a total of three months, at a cost of $11,300 each month, for a total of $33,900. The District shall reimburse Parent and Student for the cost of their travel to and from Innercept, including airfare, hotel costs, and a per diem in the amount of $34 per travel day per person. Travel costs amount to a total of $ 2,146.42 which includes $340 for per diem for four days of travel for Student and six days of travel for Parent; costs of Parent's pre-placement February 2012 trip: airfare $201.60, hotel stay at Wingate $111.59 and Alamo rental car for $64.03 (Parent did not present sufficient evidence regarding any reimbursable cost for fuel); costs for the August 2012 trip: airfare for Parent and Student $1,093.20, and hotel stay at the Coeur d'Alene (two nights) and the Roosevelt Inn Bed and Breakfast (one night) equitably discounted to be reimbursed at the rate charged by Wingate for a total of $336. Parent did not present sufficient evidence in support of a rental car for this trip.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 58 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of proof at the due process hearing. In this case, Student filed for a due process hearing and therefore bears the burden of proof as to all issues. The issues in a due process hearing are

limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

STATUTE OF LIMITATIONS

2. Due process complaints filed after October 9, 2006, are subject to a two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2) ; 34 C.F.R. 300.511(e)[36]; Ed. Code, § 56505, subds. (l) & (n).) Student does not contend that any exception is applicable in this matter. The statutory period runs from the date two years prior to the filing of the initial request for due process on April 20, 2012.

ELEMENTS OF A FAPE

3. Under the IDEA and State law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9).). "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. §

[36] All references to the federal regulations are to the 2006 promulgation of those regulations.

1401(29).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 at pp. 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

RELATED SERVICES

5. The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code, § 56363, subd. (b)(9) and (10).) Therapeutic residential placements may be related services that must be provided if they are necessary for the pupil to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park).*)

EDUCATIONAL BENEFIT

6. *Rowley* represents the Supreme Court's fundamental and guiding decision in special education law. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra,* 458 U.S. 176, 198.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at p. 200.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).)

7. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

REQUIREMENTS OF AN IEP

8. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

9. An IEP required as a result of an assessment of a pupil shall be developed at an IEP team meeting held within a total time not to exceed 60 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written consent for assessment, unless the parent or guardian agrees in writing to an extension, pursuant to Section 56344. (Ed. Code, § 56043(f)(1).) However, if a student is referred for an assessment with 30 days or less remaining in the school year, the individualized education program required as a result of that assessment shall be developed within 30 days after the commencement of the subsequent regular school year. (Ed. Code, § 56344(a).)

10. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra,* 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.*, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd. Cir. 1993) 993 F.2d 1031, 1041. (*Fuhrmann*).) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

CONSENT

11. In California, parental consent is needed to implement an IEP. (Ed. Code, § 56346, subd. (a).) Consent means that the parent has been fully informed of all relevant information regarding the proposed action; the parent understands and agrees in writing to the proposed action; and the parent understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (34 C.F.R. § 300.9; Ed. Code, § 56021.1.) If a parent does not consent to all components of an IEP, and if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with Section 1415(f) of title 20 of the United States Code. (Ed. Code, § 56346, subd. (f).)[37]

ASSESSMENTS

12. In evaluating a child for special education services, the district must assess the student in all areas related to his or her suspected disability (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A triennial assessment serves two separate but related purposes. First, it examines whether the child remains eligible for special education. Second, it determines the child's unique needs which, in turn, could

[37] As established by Factual Finding 64, Student failed to raise the issue of the District's unilateral implementation of goals to which Parent did not consent.

trigger a revision of the IEP. The triennial consists of a review of existing information and may include additional assessments. (34 C.F.R § 300.305 (a)(2).). A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

13. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain that consent, the District must develop and present an assessment plan within 15 calendar days of any referral, not counting days between the regular school sessions. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56043, subd. (a), 56321, subd. (a).) The Parent shall have at least 15 calendar days to consent to the proposed assessment plan. (Ed. Code, § 56043, subd. (b).) The assessment may commence immediately upon obtaining parental consent and must be completed and an IEP team meeting held within 60 days of receiving consent. (Ed. Code, §§ 56302.1, subd. (a); 56043, subd. (f)(1); 56344, subd. (a).) In California, the term "assessment" shall have the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5) Parents who do not allow a school district to perform a triennial reassessment cannot claim that the district has denied their child a FAPE. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory K.*); *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*).)

14. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) Parents who want their children to receive special education services must allow reassessment by the school district, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.*

(7th Cir.1996) 92 F.3d 554, 558; *Andress, supra* 64 F.3d 176, 178-79; *Gregory K., supra,* 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

PROCEDURAL VIOLATIONS

15. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

Issue 1(a): Did the District deny Student a FAPE during the 2009-2010 SY by failing to conduct the triennial assessment in a timely manner?

16. As established in Factual Findings 6-19, and Legal Conclusions 3-7, 9-10, and 12-15, the District's failure to timely conduct Student's triennial assessment denied her a FAPE. A timely triennial assessment would have provided the IEP team information on the nature and extent of Student's mental health issues, and their impact on her ability to access her educational program. The District's failure was a procedural violation which caused Student a loss of educational benefit in that Student's needs for increased mental health supports and educational therapy were not timely addressed.

AB 3632 SERVICES

17. During the 2009-2010 SY, California had an established statutory scheme that provided for interagency responsibility, between LEA's and the Department of

Mental Health, for the provision of educationally-related mental health related services. (Gov. Code, §§ 7570 - 7588.) This statutory scheme was known as AB 3632 after the Assembly Bill that created the law. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1463, fn. 2.) Under AB 3632, a special education eligible child, who needed and was able to benefit from mental health services, and for whom the school's counseling and psychological services were either not sufficient or appropriate, could be referred to county mental health for intensive and specialized services if her IEP team determined that the child had emotional and behavioral characteristics that were significant, not solely the result of a social maladjustment, observable by qualified staff and impeded her from benefiting from educational services. (Gov. Code, §7576 subd. (b); Cal. Code Regs., tit. 2, § 60040.)

18. "Mental health services" means mental health assessments and, when delineated on an IEP, individual or group psychotherapy, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. (Cal. Code Regs., tit. 2, § 60020, subd. (i).) Psychotherapy means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. (Bus. & Prof. Code, § 2903.)

19. Government Code section 7572.5 described the process by which an IEP team determined whether a residential placement was required for a student. If the child was qualified for related services under the category of ED, and any member of the IEP team recommended residential placement, then the IEP team was to be expanded to include a representative of the county mental health department. (Gov. Code § 7572.5, subd. (a).) The "expanded IEP team" was to meet within 30 days of the recommendation. (Cal. Code Regs., tit. 2, § 60100, subd. (c).) The IEP team was to determine whether the

child's needs could reasonably be met through any combination of nonresidential services preventing the need for out-of-home care; whether residential care was necessary for the child to benefit from educational services; or whether residential services were available that addressed the needs identified in the assessment and that would ameliorate the conditions leading to the seriously emotionally disturbed designation. (Gov. Code, § 7572.5, subd. (b).) The IEP team was to document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

20. If the resulting IEP called for residential placement, the IEP designated the county mental health department as lead case manager. (Gov. Code, § 7572.5, subd. (c)(1).) The county mental health case manager coordinated the residential placement plan as soon as possible after the decision was made to place the pupil in a residential placement. (Cal. Code Regs., tit. 2, § 60110, subd. (b).) If placement in a public or private residential program was necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. (34 C.F.R. § 300.104.)

21. On October 8, 2010, the former Governor vetoed funding for mental health services provided by county mental health agencies. In *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, 1519, the court found that the veto suspended the mandate of county mental health agencies to provide mental health services that were required to provide individual students with a FAPE. Subsequently, on June 30, 2011, the Governor signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Together they made substantial amendments to Chapter 26.5 of the Government Code. In particular, the sections requiring community mental health agencies to provide the services were suspended effective July 1, 2011, and were repealed by operation of law on January 1, 2012.

Issue 1(b): Did the District deny Student a FAPE by failing to make a timely mental health referral?

22. As determined in Factual Findings 20-24, and Legal Conclusions 3-7, 15, 17-19, Student proved by a preponderance of the evidence that the District committed a procedural violation by failing to make an AB 3632 referral in April 2010. The District was on notice of Student's need for a more intensive intervention than was available to her through school counseling services. However, Student did not establish that the violation impeded her right to a FAPE or deprived her of educational benefit. Had the District initiated the referral on or about April 27, 2010, the process would not have been completed by the end of the 2009-2010 SY. The process includes several stages, each having a specific timeline accumulating to more than 75 days, assuming the parent immediately consents to a proposed mental health assessment plan. The legal timeframe would not require the District to hold an expanded IEP team meeting any sooner than it did. Consequently, Student did not show that the District's failure to timely refer her to mental health services resulted in any prejudice.

CONTINUUM OF SERVICES

23. Education Code section 56360 requires that the special education local plan area (SELPA) must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services.[38] (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1); Ed. Code, §§ 56360,

[38] California law refers to students who qualify for special education and related services as individuals "with exceptional needs."

56361.) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including nonmedical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.)

RESIDENTIAL PLACEMENT

24. As part of Chapter 26.5, Government Code section 7576, subdivision (a) provided, in part, that an LEA was not required to place a pupil in a more restrictive educational environment for the pupil to receive the mental health services specified in her IEP if the mental health services could be appropriately provided in a less restrictive setting. Effective July 1, 2011, section 7576 was statutorily suspended and was repealed on January 1, 2012. However, the criterion for an educationally-related mental health placement in a residential facility was consistent with the on-going requirements of special education law for placement of a pupil with a qualifying disability in the least restrictive environment in which the pupil is reasonably likely to obtain educational benefit.

25. In *Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, at 643, the Ninth Circuit held that, to determine whether a pupil's residential placement was an educationally related placement that is the responsibility of the school district, the "analysis must focus on whether [the student's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social or emotional problems that is necessary quite apart from the learning process." In *Ashland School District v. Parents of R.J.* (9th Cir. 2009), 588 F.3d 1004, the Ninth Circuit upheld a district court's reversal of a hearing officer's decision that the district should reimburse the parents for a unilateral residential placement. The Ninth Circuit affirmed the finding that the residential

placement "stemmed from issues apart from the learning process, which manifested themselves away from school grounds," and was not necessary for her to obtain educational benefit. (*Id.* at p. 1010.)

26. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the United States District Court for the Northern District of California upheld an ALJ's authority to reimburse, as compensatory education, a student's ongoing placement at a noncertified school. (*Ravenswood City School Dist. v. J.S.,* (N.D. Cal. 2012) 2012 WL 2510844, p.7.)

27. Under California law, a residential placement for a student with a serious emotional disturbance may be made outside of California only when no in-state facility can meet the student's needs, the IEP team recommends and documents the need for residential treatment, and a mutually satisfactory placement is identified by mental health and the district that is acceptable to the parent. (Cal. Code Regs., tit. 2 § 60100, subds. (d),(e) and (h).)

28. The IDEA does not define a therapeutic placement. However, both day schools and residential facilities can qualify as therapeutic placements. By their very nature, therapeutic placements require a student's removal from the general education environment. As a result, a therapeutic placement is one of the most restrictive placements on the LRE continuum. (34 C.F.R. § 300.115.) Given their restrictive nature, removal of a student with disabilities to a residential setting complies with the LRE mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area School Dist. v. Scott P.*, (3rd Cir. 1995) 62 F.3d 520, 533-534.) Further, some residential placements are considered to be more restrictive than others. Generally, the further a residential

placement is located from a student's home and community, the more restrictive it is considered to be. (*Todd D. v. Andrews*, (11th Cir. 1991) 933 F.2d 1576, 1582.)

Issue 1(c): Did the District deny Student a FAPE during the 2009-2010 SY by failing to offer Student a residential placement?

29. Based upon Factual Findings 25-31 and Legal Conclusions 3-7, 9-10, 17-21, and 23-28, Student did not meet her burden of proof that the District denied her a FAPE by failing to offer her a residential placement during the 2009-2010 SY. Student failed to prove her contention that she was in need of residential care by the end of April 2010, such that if the IEP team met on time, it would have recommended residential care or an assessment. It was not until Student's second psychotic break in May 2010, in very close proximity to her first break, and her ensuing second hospitalization which triggered the duty to explore the need for a residential setting. The District did so by promptly referring Student for an AB 3632 assessment upon her discharge in June of 2010, and timely holding an IEP meeting in August 2010 to address Student's need for a residential placement and authorize her placement at TLC. Student did not establish that the District failed to fulfill its special education obligations in this regard.

Issues 2(a) and 3(b): Did the District deny Student a FAPE during the 2010-2011 and 2011-2012 SY's by failing to offer and provide Student an appropriate residential placement?

30. As described in Factual Findings 42-61 and supported by Legal Conclusions 3-7, 9-10, 15, 17-21, and 23-28, the evidence established that the District offered and provided Student an appropriate residential placement at TLC, including its NPS, Journey, for the 2010-2011 and 2011-2012 SY's. TLC provided Student with a closely coordinated and individualized program through qualified staff wherein she

received mental health and educational benefit. Student made steady progress across all domains during her placement at TLC as testified to by her staff, and as documented in the quarterly reports, Alameda's Community Functioning Evaluations and Dr. Solomon and Dr. Culver's Child and Adolescent Functioning Scales, and as evidenced by her advancement to the independent living skills track by January 2012. Student did not prove her contention that she was denied a FAPE as a result of an inappropriate residential placement.

RIGHT TO RECORDS

31. The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, § 56504; 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.613.)

GOALS AND REPORTING

32. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a "description of the manner in which the progress of the pupil toward meeting the annual goals… will be measured and when periodic reports on the progress the pupil is making towards meeting the annual goals … will be provided." (20 U.S.C. § 1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) When developing an

IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

MATERIAL FAILURE TO IMPLEMENT IEP SERVICES

33. A failure to implement an IEP will constitute a violation of a pupil's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. (Van Duyn, et al. v. Baker School District 5J (9th Cir. 2007) 502 F.3d 811, 822.) A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. (Ibid.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (Ibid.)

> Issues 1(e) and 2(d): Did the District deny Student a FAPE by failing to maintain and provide Parent records measuring Student's progress on her IEP goals during the 2009-2010 and 2010-2011 SY's?

34. As established by Factual Findings 32-34 and 62-70, and Legal Conclusions 3-4, 6-8, 11, 15, and 31-33, Student did not prevail on these claims. Student offered no evidence and elicited no testimony as to whether the District reported on Student's November 2009 IEP goals between April 20, 2010 and the June 9, 2010 IEP team meeting. Although Parent contended at hearing and in her closing brief that the District committed a procedural violation by failing to provide her with work samples and graded exams documenting progress on her academic goals, Student did not establish

that the November 2009 IEP required the District to provide such samples. For the 2010-2011 SY, Student did not establish that the District was required to provide any quarterly progress reports in the form of annotated goals given Parent's failure to consent to the June 2010 IEP goals and her withdrawal of consent to the prior November 2009 goals. Even so, the District substantially reported on IEP goals listed in the November 2009, June 2010, and December 2010 IEP's. Additionally, Journey mailed progress reports on goals to Parent at the end of each quarter. Although the District was not required pursuant to the last operative IEP, to provide Parent with Student's work samples and tests, Journey graded and returned to Student all her school work, including quizzes and exams. Student failed to introduce any evidence to substantiate her claim that the District failed to maintain records of goal progress or failed to provide progress reports to Parent during the 2009-2010 SY. Student failed to establish that she had any operative goals for the 2010-2011 SY or that the District had any duty to report on goals it chose to implement without Parent's consent. Therefore, Student's claims fail.

AWARDING AND CHALLENGING OF GRADES

35. The grade awarded to a student is solely determined by the teacher of the course and shall be final "in the absence of clerical or mechanical mistake, fraud, bad faith, or incompetency." The governing board of the school district and the superintendent of such district shall not order a student's grade to be changed without affording the teacher who awarded the grade an opportunity to provide the reasons for which such grade was given. (Ed. Code, § 49066.) A parent may challenge the content of any pupil record and file a written request with the superintendent of the district to correct or remove any information she alleges to be inaccurate or unsubstantiated. After an investigation, the superintendent shall then sustain or deny the allegations and

the parent may appeal the decision in writing to the governing board of the school district. (Ed. Code, § 49070.)

EDUCATIONAL RECORDS

36. Parents have a right to review and inspect their child's education records in relation to their child's special education identification, assessment, educational placement and receipt of a FAPE. (34 C.F.R. § 501(a).) A school document must meet two requirements in order to be an education record. First, it must be directly related to a specific student. Second, it must be maintained by an education agency or institution or by a party acting for the agency or institution. (34 C.F.R. § 99.3; 34 C.F.R. § 300.611(b).) The United States Supreme Court defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain". The Court added that the law would require records be kept in one place such as "a filing cabinet in a records room or on a permanent secure database" with a single record of access. (*Owasso Indep. Sch. Dist. v. Falvo*, (2002) 534 U.S. 426, 433-34.) The Court clarified that some records, such as a student's "homework" or "class work" are not educational records. (*Id.* at 435.) Hence, a student's writing sample, daily work, pretests and personal notes are not educational records. (*K.C. v. Fulton County Sch. Dist.* (N.D. Ga. 2006) 2006 WL 1868348 p. 10.) Test instruments, protocols and interpretive materials that do not contain student information also fall outside the definition of educational records. (*Letter to Shuster*, 108 LRP 2303 (OSEP 2007).)

> Issues 1(d), and 2(c): Did the District deny Student a FAPE during the 2009-2010 and 2010-2011 SY's by failing to maintain and provide Parent records showing that Student was performing work consistent with California content standards?

37. Pursuant to Factual Findings 35-41, 71-74, 97-99, 101-102, 108-109, 113, and 115-119, and Legal Conclusions 3-4, 6-8, 15, 31-33, and 35-36, Student did not establish that the District failed to collect and provide records showing Student performed academic work consistent with California content standards from April 20, 2010, to the end of 2009-2010 SY, and for the subsequent school year. The evidence established that the District provided Student an academic curriculum leading to a diploma consistent with California content standards. Bayhill and Journey taught Student appropriate course work, administered requisite academic tests to ensure mastery, and awarded grades to Student based on appropriate criteria including work completed by Student. State law provides a separate forum for challenging the accuracy of grades. Even though the District was not required to, it provided Student her work, writing samples and assignments. Parent was consistently provided periodic reports on Student's academic progress. Student failed to establish that she was denied a FAPE as to this issue.

TRANSITION SERVICES

38. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must also include appropriate measurable post-secondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the child in reaching those post-secondary goals. (*Ibid.*)

39. Transition services are defined as "a coordinated set of activities for an individual with exceptional needs that":

(A) is designed within a results-oriented process that is focused on improving theacademic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation;

(B) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a); Ed. Code, § 56345.1, subd. (a).)

40. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be "deferred" was procedural violation]; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation].)

41. School districts are not required to ensure that students are successful in achieving all of their transition goals. In *High v. Exeter Township Sch. Dist.* (E.D. Pa 2010) 54 IDELR 17, 2010 WL 363832 (*Exeter*), the court determined that the school district was not required to ensure student was successful in fulfilling her desire to attend college, as the IDEA was meant to create opportunities for disabled children, and not to guarantee

a specific result. (*Id.* at p. 21, citing *Rowley, supra,* 458 U.S. at 192.) The court in *Exeter* also discussed how a transition plan compares with an IEP, and noted that the statutory requirements for transition plans contain no progress monitoring requirement. An IEP must include a method to measure a child's progress; however, a transition plan must only be updated annually and include measurable post-secondary goals and corresponding services. (*Exeter, supra*, 54 IDELR at pp. 20-21.)

> Issues 2(b) and 3(c): Did the District deny Student a FAPE by failing to implement the transition services listed in Student's IEP for the 2010-2011 and 2011-2012 SY's?

42. As detailed in Factual Findings 75-85 and in accord with Legal Conclusions 3-4, 6-8, 11, 15, 33, and 38-41, Student did not establish that the District failed to implement her transition services. Despite Parent's lack of consent to the 2010-2011 and 2011-2012 IEP's which included updated transition plans, the core operative ITP from the November 2009 IEP was implemented. Student participated in virtually every transition service identified on her ITP and made appropriate gains. The evidence established that the District met its legal duty to implement Student's operative transition services during the 2010-2011 and 2011-2012 SY's, and Student's claim fails.

REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION

43. The IDEA provides that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public

agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE at public expense, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1)(2).) Aside from the two-year statutory limitation on claims, there is no more specific statutory limitation on the time in which a request for an IEE must be made.

44. The provision of an IEE is not automatic. Following the student's request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) Neither federal or California special education laws or regulations set a specific number of days for a school district to file a due process hearing request after a parent requests an IEE.

45. In Pajaro Valley Unified School District v. J.S., the United States Northern District Court ordered the school district to pay for an IEE of the student, stating, "the district's unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of Student." (Pajaro Valley Unified School District v. J.S., (N.D.Cal. 2006), 2006 WL 3734289, p. 3.)

46. The regulatory scheme clearly contemplates that parents can receive the benefits of an independent evaluation at no expense to themselves. (34 C.F.R. § 300.502(a)(3)(ii).) According to the Supreme Court, the purpose of the IEE is to ensure that parents, in contesting a District's assessment, "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." (Schaffer v. Weast, supra, 546 U.S. 49, 60.) The United States District Court for the Northern District of California reasoned that it would be difficult for many parents to "match the firepower" of the government if they could not afford to pay the evaluator to present her findings at an IEP meeting that necessarily includes the District's assessment team. The Court ordered reimbursement not only for the full cost of the IEE, but also for the costs of funding the presence of the evaluator at the IEP team meeting to present her report. (M.M. v. Lafayette School Dist. (N.D.Cal. 2012) 2012 WL 398773, p.11-12.)

Issue 3(a): Did the District deny Student a FAPE during the 2011-2012 SY by failing to provide an IEE?

47. Timelines for school districts to decide how to act when a parent requests an IEE are purposefully short. It is in the student's interest for the IEP team to have current and accurate information when making decisions about goals and placement. If a school district's assessment is not legally sufficient, the IEP team may make significant errors in determining the student's educational program. Therefore, a school district must act promptly to either agree to fund an independent assessment, or to file a complaint to validate the assessment previously completed by the district. As established in Factual Findings 86-93, supported by Legal Conclusions 3-4, 6-7, 13-14, and 43-46, Student demonstrated that the District failed to appropriately respond to her October 2011 written request for an IEE, by either granting her request or filing for a

due process hearing to defend its June 2010 triennial assessment. The District's failure to respond resulted in a denial of FAPE.

MEANINGFUL PARTICIPATION

48. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56304.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (Amanda J. ex rel. Annette J. v. Clark County School District (9th Cir. 2001) 267 F.3d 877, 882 (Amanda J.).) Violations that impeded parental participatory rights "undermine the very essence of the IDEA." (Id. at 892.)

49. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (Ms. S v. Vashon Island Sch. Dist. (9th Cir. 2003) 337 F.3d 1115, 1131 (Vashon Island); Target Range, supra, 960 F.2d 1479, 1484.) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (Amanda J., supra, 267 F.3d at p. 890.)

50. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (Target Range, supra, 960 F.2d 1479, 1485; Fuhrmann, supra, 993 F.2d 1031, 1036.) A parent has an adequate opportunity to

participate in the IEP process when he or she is present at the IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (N.L. v. Knox County Schs. (6th Cir. 2003) 315 F.3d 688, 693.)

PREDETERMINATION

51. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (Deal v. Hamilton County Bd. of Educ. (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (JG v. Douglas County School Dist., (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.)

PRIOR WRITTEN NOTICE

52. A school district must provide written notice to the parents of a child with a disability a reasonable time before the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) This includes a student's graduation with a regular diploma and exit from high school as the graduation constitutes a change in placement due to the termination of services upon graduation. (34 C.F.R. § 300.102(a)(3)(iii).) The IDEA, however, does not contain any specific requirements concerning information the school district must disclose to the parents in its prior notice of intent to graduate a student with a disability with a regular high school diploma.

GRADUATION

53. A pupil who is identified by an IEP as a child with a disability who requires special education and related services to receive a FAPE remains eligible after the age of 18, provided the pupil was enrolled in or eligible for the services prior to her 19th birthday, and has not yet completed her prescribed course of study, met proficiency standards, or graduated from high school with a regular high school diploma. (Ed. Code, § 56026, subd. (c)(4).) This obligation generally continues until the pupil becomes 22 years of age, with some exceptions. (Ed. Code, § 56026, subd. (c)(4)(A)- (D).) A pupil with exceptional needs who graduates from high school with a regular diploma is no longer eligible for special education and related services. (34 C.F.R. § 300.102(a)(30(i); Ed. Code, § 56026.1, subd. (a).)

54. The issue of whether a student with a disability will receive a regular high school diploma or a special education certificate when she graduates from school is not addressed by the IDEA. State law and school district policy exclusively determine diploma and graduation requirements. A regular high school diploma must be fully aligned with the State's academic standards. (34 C.F.R. § 300.102(a)(3)(iv).) If a student with a disability meets all state and school district requirements for an award of a regular high school diploma, he cannot be denied a diploma simply because he has a disability. (*Letter to Anonymous* 22 IDELR 456 (OSEP 1994).) On the other hand, a school district is not required to award a diploma to a student with a disability who has not met the requirements for a regular high school diploma, even if the student has met her IEP goals. (*Special Sch. Dist. of St. Louis County* 16 IDELR 307 (OCR 1989).) Further, the IDEA does not make achievement of a disabled student's IEP goals a prerequisite for awarding a regular high school diploma, as the statute, as a general matter, does not establish standards for graduation. (*Letter to Richards* 17 IDELR 288, 289 (OSEP 1990).)

55. Neither the IDEA nor state education law requires that each graduating student exhibit academic proficiency on a 12th grade level. Instead, the State requires that a student complete the curriculum, and have sufficient passing credits in each required area of study. When an individual with exceptional needs meets public education agency requirements for completion of a prescribed course of study designated in the student's IEP, the public education agency which developed the IEP shall award the diploma. (Cal. Code Regs., tit. 5, § 3070.)

56. Commencing with the 2009-2010 school year, an eligible pupil with a disability is not required to pass the California High School Exit Examination as a condition of receiving a diploma of graduation or as a condition of graduation from high school. (Ed. Code, § 60852.3, subd. (a).) An eligible pupil with a disability is a pupil with an IEP pursuant to the IDEA that indicates that the pupil is scheduled to receive a high school diploma, and that the pupil has satisfied or will satisfy all other state and local requirements for the receipt of a high school diploma, on or about July 1, 2009. (Ed. Code, § 60852.3, subd. (c).)

57. If a student with a disability meets all state and district requirements for a diploma, then she cannot be denied it purely because she has a disability. To do so would constitute discrimination based on disability, prohibited under Section 504, (*Letter to Runkl*, 25 IDELR 387(OCR 1996); *Letter to Anonymous* 22 IDELR 456 (OSEP 1994).)

58. Parental claims challenging their child's readiness for graduation by asserting that an award of a regular high school diploma is a violation of the district's duty to provide FAPE are not generally successful. (*Tindell v. Evansville-Vanderburgh School Corporation* (S.D. Ind. 2011) 805 F.Supp.2d 630, 633-34 [student not ready to leave his residential placement, not entitled to continued special education services; the IDEA does not require districts to guarantee a particular result or level of functioning as

a result of the IEP, but only that the IEP for the student be reasonably calculated to provide educational benefits when it is developed.]; *Doe v. Marlborough Public Schools,* 2010 WL 2682433 [student properly graduated upon showing school developed an IEP reasonably calculated to provide educational benefits, up to the time of the issuance of the diploma, despite the fact that student may not be ready for independent living.]; *In re Child with Disability* (SEA VA 1988) 401 IDELR 220, [diploma properly awarded even though student had not achieved his IEP goals and objectives.].)

59. Graduation is a change in placement and terminates the right to any prospective relief. The school district is required to convene an IEP meeting prior to terminating special education services. (*Letter to Hagen-Gilden* 24 IDELR 294 (OSEP 1996); *Letter to Steinke* 21 IDELR 379 (OSEP1994); 34 CFR 300.102(a)(3)(iii).) The purpose of this IEP meeting is to ensure that the graduation requirements are being met and IEP goals and objectives have been achieved. (*Letter to Richards*, *supra*, 17 IDELR 288.) The IDEA does not include a requirement that an IEP contain specifically identified graduation criteria or a graduation plan; however, to the extent that a student's disability impacts his ability to earn a regular high school diploma, meeting graduation requirements may become an IEP goal. (34 C.F.R. § 300.320(a).). IEP decisions about graduation are not specifically included in the topics that must be discussed by IEP teams and documented in the written IEP. (34 C.F.R. §§ 300.320 through 300.324.)

> Issues 3(d) and 3(e): Did the District deny Student a FAPE during the 2011-2012 SY by predetermining that Student was on a diploma track and predetermining that Student was exited from special education with a diploma?

60. Pursuant to Factual Findings 94-96, 100, 103-104, 106-107, 112, and 125, and Legal Conclusions 3-4, 6-7, 15, and 48-51, Student did not establish her claims of predetermination. Rather, the evidence established that Parent meaningfully

participated in each and every IEP team meeting. Parent attended each meeting with her attorney, and raised her concerns and shared her input about Student's academic program, graduation, and termination of special education eligibility. Her input was considered by the IEP team. Parent also had her expert, Dr. Peterson attend the January and February 2012 IEP's. This level of participation disproves Student's claim of predetermination.

61. Moreover, as established by Factual Findings 108-109, Parent did not prove her contention that Student lacked the ability to earn a high school diploma. It was not until the January 2012 IEP team meeting that Parent indicated her intention to refuse a diploma and formally requested that Student be transferred to a certificate of completion track. Student was rightfully on a diploma track and arrived at her graduation destination as early as December 2011. As established in Factual Findings 97-101, Student failed to meet her burden of proving that she had not met graduation requirements.

62. In accord with Legal Conclusions 52-59, and as supported by Factual Findings 110-125, the District properly convened an IEP team meeting in January 2012 to discuss Student's graduation and resulting change in placement. This meeting reconvened in February 2012 to provide Parent an opportunity to review work samples and to further consider Parent's input. After considering Parental input and the IEE recommendations, the District prepared a PWN informing Parent of the fact that Student would graduate in March 2012. Student failed to establish by a preponderance of the evidence that District denied Student a FAPE by predetermining her exit from special education by graduating her in March of 2012.

Issue 3(f): Did the District deny Student a FAPE during the 2011-2012 SY by stopping payment to TLC resulting in her discharge?

63. As detailed in Factual Finding 126, the District informed TLC on March 23, 2012, that Student's placement was no longer being funded through her IEP. As established at hearing, pursuant to Factual Findings 113, and 121-131, and Legal Conclusions 3-4, 6-7, 15, and 53, the District had no legal obligation to fund Student's residential placement or provide any special education services past the date wherein she met requirements for a diploma, March 16, 2012. Although the District initially stopped payment to TLC in March of 2012, the evidence established that the District subsequently funded TLC in full through Student's discharge date of May 31, 2012. Student did not establish that the District denied her a FAPE by stopping payment to TLC resulting in her discharge.

> Issue 3(g): Did the District deny Student a FAPE during the 2011-2012 SY by failing to offer Student an appropriate residential placement once she was discharged from TLC?

64. As determined in Factual Findings 121-131 and Legal Conclusions 3-4, 6-7, 15, and 53, by the time of her discharge from TLC, Student completed her prescribed course of study, earned her high school diploma, and made progress on her IEP goals which terminated her right to special education services. Apart from the stay put order discussed below, Student failed to prove that the District was obligated to offer her an appropriate residential placement once she was discharged from TLC.

STAY PUT PLACEMENT

65. Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, §56505, subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which

has been implemented prior to the dispute arising. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 902; *Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) The primary purposes of the stay put provision are to maintain the stability of the student's educational program during a due process dispute, and to prevent unilateral changes in that program by a school district. (*K.D. v. Department of Educ.* (9th Cir. 2011) 665 F.3d 1110, 1120; see 34 C.F.R § 300.518(a).) In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.)

66. Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Vashon Island, supra,* 337 F.3d 1115, 1133-35.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 (*Van Scoy*) ["stay put" placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) In *Van Scoy, supra*, the Court acknowledged that the stay-put provision of the IDEA entitles a student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account changed circumstances.

67. Stay put may apply when a child with a disability files for a due process hearing on the issue of whether regular graduation from high school (which ends IDEA eligibility) is appropriate. (*Cronin v. Bd. of Educ. of East Ramapo Cent. Sch. Dist.* (S.D.N.Y. 1988) 689 F.Supp. 197, 202 fn. 4; see also *R.Y. v. Hawaii* (D. Hawaii February 17, 2010, Civ. No. 09-00242) 2010 WL 558552, pp. 6-7.) Stay put applies because if it did not, schools

would be able to end special education eligibility for students by unilaterally graduating them from high school. (*Ibid.*)

JURISDICTION OF OAH

68. The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education" and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) The limited special education jurisdiction of OAH does not include adjudicating a claim that a school district has failed to implement or comply with a settlement agreement or an order by OAH, such as an order for stay-put. A claim that a school district failed to comply with an order or the terms of a settlement agreement must be pursued through a separate compliance complaint procedure with the California Department of Education. (34 C.F.R. § 300.151-153; Ed. Code, § 56500.2; Cal. Code Regs., tit. 5, § 4600 et seq.).

69. Student has not brought an enforcement case but rather raises the issue of whether the District's failure to comply with the stay put order resulted in a denial of

educational placement and services. OAH has jurisdiction to adjudicate a claim alleging a denial of FAPE as a result of violation of a settlement agreement, and by analogy, of an order for stay put. (*Pedraza v. Alameda Unified Sch. Dist.,* (N.D. Cal. 2007) 2007 WL 949603 [when student alleges a denial of FAPE as a result of a violation of a settlement agreement, and not merely a breach of the settlement agreement, OAH has jurisdiction to adjudicate claims alleging denial of a FAPE.].)

Issue 3(h): Did the District deny Student a FAPE during the 2011-2012 SY by failing to comply with the May 7, 2012 stay put order?

70. The District did not oppose Student's motion for stay put. Even if the District had opposed on the grounds that Student filed for due process after the date of meeting all State and District requirements for the issuance of a regular high school diploma, Student was entitled to a full evidentiary hearing to challenge her graduation. Pending resolution of this dispute, she was entitled to maintain her operative placement at TLC and Journey. There are no summary judgment proceedings in special education matters.

71. As established in Factual Findings 132-150 and supported by Legal Conclusions 3-4, 6-7, 15, and 65-69, Student proved her claim that the District failed to comply with the stay put order and that the failure to comply resulted in a denial of a FAPE. Since TLC terminated Student's placement on May 31, 2012, the District was obligated to offer and provide an equivalent placement from June 1, 2012, up to the date of this decision. The District did not establish that Parent prevented if from complying with the stay put order, and regardless of Parent's alleged actions, Student remained entitled to a stay put placement during these proceeding.

REMEDIES

72. The U.S. Supreme Court addressed the issue of available remedies under the IDEA in *School Committee of Town of Burlington v. Department of Educ.* (1985) 471 U.S. 359. The Court held that a court's wide discretion in awarding relief included the authority to award tuition reimbursement. In finding that reimbursement is not an award of damages, the Court stated, "Reimbursement merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." (*Id.* at 370-371.). When an 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. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id*. at 369 – 370; 20 U.S.C. § 1415(i)(2)(C)(3).)

73. The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.*(6th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra,* 510 U.S. 7, 15-16 [126 L.Ed.2d 284].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*)

74. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

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

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

77. A pupil's graduation with a regular high school diploma does not necessarily relieve a school district or other public agency of its obligation to provide compensatory education to remedy a denial of FAPE. (*San Dieguito High Sch. Dist. v. Guray-Jacobs* (S.D. Cal. 2005, No. 04cvl330) 44 IDELR 189, 105 LRP 56315 (*San Dieguito*); *Capistrano Unified Sch. Dist. V. Wartengerg* (9th Cir. 1995) 59 F.3d 884*; U.S. Dept. of Education, Office of Special Education Programs* (*OSEP*)*, Policy Letters* (March 20, 2000, August 22, 2000).) In an appropriate case an ALJ may grant relief that extends past graduation, age 22, or other loss of eligibility for special education and related services as long as the order remedies injuries the student suffered while he was eligible. (*Maine School Admin Dist. No. 35 v. Mr. and Mrs. R.* (1st Cir. 2003) 321 F.3d 9*,* 17-18 [graduation]; *San Dieguito, supra* 44 IDELR 189, 105 LRP 56315 [same]; see also *Barnett*

v. Memphis City Schools (6th Cir. 2004) 113 Fed.App. 124, p. 2 [nonpub. opn][relief appropriate beyond age 22].)

78. "Appropriate" relief refers to the court's jurisdiction rather than a license to award retrospective damages. "Without some indication that Congress intended 'to create not just a private right but also a private remedy ... a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" (*C.O. v. Portland Public Schools* (9th Cir. 2012) 679 F.3d 1162, 1167,quoting *Alexander v. Sandoval* (2001) 532 U.S. 275, 286-87.)

79. As established by Factual Findings 6-19, and Legal Conclusions 3-7, 9-10, and 12-15, the District denied Student a FAPE during the 2009-2010 SY when it failed to conduct a timely triennial assessment and convene a timely IEP team meeting. In accordance with Legal Conclusions 75-78, the District shall therefore establish an educational fund for compensatory education consisting of the equivalent of the current market rate for 18 weeks of educational therapy services at three hours per week as compensatory education for the period of April 20, 2010–August 26, 2010, for a total of 54 hours. Parent may apply to this fund for reimbursement for any academic or supportive mental health service for Student, until her 22nd birthday. Additionally, the District shall reimburse Parent for the amount of the mental health services rendered by TLC and charged to Parent from Student's admittance on July 23, 2010, until the District established payment for this placement on August 26, 2010. As established by Dr. Solomon's testimony, TLC charged $2.61 per minute for mental health services and the cost of Student's mental health services in 2010 ranged from $1500-$2,000 each month.

80. As delineated in Factual Findings 86-93 and Legal Conclusions 3-4, 6-7, 13-14, and 43-46, Student established that the District denied her a FAPE during the 2011-2012 SY when it failed to fund her request for an IEE. In this regard, the District is ordered to reimburse parent for her costs of retaining Dr. Peterson for the purposes of

conducting an evaluation and observations of Student, preparing a report and presenting her findings at the January and February 2012 IEP team meetings. This amounts to the sum of $10,008.

81. Pursuant to Factual Findings 132-150 and Legal Conclusions 3-4, 6-7, 15, and 65-69, the evidence established that the District's violation of stay put from June 1, 2012 until the issuance of this decision denied Student an appropriate placement, resulting in a denial of FAPE. Student established that Innercept is an appropriate residential placement which provides services similar to those provided by TLC. Pursuant to Legal Conclusions 72-75, Student is entitled to reimbursement. Therefore, the District is responsible for reimbursing the costs of Innercept from August 6, 2012 through November 5, 2012, a total of three months, at a cost of $11,300 each month, for a total of $33,900. The District shall reimburse Parent and Student for the cost of their travel to and from Innercept, including airfare, hotel costs, and a per diem in the amount of $34 per travel day per person. Travel costs amount to a total of $2,146.42 which includes $340 for per diem for four days of travel for Student and six days of travel for Parent; the costs of Parent's pre-placement February 2012 trip, including airfare ($201.60), hotel stay at Wingate ($111.59) and Alamo rental car ($64.03); and the costs for the August 2012 trip, including airfare for Parent and Student ($1,093.20), and hotel stay at the Coeur d'Alene (two nights) and the Roosevelt Inn Bed and Breakfast (one night) equitably discounted to be reimbursed at the rate charged by Wingate for a total of $336 for the three nights.

ORDER

1. The District is ordered to establish a compensatory education fund for Student in the amount equivalent to the current market value of 54 hours of educational therapy time by a credentialed special education teacher, plus the costs of Student's

mental health services rendered by TLC and charged to Parent for the time frame of July 23, 2010 through August 26, 2010. The District is ordered to provide reimbursement from the compensatory education fund to Parent for any program, service, tuition or placement that would fall within the broad scope of special education and related services, including but not limited to residential placement costs, academic supports, mental health services, and non-academic enrichment activities for Student, within 45 days from receipt of Parent's request. Parent's application to the fund must be supported by invoices or receipts, and proof of payment. Parent may apply to the fund on behalf of Student through the date of her 22nd birthday.

2. The District is ordered to reimburse Parent the amount of $10,008 within 45 days of this Decision for the cost of Dr. Cynthia Peterson's IEE, including observations and related travel and attendance at the January and February 2012 IEP's and related travel. No further proof of payment is required.

3. The District is ordered to reimburse Parent in the amount of $33,900 for the costs of Innercept from August 6, 2012, through November 5, 2012, and shall reimburse Parent for related travel expenses in the amount of $2,146.42. Payment shall be made within 45 days of this Decision and no further proof of payment is required.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The Student prevailed as to Issues 1(a), 3(a), and 3(h). The District prevailed as to all remaining issues.

NOTICE OF APPEAL RIGHTS

The parties are advised that they 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: November 5, 2012

/s/

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Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings